# GEORGETOWN UNIVERSITY LAW CENTER
# SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2013 PREVIEW

August 26, 2013

**A LOOK AHEAD AT OCTOBER TERM 2013**

This report previews the Supreme Court's docket for October Term 2013. Section I discusses some especially noteworthy cases. Section II organizes the 2013 Term cases into subject-matter categories and provides a brief summary of each.

# SECTION I: TERM HIGHLIGHTS

This Term is unlikely to duplicate in importance the significance of the past two Terms. There is nothing on this Term's current docket, or anything on the horizon, that matches in importance the Court's decisions on the constitutionality of the Defense of Marriage Act, the Voting Rights Act, or the Affordable Care Act. Still, the Term is likely to produce far more than the usual number of decisions on issues of importance to the country. Already on the docket are issues relating to campaign finance, affirmative action, legislative prayer, abortion protest, abortion inducing drugs, and recess appointments. On the horizon are cases relating to the contraception mandate and cell phone privacy.

There are currently 45 cases on the docket. Those cases will likely fill the October, November, and December sittings, and some slots during the first week in the January sitting. The Court will likely grant approximately 35-40 additional cases to be heard during the remainder of the Term. Of those cases already granted, here are the most noteworthy.

***Cline v. Oklahoma Coalition for Reproductive Justice*** (12-1094)

Recently, state legislatures have renewed efforts to regulate abortion. *Cline* is the first to reach the Supreme Court. It involves a challenge to an Oklahoma statute that requires abortion inducing drugs, including RU-486, to be administered according to the protocol described on the drug's FDA-approved label. Responding to emerging data, doctors have developed off-label protocols for RU-486 that differ from the FDA-approved protocol by allowing a lower dosage, permitting self-administration of a follow-up drug (misoprostol), and allowing administration up to 63 days after gestation (as opposed to 49). According to trial court findings, the alternative protocols are safer and more effective. According to the State, there is great uncertainty about their safety. In a brief opinion, the Supreme Court of Oklahoma held the Oklahoma statute facially invalid under *Planned Parenthood v. Casey*.

Barring a change on the Court, *Casey* will continue to govern challenges to abortion restrictions. The *Casey* plurality concluded that a state may legitimately regulate abortions from the moment of gestation as long as it does not impose an undue burden on a woman's right to choose an abortion. And in *Gonzales v. Carhart*, a majority of the Court interpreted *Casey* to allow state restrictions on particular abortion procedures when the government reasonably concludes there is medical uncertainty about the safety of that procedure and an alternative procedure is available. *Cline* could present an important test on the limit of that authority.

Proceedings at the certiorari stage, however, call into question whether the Court will ultimately decide this case. The challengers say that the Oklahoma statute bars the use of RU-486's follow-up drug (misoprostol) as well as the use of methotrexate to terminate an ectopic pregnancy. If that were so, the statute would both bar any drug-induced abortion and eliminate the preferred method for ending an ectopic pregnancy. While the state denies that the law has those effects, it does not argue that such restrictions would be constitutional. The Court accordingly certified to the Oklahoma Supreme Court those disputed questions of state law. Should the Oklahoma Supreme Court hold that the Oklahoma statute is unconstitutional solely because it prohibits the use of misoprostol and methotrexate, this case may well go way. If,

however, the Oklahoma Supreme Court invalidates the law insofar as it prohibits alternative methods for administering RU-486, the Court will almost certainly want to review it, and it could become the most important abortion case since *Casey*.

***Town of Greece v. Galloway*** (12-696)

In *Marsh v. Chambers*, the Court upheld a state's practice of legislative prayer based largely on an unbroken tradition of that practice dating back to the framing of the Constitution. The Court adopted two apparent limits: the government may not select prayer-givers based on a discriminatory motive; and prayer opportunities may not be exploited to proselytize in favor of one religion or disparage another. The Second Circuit acknowledged that the Town of Greece had not violated either of *Marsh's* limits. Applying the reasonable observer standard drawn from the *County of Allegheny v. ACLU Greater Pittsburgh Chapter* crèche case, it nonetheless invalidated the Town's practice. The court concluded that a reasonable observer would view the Town as endorsing Christianity over other religions because the Town's process of composing a list of prayer-givers from clergy within its geographic boundaries and volunteers virtually guaranteed a Christian prayer-giver; most of the prayers contained uniquely Christian references; and prayer-givers invited participation, and town officials participated, in the prayers.

The difficulty with extending the reasonable observer test to legislative prayer is that it would seem to require legislatures and courts to make theological judgments about the content of prayers to determine whether they contain too many uniquely Christian references, and it admittedly provides legislatures with little guidance on how to avoid a constitutional challenge to a practice that has long been viewed as legitimate. An even larger question is the continuing viability of the reasonable observer test. In *County of Alleghany*, Justice Kennedy wrote a dissent criticizing the reasonable observer test as insensitive to our traditions and unworkable for governments and courts to apply. He argued that religious accommodations are consistent with the Establishment Clause as long as they do not coerce attendance at, or participation in, a religious observance, or directly fund religion. Ever since Justice O'Connor left the Court, it has been unclear whether a majority of the Court would adhere to the reasonable observer test. The Court could conceivably view this case as an appropriate opportunity to reconsider the reasonable observer test altogether, or at least plant the seeds for that development. If so, the decision could affect not only the constitutionality of legislative prayers, but also all religious accommodations, including the public display of religious symbols.

***McCullen v. Coakley*** (12-1168)

In *Hill v. Colorado*, the Court held that a law limiting protest and counseling within eight feet of a person entering a health care facility in order to protect persons entering the facility from unwanted speech did not violate the First Amendment. Critical to the Court's decision was its conclusion that the prohibition was a content neutral because it prevented both pro-abortion and anti-abortion speakers from entering the eight foot zone. The Massachusetts statute at issue in *McCullen* shares the same purpose as the law upheld in *Hill*, but takes a different approach. It prohibits anyone from entering a public sidewalk within 35 feet of a reproductive health care facility, but exempts employees of the facility acting within the scope of employment. Because of the differences in approach, the Massachusetts statute raises questions not resolved in *Hill.*

The principal question is whether the employee exemption renders the Massachusetts statute content-based because employees can use the exemption to deliver pro-abortion messages. Two other potentially significant differences are that the Massachusetts statute applies only to reproductive health care facilities, making its abortion-specific purpose more

apparent, and has a larger buffer zone, making conversational speech more difficult. In the end, however, this case may end up being as much about whether the Justices view *Hill* itself as sound as it is about the constitutional significance of the distinctions. The majority in *Hill* was especially sympathetic to the position of patients who want to undergo a private medical procedure in peace, without being subjected to the emotional turmoil of confrontational protests. The dissenters, on the other hand, charged the majority with creating a special brand of reduced First Amendment protection for abortion protesters that would be viewed as intolerable if applied to any other speaker. Those diametrically opposed perspectives may well shape the Court's decision in this case.

***McCutcheon v. Federal Election Commission*** (12-536)

In *Citizens United v. FEC,* the Court held that restrictions on independent campaign expenditures violate the First Amendment, but left intact the holding in *Buckley v. Valeo* that Congress may limit campaign contributions. The difference is that limits on campaign contributions are thought to impinge less on First Amendment freedoms and have a stronger nexus to preventing corruption. At issue in *McCutcheon* is the constitutionality of federal aggregate contribution limits, *i.e.,* the total amount that can be contributed to all candidates, party committees, or PACs, as opposed to the base limits on contributions to particular candidates, party committees, or PACs. In *Buckley*, the Court summarily upheld aggregate contribution limits as a means of preventing circumvention of the base limits on candidate contributions. The rationale was that, without aggregate limits, persons could circumvent the base limits on candidate contributions through massive unearmarked contributions to political committees likely to contribute to a person's favored candidate. The question is whether differences in the composition of the Court or other changes that have occurred since *Buckley* will lead to a different result this time around.

The first question is what kind of scrutiny to give to aggregate contribution limits. The Court in *Buckley* treated both base limits and aggregate limits as less constitutionally suspect than expenditure limits. Since then, three Justices (Kennedy, Scalia, Thomas) have said they would apply the same scrutiny to contribution limits as expenditure limit, leaving the fate of this aspect of *Buckley* in the hands of Chief Justice Roberts and Justice Alito. Aggregate limits may be particularly amenable to reconsideration because they limit not only the amount a person can contribute to a candidate, but the number of persons to whom a person can make a full base-level contribution. Regardless of the level of scrutiny that applies, the Court will have to decide whether *Buckley's* circumvention rationale continues to makes sense. At the time of *Buckley*, there were no base limits on party committees or PACs, but now there are. If those new base limits adequately address the risk of circumvention, there would be no remaining justification for aggregate limits. The government says it is just as easy now to circumvent the base limits unless there are aggregate limits. The question is whether that claim will be persuasive to a Court that is increasingly skeptical of prophylactic rationales for limiting campaign-related expenditures.

***Schuette v. Coalition to Defend Affirmative Action*** (12-682)

In *Fisher v. University of Texas,* the Court held that universities have limited authority to consider race in admissions to further diversity. A university, however, does not violate the Constitution when it fails to adopt a diversity policy or repeals one it initially had. Enter a doctrine known as the restructuring doctrine. Under that doctrine, a state may not remove authority to decide a racial issue from one political entity and lodge it in another when that

creates a more burdensome political hurdle. The Court has applied that doctrine only twice, first in *Hunter v. Erickson* to invalidate a reallocation of authority over the decision to prohibit racial discrimination in housing, and then in *Washington v. Seattle Sch. Dist. No. 1* (*Seattle I*), to invalidate a reallocation of authority over the decision whether to bus to achieve racial integration in the schools. The question here is whether the political restructuring doctrine invalidates an amendment to the Michigan constitution prohibiting public universities from using racial preferences in admissions. The Sixth Circuit held that it did it because affirmative action is a racial issue of particular concern to racial minorities, and it is more difficult for minorities to obtain favorable action through the constitutional amendment process.

The State principally argues the political restructuring doctrine applies to reallocations of authority over measures to ensure equal opportunity, not those that give racial preference. That distinction may not fully account for the *Seattle I* busing case. So the State also argues that *Seattle I* should be overruled if necessary in light of *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (*Seattle II*), which makes clear that racial busing is constitutionally suspect, something that was not clear at the time of *Seattle I*. The State also offers some narrower grounds for decision, including that the political restructuring doctrine should not apply to admission decisions made by unelected university officials.

If the Court accepts the State's principal submission, it will empower voters in any state dissatisfied with affirmative action by its universities to eliminate it through constitutional amendment. That could prove to be significant since universities are often more sympathetic to affirmative action than the people of the state in which they reside. On the other hand, a decision in the other direction would protect current policies from the voters. Just how significant either decision would be, however, may depend on whether universities have any real authority to continue their affirmative action plans, a question *Fisher* left up in the air.

***NLRB v. Noel Canning*** (12-1281)

President Obama filled three vacancies to the National Labor Relations Board while the Senate was in *pro forma* sessions with no business being conducted. The question is whether he had the authority to do that under the Recess Appointments Clause, which gives the President power "to fill up all vacancies that may happen during the Recess of the Senate." The specific questions are whether the President has power to fill vacancies during intra-session as well as intersession recesses; whether that power extends to vacancies that first arose when the Senate was in session, but persist during a recess in which the appointment is made; and whether the Senate is in session when it is conducting a *pro forma* session with no business being conducted.

The Court is basically writing on a clean slate, so this is a case in which the parties are focused on text, historical practice, and underlying values, rather than precedent. Does the term "the Recess" refer to a single intersession recess, or the entire class of recesses, including both intersession and intra-session recesses. Does the term "may happen" mean happen to arise or happen to exist. Does the historical practice of past Presidents support the President's position or the challenger's. Would accepting the President's position allow circumvention of the advice and consent clause or would accepting the challenger's position hobble the President's ability to faithfully execute the laws. And which of these sources of constitutional interpretation, text, practice, or underlying values, matters most.

Underneath that great constitutional debate is an intense partisan struggle over Presidential appointments. When President Bush made a similar recess appointment, Senator Kennedy led the charge against it. Now Senate Republicans have joined in opposition to

President Obama's appointments. Apart from finally resolving a great constitutional debate, the decision in this case is likely to significantly affect this partisan struggle.

***Bond v. United States*** (12-158)

Carol Anne Bond obtained chemicals online and from her employer that could be lethal if administered in sufficiently high doses and spread them on her rival's car door, mailbox, and apartment doorknob. She was prosecuted by federal authorities for knowingly using a chemical weapon. The statute under which she was prosecuted was intended to implement the Chemical Weapons treaty, which similarly prohibits the use of chemical weapons. The principal question in this case is whether the federal statute validly implements the treaty as applied to Bond's conduct.

*Missouri v. Holland* has often been understood to give Congress plenary power under the Necessary and Proper Clause to implement valid treaties. Since *Holland*, however, the modern Court has, in its commerce clause cases, read the Tenth Amendment as presupposing that there are some things that states can do that the federal government may not. The question in *Bond* is whether the Court will conclude that the Tenth Amendment similarly limits the scope of the Treaty power.

While conceding the validity of the Treaty, petitioner argues that Congress's power to implement the Treaty must be confined to matters of national and international interest, such as terrorism, and not extend to purely local crime, such as an assault on a rival. Otherwise, petitioner argues, the federal government will have the very police power the framers denied it. The federal government rejects the idea that there is any matter that is too local to be federally regulated under a treaty. Instead, it argues that the framers viewed the two-thirds Senate approval requirement as the means by which state interests would be protected. Any other limitation, the government argues, would hamper the nation's efforts in the international arena.

Both sides have offered potential ways out of this constitutional dilemma. Petitioner says the statute can be interpreted to apply only to terrorist uses of chemical weapons. And the government argues that the federal statute is valid commerce clause legislation. Each of these ways out encounters difficulties. Petitioner's reading of the statute is not the most natural. And even if the government can get over the Third Circuit finding of waiver, the commerce clause argument raises serious questions of its own. So while there is a chance that the decision in this case could go off on other grounds, it is also quite possible that it will result in the most important decision on the treaty power since *Holland.*

# SECTION II: CASE SUMMARIES *Page*

## *Business Law*


- Arbitration
  *BG Group v. Republic of Argentina*……..11

- Employee Retirement Income Security Act
  *Heimeshoff v. Hartford Life & Casualty Co*……..12

- Labor
  *Sandifer v. United States Steel Corp*……...…….13
  *Unite Here Local 335 v. Mulhall*……14

- Immunity – Aviation and Transportation Immunity Act
  *Air Wisconsin Airlines v. Hoeper*……15

- Patent
  *Medtronic v. Boston Scientific Corp*……16

- Preemption – Airline Deregulation Act
  *Northwest v. Ginsberg*……17

- Securities
  *Chadbourne & Parke v. Troice*……18
  *Willis of Colorado v. Troice*……18
  *Proskauer Rose v. Troice*……18
  *Lawson v. FMR LLC*……19
  *UBS Financial Services v. Union de Empleados de Muelles*……...20

- Tax
  *United States v. Woods*……21


## *Constitutional Law*


- Abortion
  *Cline v. Oklahoma Coalition for Reproductive Justice*……...…22

- First Amendment – Religion
  *Town of Greece v. Galloway*……..…..23

- First Amendment – Speech
  *McCullen v. Coakley*…….……..…24
  *McCutcheon v. Federal Election Commission*…….……...25

- Fourteenth Amendment – Equal Protection
  *Madigan v. Levin*……..…..…..26
  *Schuette v. Coalition to Defend Affirmative Action*…….…..…..…27

- Recess Appointments Clause
  *National Labor Relations Board v. Noel Canning*…….…....28

- Treaty Power and Commerce Clause
  *Bond v. United States*……...……30


## *Criminal Law*


- Federal Statutory Offenses
  Aiding or Abetting Use of a Firearm
  *Rosemond v. United States*…….…....31
  Distribution of Drugs Causing Death
  *Burrage v. United States*…….……..……32
  Possession of Child Pornography
  *Paroline v. United States*…….……33
  Trespass on a Military Installation
  *United States v. Apel*……..…..34

- Fifth Amendment – Due Process
  *Kaley v. United States*……..35

- Fifth Amendment – Self-Incrimination
  *Kansas v. Cheever*……36

- Fourth Amendment – Search and Seizure
  *Fernandez v. California*……...……37

- Habeas Corpus – Anti-Terrorism and Effective Death Penalty Act
  *Burt v. Titlow*…….…..…38
  *White v. Woodall*……..39


## *Environmental Law*


- Clean Air Act
  *Environmental Protection Agency v. EME Homer City Generation*……...40
  *American Lung Association v. EME Homer City Generation*…….40

## *Federal Practice and Procedure*


- Abstention
  *Sprint Communications Co. v. Jacobs*……...…..42

- Class Action Fairness Act
  *Mississippi, ex rel. Hood v. AU Optronics Corp*..……..43

- Civil Procedure
  *Atlantic Marine Construction Co. v. U.S. District Court, W.D. Texas*……...….44
  *Daimler-Chrysler v. Bauman*……...…45
  *Walden v. Fiore*……....46

- Final Judgment Rule – Contractual Attorney's Fees
  *Ray Haluch Gravel Co. v. Central Pension Fund*……...……47

- Standing – Lanham Act
  *Lexmark International v. Static Control Components*…….48


## *Other Public Law*


- Bankruptcy
  *Executive Benefits Insurance Co. v. Arkison*…….…..49
  *Law v. Siegel*……50

- Fair Housing Act
  *Mount Holly v. Mt. Holly Gardens Citizens in Action* ……51

- Hague Convention on Civil Aspects of International Child Abduction
  *Lozano v. Alvarez*…….....52

- Immigration
  *Mayorkas v. Cuellar de Osorio*……53

- Indian Law
  *Michigan v. Bay Mills Indian Community*……...54

## *Alphabetical Case Index* *Page*

*Air Wisconsin Airlines v. Hoeper*……..…..15

*American Lung Association v. EME Homer City Generation*……...40

*Atlantic Marine Construction Co. v. U.S. District Court, W.D. Texas*……..44

*BG Group v. Republic of Argentina*……...…11

*Bond v. United States*…….30

*Burrage v. United States*……32

*Burt v. Titlow*…….38

*Chadbourne & Parke v. Troice*……..18

*Cline v. Oklahoma Coalition for Reproductive Justice*…….22

*Daimler-Chrysler v. Bauman*……45

*Environmental Protection Agency v. EME Homer City Generation*…….40

*Executive Benefits Insurance Co. v. Arkison*…….49

*Fernandez v. California*…….37

*Heimeshoff v. Hartford Life & Casualty Co*..……...12

*Kaley v. United States*……...….35

*Kansas v. Cheever*……..36

*Law v. Siegel*……..…50

*Lawson v. FMR LLC*……..19

*Lexmark International v. Static Control Components*……...……48

*Lozano v. Alvarez*……...52

*Madigan v. Levin*……...……26

*Mayorkas v. Cuellar de Osorio*…….……..53

*Medtronic v. Boston Scientific Corp*……16

*McCullen v. Coakley*……24

*McCutcheon v. Federal Election Commission*……25

*Michigan v. Bay Mills Indian Community*……54

*Mississippi, ex rel. Hood v. AU Optronics Corp*……43

*Mount Holly v. Mt. Holly Gardens Citizens in Action*……51

*National Labor Relations Board v. Noel Canning*……28

*Northwest v. Ginsberg*……17

*Paroline v. United States*……33

*Proskauer Rose v. Troice*……18

*Ray Haluch Gravel Co. v. Central Pension Fund*……47

*Rosemond v. United States*……31

*Sandifer v. United States Steel Corp*……13

*Schuette v. Coalition to Defend Affirmative Action*……27

*Sprint Communications Co. v. Jacobs*……42

*Town of Greece v. Galloway*……23

*UBS Financial Services v. Union de Empleados de Muelles*……20

*Unite Here Local 335 v. Mulhall*……14

*United States v. Apel*……34

*United States v. Woods*……31

*Walden v. Fiore*……46

*White v. Woodall*……39

*Willis of Colorado v. Troice*……18

# *Business Law*

## Arbitration

***BG Group PLC v. Republic of Argentina*** (12-138)

**Question Presented:**

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

**Summary:**

In *Howsam v. Dean Witter Reynolds, Inc.*, and *John Wiley & Sons, Inc. v. Livingston*, the Court established default presumptions on whether the court or an arbitrator should resolve certain questions in the absence of the parties' agreement. The Court held that questions of arbitrability, such as whether the parties have agreed to submit a dispute to arbitration, are presumptively for a court to decide. On the other hand, certain other questions, such as procedural questions which grow out of the dispute and bear on its final disposition, are presumptively for an arbitrator to decide. At issue in this case is whether *Howsam* and *John Wiley* establish a categorical rule that a dispute over the satisfaction of a precondition to arbitration is presumptively for the arbitrator to decide.

Respondent Argentina entered into a treaty with the United Kingdom (UK). The treaty granted any UK investor in Argentina the right to arbitrate any dispute involving Argentina's compliance with the treaty. Before filing for arbitration, however, the treaty requires an investor to file suit in a competent tribunal in Argentina and wait eighteen months. Petitioner BG Group PLC is a UK company that invested in Argentina. After Argentina adopted measures that reduced the value of its investments, petitioner filed for arbitration. The arbitrator concluded that, because Argentina had penalized resort to its courts, the litigation precondition did not preclude arbitration. The arbitrator then found that Argentina violated the treaty, and awarded petitioner more than $150 million in damages. A federal district court confirmed the award.

The D.C. Circuit reversed. The court held that the question whether petitioner was required to litigate and wait was a question for the court to decide. The court reasoned that, under *Howsam,* questions of arbitrability are for courts to resolve in the absence of unmistakable evidence that the parties intended for an arbitrator to decide them. Because the treaty did not address whether a court or an arbitrator should resolve a dispute over compliance with the litigate-and-wait provision, the court concluded that the issue was one for the court to resolve. The court added that the question is one the parties would likely have expected the court to resolve because the precondition itself involves resort to a court. Applying its own independent judgment, the court concluded that petitioner had not complied with its treaty obligation to litigate and wait.

Petitioner argues *Howsam* and *John Wiley* establish a categorical rule that preconditions to arbitration are presumptively for the arbitrator to decide. Because the litigation-and-wait provision is a precondition to arbitration, petitioner argues, the dispute over whether there was compliance with that provision was for the arbitrator to decide.

**Decision Below:**

665 F.3d 1363 (D.C. Cir. 2012)

**Petitioner's Counsel of Record:**

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

**Respondent's Counsel of Record:**
Matthew D. Slater, Cleary, Gottlieb, Steen & Hamilton

## Employee Retirement Income Security Act

***Heimeshoff v. Hartford Life & Accident Insurance Co. and Wal-Mart Stores*** (12-729)
**Question Presented:**

When should a statute of limitations accrue for judicial review of an ERISA disability adverse benefit determination?

**Summary:**

The Employee Retirement Income Security Act (ERISA) permits an individual who is denied benefits under an ERISA plan to challenge the denial in federal court. It does not, however, specify a date on which the limitations period for that action begins to run. The question in this case is whether the limitations period always begins to run after the beneficiary has exhausted administrative remedies, or whether a court may enforce a provision in an ERISA plan that begins the limitations period at an earlier date.

After exhibiting signs of fibromyalgia, petitioner Julie Heimeshoff sought long-term disability benefits under an ERISA plan administered by respondent Hartford Insurance Company. Hartford denied her claim and affirmed that denial on administrative appeal. Petitioner then filed suit under ERISA to challenge that denial. Respondents moved to dismiss on the ground that petitioner's action was time-barred under the plan. Although the plan specified a three-year limitations period and petitioner filed her action within three years of the denial of her administrative appeal, the plan required petitioner to file her court action within three years of when written proof of loss was required, and petitioner filed her court action after that period ended. The trial court granted respondents' motion to dismiss.

The Second Circuit affirmed. It held that Hartford's three-year limitations period was lawful because state law governs the limitations period under ERISA, and the applicable state law of Connecticut permits parties to shorten the limitations period to one year. The court further held that while federal law controls when an ERISA claim accrues, an ERISA plan may have the limitations period begin to run before a claim accrues.

Petitioner argues the background rule against which Congress legislates is that a limitations period does not begin to run until a claim can be filed in court and that nothing in ERISA suggests that Congress intended to deviate from that rule. Because an ERISA claimant cannot file a court action until administrative remedies are exhausted, petitioner argues, the limitations period does not begin to run until an administrative appeal is denied. Petitioner further argues that deferring to a plan's earlier start date would discourage good faith internal resolution of claims and risk elimination of a beneficiary's right to bring a court action. Finally, petitioner argues that respondents' proposal to establish a reasonableness requirement for a plan's limitations period would leave the parties without any idea of how long a beneficiary has to file a court action.

**Decision Below:**
496 Fed. Appx. 129 (2d Cir. 2012)
**Petitioner's Counsel of Record:**
Steven P. Krafchick, Krafchick Law Firm
**Respondents' Counsel of Record:**
Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

## Labor

***Sandifer v. United States Steel Corporation*** (12-417)

**Question Presented:**

What constitutes "changing clothes" within the meaning of section 203(o) [of the Fair Labor Standards Act]?

**Summary:**

The Fair Labor Standards Act (FLSA) requires that workers be paid at least federal minimum wage for all hours worked. Under section 203(o), however, an employer need not pay a worker for time spent "changing clothes" if that time is not compensable under a collective bargaining agreement. At issue is whether donning and doffing safety equipment constitutes "changing clothes" within the meaning of section 203(o) so that a collective bargaining agreement could exclude pay for that activity.

Sandifer and approximately 800 other employees of U.S. Steel brought a collective action seeking compensation for time spent at work donning and doffing safety equipment. The safety equipment consists of flame-retardant pants and jacket, work gloves, steel-toed boots, a hard hat, safety glasses, earplugs, and a protective hood. Under the collective bargaining agreement that applies to petitioners, time spent putting on and taking off that safety equipment is not compensable. The district court ruled in favor of U.S. Steel, holding that the safety equipment at issue constitutes "clothes" under section 203(o), so that the collective bargaining agreement applicable to petitioners validly precluded compensation for the time spent donning and doffing them.

The Seventh Circuit affirmed. The court held that the term "clothes" in section 203(a) does not include safety items that are not clothing in the ordinary sense, such as glasses and ear plugs, and possibly a hard hat. At the same time, the court held that the term "clothes" includes all "work clothes," including those that serve a protective function, such as flame-retardant pants and jackets, boots, and gloves. Because such equipment constitutes "clothes," the court concluded, section 203(o) and the collective bargaining agreement exclude from compensation time spent changing into and out of them. The court rejected petitioners' argument that section 203(o) is an exemption in the FLSA that should be construed narrowly because it is located in the definitions section of the FLSA, rather than in a section that carves out exemptions.

Petitioners argue that "clothes" within the meaning of section 203(o) refers to items that are intended to provide comfort and decency, not to protective equipment. Petitioners rely on the term "changing" in section 203(o). "Changing clothes" necessarily means substituting clothes, petitioners contend, and protective equipment is often added not substituted for other clothes. Petitioners further argue that Congress had in mind workers like bakers, who substitute one set of ordinary clothes for another, not workers who don safety equipment. Finally, petitioners contend that the principle that limitations on the scope of the FLSA should be construed narrowly does not depend on whether the limitation appears in a definitional section or in an exemption section.

**Decision Below:**

678 F.3d 590 (7th Cir. 2012)

**Petitioners' Counsel of Record:**

Eric Schnapper, University of Washington School of Law

**Respondent's Counsel of Record:**

Lawrence C. DiNardo, Jones Day

***Unite Here Local 355 v. Mulhall*** (12-99)

**Question Presented:**

Whether an employer and union may violate § 302 [of the Labor Management Relations Act] by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business?

**Summary:**

Section 302 of the Labor-Management Relations Act (LMRA) makes it illegal for an employer to "pay, lend or deliver . . . any money or other thing of value" to a labor union that seeks to represent its employees. At issue in this case is whether an employer's organizing assistance to a union can be a "payment" of a "thing of value" within the meaning of section 302.

Petitioner Unite Here, a labor union, entered into an agreement with Mardi Gras Gambling. In exchange for petitioner's promise not to strike and its support for a slot machine ballot initiative, Mardi Gras promised to: (1) let union employees on its premises; (2) give the union its employees' names and address; (3) remain neutral to unionization of its employees; and (4) voluntarily recognize Unite as the representative of its employees if a majority of employees gave written authorization. Respondent, an employee opposed to unionization, filed suit to enjoin enforcement of the agreement, alleging that it violated section 302 of the LMRA. The district court dismissed the claim.

The Eleventh Circuit reversed. It held that providing organizing assistance can constitute "payment" of a "thing of value" in violation of section 302. The court reasoned that the phrase "thing of value" encompasses both tangibles and intangibles and that intangible assistance can operate as a "payment" when its performance fulfills an obligation. The court acknowledged that employers and unions may set ground rules for an organizing campaign, but concluded that such rules become illegal payments if used to corrupt a union or extort a benefit from an employer. The court remanded for a determination of Unite's and Mardi Gras' motive for entering into the agreement.

Petitioner argues that organizing assistance does not constitute "payment" of a "thing of value" in violation of section 302. In support of that argument, petitioner contends that the purposes of section 302 are to prevent employers from bribing union officials and union officials from extorting tributes from employers, and organizing assistance does not implicate either purpose. Petitioner also argues the Supreme Court has already upheld the validity of contracts promising organizing assistance under section 301 of the LMRA, and it would make no sense to conclude that contracts that are enforceable under section 301 are illegal under section 302. Finally, petitioner contends that organizing assistance has no ascertainable value because unions cannot trade, sell, assign, or pledge such assistance. That the union was willing to spend money on a ballot initiative in exchange for organizing assistance, petitioner contends, does not show that organizing assistance is a thing of value within the meaning of section 302.

**Decision Below:**

667 F.3d 1211 (11th Cir. 2012)

**Petitioner's Counsel of Record:**

Richard G. McCracken, Davis Cowell & Bowe LLP

**Respondents' Counsel of Record:**
Mark E. Levitt, Allen, Norton & Blue, P.A.
William L. Messenger, National Right to Work Legal Defense Foundation

## Immunity – Aviation and Transportation Immunity Act

***Air Wisconsin Airlines Corp. v. Hoeper*** (12-315)
**Question Presented:**

Whether [Aviation and Transportation Immunity Act] immunity may be denied without a determination that the air carrier's disclosure was materially false.

**Summary:**

Federal law requires air carriers to report civil aviation threats to federal authorities. In turn, the Aviation and Transportation Security Act (ATSA) provides that air carriers that report any suspicious transaction relating to a threat to public safety shall not be civilly liable. The immunity does not apply, however, if the disclosure was knowingly false or made with reckless disregard to the truth. At issue in this case is whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false.

Respondent William Hoeper, a pilot for petitioner Air Wisconsin, blew up at instructors and behaved irrationally when he failed a certification test. As a Federal Flight Deck Officer (FFDO), respondent could carry a weapon aboard a commercial flight. One of petitioner's managers reported to the Transportation Security Authority (TSA) that respondent was boarding a flight, that he might be armed and mentally unstable, and that he was terminated that day. TSA removed respondent from a plane, but ultimately released him. Respondent sued petitioner for defamation. The trial court denied petitioner's motion for summary judgment based on ATSA immunity, and a jury awarded respondent $1.4 million in damages. The Colorado court of appeals affirmed.

The Colorado Supreme Court affirmed. The court held that petitioner was not immune under the ATSA because the manager's statements were made with reckless disregard for the truth. In the court's view, the manager should have reported that respondent acted irrationally and blew up at administrators (not that he might be mentally unstable), that respondent knew he was about to be terminated (not that he was terminated), and that respondent was a FFDO (not that he might be armed). The court held that, in order to resolve the ATSA immunity question, it was not required to find that the manager's statements were actually false, but only that they were made in reckless disregard of the truth.

Petitioner argues that ATSA immunity may not be denied without a finding that a carrier's statements are actually false. Petitioner further argues that each of the statements at issue is substantially true. The government, as amicus curiae, argues that a denial of ATSA immunity also requires a finding that statements made are materially false, *i.e.*, that truthful statements would have had a different effect on federal authorities. It further argues there is no evidence of material falsity in this case. In response to the government's argument at the certiorari stage, the Court reformulated the question to encompass whether a finding of materiality is required.

**Decision Below:**
2012 WL 907764 (Colo. 2012)
**Petitioner's Counsel of Record:**
Peter D. Keisler, Sidley Austin LLP

**Respondent's Counsel of Record:**
Scott A. McGath, Overturf McGath Hull & Doherty P.C.

## Patent

***Medtronic, Inc., v. Boston Scientific Corp.*** (12-1128)
**Question Presented:**

[W]hether, in [] a declaratory judgment action brought by a licensee under *MedImmune*, [*Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007),] the licensee has the burden to prove that its products do *not* infringe the patent, or whether (as is the case in all other patent litigation, including other declaratory judgment actions), the patentee must prove infringement.

**Summary:**

In *MedImmune, Inc, v. Genentech, Inc.*, the Supreme Court held that a patent licensee that believes its licensor is improperly demanding royalties may bring a declaratory judgment action, claiming that no royalties are due because the product does not infringe the patent, while continuing to pay royalties under the license. This allows a licensee to challenge its liability to pay royalties without breaching the license. The question presented in this case is whether, in a *MedImmune* action, the accused infringer or the licensor bears the burden of proof.

Medtronic entered into an agreement giving Medtronic a license to practice certain patents in exchange for royalties. Under the agreement, if respondent MFV believed a new Medtronic product infringed its patents, it would identify the product and Medtronic could either pay royalties or initiate a declaratory judgment action for a determination of non-infringement. After MFV notified Medtronic that it believed certain Medtronic products infringed its patents, Medtronic brought a *MedImmune* action in federal district court seeking a declaration of non-infringement. The district court ruled for Medtronic, holding that MFV failed to satisfy its burden of proving infringement.

The Federal Circuit reversed, holding that Medtronic bore the burden of proving non-infringement. The court reasoned that, in general, the party seeking relief bears the burden of proof. Because only Medtronic was seeking relief, the court held, it bore the burden of proving non-infringement. The court acknowledged that when a party seeks a declaratory judgment of non-infringement, a defendant that files a counterclaim for infringement bears the burden of proof. The court concluded however, that this rule has no application to a *MedImmune* declaratory judgment action because the plaintiff's license precludes the defendant from asserting a counterclaim.

Petitioner argues that the party asserting infringement always has the burden of proof, regardless of whether the issue arises in a coercive action filed by the party holding the patent or a declaratory judgment action filed by an alleged infringer. In support of that argument, petitioner contends that the assignment of the burden of proof is a matter of substantive law and therefore should not change simply because it arises in a different procedural context. Petitioner further argues that, for purposes of assigning the burden of proof, there is no material difference between a *MedImmune* declaratory judgment action and a declaratory judgment action in which the defendant counterclaims for infringement since in both cases the controversy begins with the patent holder's assertion of infringement. Finally, petitioner argues that requiring a *MedImmune* plaintiff to prove non-infringement would impose a virtually impossible burden, because patents typically contain dozens of claims, any one of which triggers liability, and because the doctrine of equivalence often turns on numerous theories that are not evident on the face of the patent.

**Decision Below:**
695 F.3d 1266 (Fed. Cir. 2012)
**Petitioner's Counsel of Record:**
Martin L. Lueck, Robins Kaplan Miller & Ciresi LLP
**Respondents' Counsel of Record:**
Arthur I. Neustadt, Oblon, Spivak, McClelland, Maier & Neustadt, LLP

## Preemption – Airline Deregulation Act

***Northwest, Inc. v. Ginsberg*** (12-462)
**Question Presented:**

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim was not preempted under the [Airline Deregulation Act] because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of [*American Airlines, Inc. v.*] *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

**Summary:**

The Airline Deregulation Act (ADA) preempts states from "enacting or enforcing" any laws related to the "price, route, or service" of an air carrier. In *American Airlines, Inc. v. Wolens*, the Supreme Court held that the ADA did not preempt claims that an airline breached its contract when it modified its frequent flier program. The Court concluded that the frequent flier contract claim related to both "price" and "service." But it held that allowing recovery solely for an airline's alleged breach of its own, self-imposed undertakings does not amount to "enactment" or "enforcement" of any law. The question presented in this case is whether a state law claim based on an implied covenant of good faith and fair dealing that expands an airline's contractual undertaking is preempted by the ADA.

Respondent Ginsberg was a member of petitioner Northwest's frequent flier program. The terms of the program gave petitioner the right to revoke the membership of anyone who, in petitioner's "sole judgment," engaged in improper conduct. Pursuant to that provision, petitioner revoked respondent's membership. Respondent filed suit, alleging that, by revoking his membership without cause, petitioner breached its implied covenant of good faith and fair dealing. The district court held that respondent's implied covenant claim was preempted by the ADA and dismissed his suit.

The Ninth Circuit reversed, holding that implied covenant claims are not preempted by the ADA. The court concluded that, under *Wolens*, a contract claim is not preempted by the ADA, and an implied covenant claim is simply one kind of contract claim. The court also held that an implied covenant claim is too tenuously connected to rates, routes, or service to fall within the ADA's preemptive scope.

Petitioner argues that implied covenant claims are not categorically exempt from ADA preemption. Petitioner argues that *Wolens* authorizes contract claims related to price, routes, and services only when they are based on an airline's self-imposed obligations without enlarging the terms of the bargain. Here, petitioner argues, respondent's implied covenant claim would expand the terms of the bargain because the contract gave petitioner sole discretion to terminate respondent's membership. Petitioner further argues that, under *Wolens*, claims arising from frequent flier programs are necessarily related to both rates and services.

**Decision Below:**
653 F.3d 1033 (9th Cir. 2012)
**Petitioners' Counsel of Record:**
Paul D. Clement, Bancroft PLLC
**Respondent's Counsel of Record:**
Adina H. Rosenbaum, Public Citizen Litigation Group

## Securities

***Chadbourne & Park LLP v. Troice*** (12-79)
***Willis of Colorado, Inc. v. Troice*** (12-86)
***Proskauer Rose LLP v. Troice*** (12-88)
**Questions Presented:**

(1) Whether [the Securities Litigation Uniform Standards Act (SLUSA)] precludes a state-law class action alleging a scheme of fraud that involves misrepresentations about transactions in SLUSA-covered securities. (No. 12-79)

(2) Whether a covered state law class action complaint that unquestionably alleges "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security nonetheless can escape the application of SLUSA by including other allegations that are farther removed from a covered securities transaction. (No. 12-86)

(3) Does [SLUSA] prohibit private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud? (No. 12-88)

**Summary:**

The Private Securities Litigation Reform Act of 1995 (PSLRA) establishes limitations on when plaintiffs can bring claims under federal securities laws. After many plaintiffs evaded those limitations by filing state law claims, Congress enacted SLUSA, which precludes state-law class actions involving "a misrepresentation" made "in connection with the purchase or sale of a covered security." The question presented in this case is whether a misrepresentation that an uncovered security is backed by an investment in covered securities is made "in connection with the purchase or sale of a covered security."

Allen Stanford and entities he controlled, including Stanford International Bank (SIB), ran a Ponzi scheme in which SIB issued fixed return certificates of deposit (CDs) that it falsely claimed were backed by safe, liquid investments in securities. In fact, the investments did not exist, and SIB had to use new CD sales proceeds to make interest and redemption payments on preexisting CDs. Individual investors (respondents) filed a state law fraud suit in state court against Stanford-related entities (petitioners), alleging that respondents were induced to purchase CDs by the fraudulent claim that the CDs were backed by safe, liquid investments in securities. Petitioners removed the case to federal court, and the district court dismissed the case under SLUSA.

The Fifth Circuit reversed. It held that under SLUSA, a misrepresentation is "in connection with" the purchase or sale of covered securities if the alleged fraud is "more than tangentially related" to purchase or sale. The court concluded that that the false claim that the CDs were backed by safe, liquid investments was only "tangentially related" to the "crux" or "gravamen" of the alleged fraud because it was only one of a host of misrepresentations intended to induce investors to purchase the CDs. The court also deemed it significant that the CDs

promised a fixed return and were not tied to the success of any investments in covered securities.

Petitioners argue that SLUSA's "in connection with" requirement is satisfied because respondents' complaint alleged misrepresentations *about* covered securities and those misrepresentations were critical to luring investors to purchase the CDs. Petitioners further argue that SLUSA cannot be evaded by allegations that other misrepresentations also played a role in the scheme because a single misrepresentation in connection with a covered security triggers preclusion. Finally, petitioners argue that it is irrelevant that the CDs promised a fixed return and were not tied to the success of investments in covered securities. SLUSA preclusion depends on a link between the misrepresentation and a covered security, they argue, not on a link between the performance of plaintiff's investment and a covered security.

**Decision Below:**
675 F.3d 503 (5th Cir. 2012)

**Petitioners' Counsel of Record:**
Walter Dellinger, O'Melveny & Myers LLP (No. 12-79)
Paul D. Clement, Bancroft PLLC (No. 12-86)
James P. Rouhandeh, Davis Polk & Wardwell (No. 12-88)

**Respondents' Counsel of Record:**
Thomas C. Goldstein, Goldstein & Russell, P.C.

***Lawson v. FMR LLC*** (12-3)

**Question Presented:**

Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section [806 of the Sarbanes-Oxley Act, 18 U.S.C. §] 1514A?

**Summary:**

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, prohibits a "public" company or "any contractor or subcontractor" of "such a company" from retaliating against an "employee" because of whistleblowing activity. The question presented is whether an employee of a privately-held contractor or subcontractor of a public company is protected by section 806, or whether only an employee of a public company is protected.

Petitioners Jackie Lawson and Jonathan Zang brought separate suits alleging that their employers (respondents) retaliated against them for reporting fraud affecting Fidelity mutual funds. Respondents are private companies that provide investment advice to Fidelity mutual funds. Fidelity mutual funds are public companies that do not have any of their own employees. Respondents moved to dismiss petitioners' suits on the ground that section 806 protects only employees of public companies. The district court denied the motion.

The First Circuit reversed, holding that only employees of public companies are protected from retaliation by section 806. Under that interpretation, a private contractor or subcontractor of a public company is covered by section 806 only when it retaliates against an employee of a public company. The court concluded that the term "employee" is most naturally read to mean employee of a public company. The court also relied on the title and caption of section 806, both of which refer exclusively to protecting employees of public companies.

Petitioners argue that section 806 forbids private contractors and subcontractors of public companies from retaliating against their own employees. They argue that when Congress imposes a duty on a company with respect to an employee, it ordinarily means the employee of that entity, not the employee of a different entity. Petitioners further argue that the actions forbidden by section 806, *e.g.*, discrimination in the terms and conditions of employment, are actions that an entity would almost always take against its own employees. Petitioners also

argue that the titles and captions that refer to employees of public companies cannot override the plain meaning of a provision, particularly because another heading does not contain that limitation. Petitioners further argue that section 806 was enacted against the background of the Enron scandal, which included actions by Arthur Anderson to discourage its employees from reporting Enron's fraud. Finally, petitioners argue that if the Court concludes that section 806 is ambiguous, it should defer to the interpretation of the Department of Labor.

**Decision Below:**
670 F.3d 61 (1st Cir. 2012)

**Petitioners' Counsel of Record:**
Eric Schnapper, University of Washington School of Law

**Respondents' Counsel of Record:**
Mark A. Perry, Gibson Dunn & Crutcher LLP

***UBS Financial Services v. Union de Empleados de Muelles*** (12-1208)

**Question Presented:**

Should, consistent with the standard of review employed by other Circuit Courts of Appeals, but in direct conflict with the decision below, the United States Court of Appeals for the First Circuit have reviewed for abuse of discretion the District Court's determination, pursuant to Rule 23.1, that the particularized facts alleged in a shareholder derivative complaint were insufficient to excuse a pre-suit demand on the corporation's board of directors?

**Summary:**

Federal Rule of Civil Procedure 23.1 requires that a plaintiff in a shareholder derivative action allege particularized facts to show either that it made a pre-suit demand on the board of directors to redress the wrongs alleged or that it would have been futile to do so. The question presented is whether a district court's decision that a complaint fails to allege facts sufficient to show that a pre-suit demand would have been futile should be reviewed de novo or for an abuse of discretion.

UBS Financial sold bonds to UBS Trust, which resold them to four Funds. The bonds subsequently depreciated in value, dragging down the worth of the Funds. Investors that own shares in the four Funds (respondents) filed a shareholders derivative action against UBS Financial, UBS Trust, and the board of directors of the four Funds (collectively petitioners). Respondents' complaint pleaded that a pre-suit demand would have been futile. The district court dismissed respondents' claims for failure to plead demand futility with sufficient particularity.

The First Circuit vacated the district court order, holding that respondents had adequately pleaded demand futility. The court held that the proper standard for reviewing the district court's decision on demand futility was de novo rather than abuse of discretion. The court reasoned that challenges to the legal sufficiency of pleadings are generally reviewed de novo, and there is no reason to treat allegations of demand futility differently. The court added that a district court is no better positioned than appellate courts to evaluate whether a complaint adequately alleges demand futility.

Petitioners argue that district court dismissals for failure to adequately allege demand futility should be reviewed only for an abuse of discretion. Petitioners argue that the issue of demand futility depends on the particular facts alleged in each case, and that judgments that turn on individualized circumstances are ordinarily reviewed under an abuse of discretion standard. Petitioners further contend that a shareholder suit was historically an equitable action, and that

the abuse of discretion standard is consistent with the deference afforded trial courts in equitable actions.

**Decision Below:**
704 F.3d 155 (1st Cir. 2013)

**Petitioners' Counsel of Record:**
Paul J. Lockwood, Skadden, Arps, Slate, Meagher & Flom LLP

**Respondents' Counsel of Record:**
Jay W. Eisenhofer, Grant & Eisenhofer PA

## Tax

***United States v. Woods*** (12-562)

**Questions Presented:**

(1) Whether the overstatement penalty [in section 6662 of the Internal Revenue Code] applies to an underpayment resulting from a determination that a transaction lacks economic substance because the sole purpose of the transaction was to generate a tax loss by artificially inflating the taxpayer's basis in property.

(2) Whether the district court had jurisdiction in this case under 26 U.S.C. §6226 to consider the substantial valuation misstatement penalty.

**Summary:**

A taxpayer determines the loss or gain of a transaction by subtracting the basis (often the purchase price) from the sale price. If the taxpayer overstates the basis, he will understate the gain, which often results in the underpayment of tax. Section 6662 of the Internal Revenue Code therefore imposes a penalty for an underpayment that is "attributable to" an overstatement of the basis. The substantive question in this case is whether section 6662's penalty provision applies to an underpayment resulting from a determination that a transaction lacks economic substance because the sole purpose of the transaction was to generate a tax loss by artificially inflating the taxpayer's basis in property. A district court has jurisdiction to determine "the applicability of any penalty" that "relates to an adjustment in a partnership item." The jurisdictional question in this case, added at the Court's direction, is whether the district court had jurisdiction under section 6226 to consider the substantial valuation misstatement penalty.

Respondent Gary Woods and another individual participated in an abusive tax shelter called Current Options Bring Reward Alternatives (COBRA). Respondent engaged in two COBRA transactions with two sham partnerships, generating a paper loss of $45 million, but an actual loss of only $1.37 million. The IRS treated the transactions as a nullity and disallowed any tax benefits based on a determination that the transactions lacked economic substance. Pursuant to section 6662, the IRS also levied a 40 percent penalty on respondents for a gross misstatement of basis. Respondent filed suit in federal district court, challenging the IRS's conclusion that COBRA transactions lacked economic substance and the applicability of section 6662's penalty provision. The district court upheld the IRS determination that the COBRA transactions lacked economic substance but held that the overpayment penalty was inapplicable.

Based on circuit precedent, the Fifth Circuit affirmed. Under that precedent, when the IRS totally disallows a deduction, it may not penalize the taxpayer for an overstatement of the basis. In that circumstance, the Fifth Circuit has concluded, the underpayment is "attributable" to claiming an improper deduction, not to the understatement of the basis.

The government first argues that the district court had jurisdiction over the case. It

argues that the penalty imposed under section 6662 "relates to" an "adjustment in a partnership item" because it was imposed as a directly consequence of the IRS's determination that the COBRA transactions were nullities for tax purposes. Second, the government argues that an underpayment is "attributable" to an "overstatement of the basis" when the underpayment results from a determination that a transaction lacks economic substance because its sole purpose was to inflate the basis in property. Nothing in section 6662, the government argues, distinguishes between overstatements that arise from factual misrepresentations about a purchase price, and overstatements that arise from an erroneous asserted belief about the effect of sham transactions on the basis. Because Woods paid far less tax that he would have paid had he used the correct basis (zero), his underpayment of tax was attributable to a basis overstatement.

**Decision Below:**
471 Fed. Appx. 320 (5th Cir. 2012)
**Petitioner's Counsel of Record:**
Donald B. Verrilli Jr., Solicitor General of the United States
**Respondents' Counsel of Record:**
Gregory G. Garre, Latham & Watkins, LLP

# *Constitutional Law*

## Abortion

***Cline v. Oklahoma Coalition for Reproductive Justice*** (12-1094)
**Question Presented:**

Whether the Oklahoma Supreme Court erred in holding - without analysis or discussion - that [a state] regulation [requiring that abortion-inducing drugs be administered according to the protocol described on the drugs' FDA-approved labels] is facially unconstitutional under *Planned Parenthood v. Casey.*

**Summary:**

In *Planned Parenthood v. Casey,* a plurality of the Court concluded that a state has a legitimate interest in regulating abortions from the outset of a pregnancy in order to protect the health of the woman and the life of the fetus that may become a child. The plurality further concluded that such regulation may not unduly burden a woman's right to choose an abortion. An Oklahoma statute requires that any abortion-inducing drug must be administered according to the protocol described on the drug's FDA-approved label. The question presented in this case is whether the Oklahoma statute is facially constitutional under *Casey.*

The FDA has approved the use of mifepristone (RU-486) to terminate a pregnancy. Its label states that the appropriate treatment regimen is for a health care facility to administer 600 mg of mifepristone orally, and to administer 4 mg of misoprostol two days later. In addition, mifepristone is not to be administered after 49 days of gestation. Responding to emerging data, doctors have developed off-label protocols for the administration of mifepristone that differ from the FDA-approved protocol. First, they allow women to take one-third the dosage of mifepristone. Second, they allow women to self-administer misoprostol outside a health care facility. Third, they permit mifepristone to be administered 63 days after gestation. Such off-label uses are not prohibited by federal law, but they are prohibited by the Oklahoma statute. Respondents Reproductive Services and Oklahoma Coalition for Reproductive Justice filed suit in federal district court, challenging the Oklahoma statute as unconstitutional under *Casey.*

Finding that the off-label regimens are safer and more effective than the FDA-approved protocols, the district court invalidated the Oklahoma statute.

The Oklahoma Supreme Court affirmed. It held that the Oklahoma statute is facially unconstitutional under *Casey.*

The state argues that the Oklahoma statute is constitutional under *Casey* and *Gonzales v. Carhart.* Under those decisions, the state argues, a state has wide discretion to pass legislation in areas where there is medical and scientific uncertainty. Here, the state argues, the record illustrates great uncertainty as to the safety of off-label uses of abortion-inducing drugs. At the petition stage, the parties disputed whether the Oklahoma statute bars the use of misoprostol to induce an abortion. They also disputed whether the Oklahoma statute bars the use of methotrexate to terminate an ectopic pregnancy. The Oklahoma Supreme Court's decision did not address either issue. The Supreme Court accordingly certified to the Supreme Court of Oklahoma whether the Oklahoma statute prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the FDA; and (2) the use of methotrexate to treat ectopic pregnancies. The Court reserved further proceedings pending receipt of a response from the Supreme Court of Oklahoma.

**Decision Below:**
292 P.3d 27 (Okla. 2012)
**Petitioners' Counsel of Record:**
Patrick R. Wyrick, Solicitor General of Oklahoma
**Respondents' Counsel of Record:**
Michelle Movahed, Center for Reproductive Rights

## First Amendment – Religion

***Town of Greece v. Galloway*** (12-696)
**Question Presented:**

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

**Summary:**

In *Marsh v. Chambers*, the Supreme Court held that the Nebraska legislature's practice of beginning its sessions with a prayer delivered by a state-employed clergyman did not violate the Establishment Clause. The Court relied on the absence of evidence of improper government motive in the selection of prayer-givers, and the absence of evidence that prayer opportunities were exploited to proselytize, advance, or disparage any one faith or belief. The question in this case is whether, even absent evidence of improper motive or exploitation, a legislative prayer practice violates the Establishment Clause when a reasonable observer would view the practice as favoring certain religious beliefs over others.

The Town of Greece, New York, begins its monthly board meetings with a prayer offered by a prayer-giver. The Town would have accepted any volunteer to give a prayer, and the prayers given did not proselytize or advance Christianity, or disparage any other religious faith. Nonetheless, the Town invited prayer-givers almost exclusively from Christian religious institutions within the Town, and most of the prayers contained references to the Christian religion. Respondents, who are town residents, filed suit against the Town, alleging that its

legislative prayer practice violated the Establishment Clause. The district court rejected respondents' Establishment Clause claim.

The Second Circuit reversed. The court held that a legislative prayer practice violates the Establishment Clause when a reasonable observer would view the practice as favoring a particular religious belief. The court drew that standard from *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, a case where the Supreme Court invalidated a public display of a crèche. Applying the reasonable observer test, the court invalidated the Town's legislative prayer practice based on the following circumstances: (i) the Town's selection process virtually guaranteed a Christian prayer-giver; (ii) most of the prayers contained uniquely Christian references; (iii) the Town did not explain to attendees that it did not intend to associate the Town with Christianity, and (iv) most of the prayer-givers appeared to speak on behalf of the Town.

Petitioner contends that under *Marsh*, legislative prayer is consistent with the Establishment Clause absent impermissible government motive in the selection of prayer- givers, or exploitation by the prayer-givers to proselytize, advance, or disparage a particular faith or belief. Petitioner further argues that the *Marsh* test protects against the government's promotion of a religious faith, while respecting the right of a prayer-giver to offer an invocation in that individual's religious tradition. Finally, petitioner contends that, by focusing on prayer content, the reasonable observer test impermissibly forces courts to act as theologians.

**Decision Below:**
681 F.3d 20 (2d Cir. 2012)

**Petitioner's Counsel of Record:**
Thomas G. Hungar, Gibson, Dunn & Crutcher LLP

**Respondents' Counsel of Record:**
Ayesha N. Khan, Americans United for Separation of Church and State

## First Amendment – Speech

***McCullen v. Coakley*** (12-1168)

**Questions Presented:**

(1) Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

(2) If *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

**Summary:**

A Massachusetts Act prohibits persons from entering or remaining on a public way or sidewalk within 35 feet of the entrance, exit, or driveway of a reproductive health care facility. The Act exempts from that prohibition employees and agents of the facility acting within the scope of their employment. In *Hill v. Colorado*, the Court held that a law limiting protest and counseling within eight feet of a person entering a health care facility did not violate the First Amendment. At issue in this case is whether the differences between the Massachusetts Act and the law upheld in *Hill*—the employee/agent exemption, the application solely to reproductive health care facilities, and the size of the buffer zone—render the Massachusetts Act unconstitutional. This case also asks whether, if *Hill* permits the enforcement of this law, *Hill* should be limited or overruled.

Petitioners are persons who station themselves near clinics in Massachusetts in order to encourage women to pursue alternatives to abortion. They filed suit in federal district court,

alleging that the Massachusetts Act violates their rights under the First Amendment. The First Circuit rejected petitioners' facial challenge, and the district court subsequently rejected petitioners' as-applied challenges.

The First Circuit affirmed. The court held that the Massachusetts Act is a valid time, place, and manner restriction. It held that the employee/agent exemption does not render the statute viewpoint-based because the exemption does not purport to allow advocacy by an exempt person. The court further held that petitioners' inability to engage in speech at a conversational distance did not render the statute unconstitutional because the law leaves open effective alternative methods of communication, such as the display of placards and verbal communications that reach their intended audience.

Petitioners argue that the Massachusetts statute violates the First Amendment. First, petitioners argue that the employee/agent exemption renders the Act impermissibly content-based. In particular, petitioners argue that, as a result of the exemption, the law permits speech that facilitates access to the clinics, but prohibits speech that facilitates other alternatives. Second, petitioners argue that the application of the law solely to abortion clinics demonstrates that the law is impermissibly aimed at abortion protests. Third, petitioners argue that the law is not narrowly tailored because it prevents protesters from proffering leaflets or speaking to willing listeners from a conversational distance and remits them to far less effective alternatives. Finally, petitioners argue that, if the Act is constitutional under *Hill*, *Hill* should be limited or overruled.

**Decision Below:**
708 F.3d 1 (1st Cir. 2013)
**Petitioners' Counsel of Record:**
Mark L. Rienzi, Catholic University of America Columbus School of Law
**Respondents' Counsel of Record:**
William W. Porter, Assistant Attorney General of Massachusetts

***McCutcheon v. Federal Election Commission*** (12-536)
**Questions Presented:**

(1) Whether the biennial limit on contributions to non-candidate committees, 2 U.S.C. 441a(a) (3)(B), is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees.

(2) Whether the biennial limits on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), are unconstitutional facially for lacking a constitutionally cognizable interest.

(3) Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially.

(4) Whether the biennial limit on contributions to candidate committees, 2 U.S. C. 441a(a)(3) (A), is unconstitutional for lacking a constitutionally cognizable interest.

(5) Whether the biennial limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutionally too low.

**Summary:**

The Federal Election Campaign Act (FECA) imposes base contribution limits and aggregate contribution limits. The base limits determine how much a person may contribute to any particular candidate, party committee, or PAC. The aggregate limits determine the total amount a person may contribute to all candidates, party committees, or PACs. For example, FECA's base limit allows a person to contribute $2,600 per election to any particular candidate, while FECA's aggregate contribution limits allow a person to contribute a total of $48,000 per

election cycle to federal candidates collectively. In *Buckley v. Valeo*, the Court upheld certain base and aggregate limits. The questions presented in this case concern whether the current aggregate contribution limits violate the First Amendment.

Appellant McCutcheon wants to make more base level contributions than FECA's aggregate contribution limits allow, and appellant Republican National Committee wants to receive more base level contributions than FECA's aggregate contribution limits allow. Appellants filed suit in a three-judge court the United States District Court for the District of Columbia, alleging that FECA's aggregate contribution limits violate their First Amendment rights. The court rejected appellants' First Amendment claim. The court ruled that, under *Buckley*, strict scrutiny does not apply to aggregate contribution limits. Instead, the court held, such limits, like all contribution limits, are valid as long as they are closely drawn to serve a sufficiently important interest. Applying that standard, the court upheld FECA's aggregate contribution limits. It reasoned that the aggregate contribution limits are closely drawn to further the important interest in avoiding circumvention of the concededly valid base limits.

Appellants argue that strict (or elevated) scrutiny should apply to aggregate contribution limits because they impose a more severe burden than base contribution limits. In particular, appellants argue, while base contribution limits affect only the amount a person may contribute to a particular candidate (party committee or PAC), aggregate contribution limits affect the number of different candidates (party committees or PACs) a political donor can support. Appellants further argue that FECA's current aggregate limits are unconstitutional regardless of whether strict scrutiny or the "closely drawn" standard applies. *Buckley* upheld aggregate limits on a circumvention theory, appellants contend, because the absence of base limits on contributions to party committees and PACs would otherwise have allowed persons to channel massive donations to candidates through those committees. Because FECA now imposes base limits on contributions to party committees and PACs, petitioners argue, there is no justification for aggregate contribution limits. Finally, petitioners argue that, to the extent that *Buckley* is thought to support the constitutionality of the current aggregate limits, that decision should be overruled.

**Decision Below:**
893 F. Supp. 2d 133 (D.D.C. 2012)
**Appellants' Counsel of Record:**
James Bopp Jr., The Bopp Law Firm
**Appellee's Counsel of Record:**
Donald B. Verrilli Jr., Solicitor General of the United States

## Fourteenth Amendment – Equal Protection

***Madigan v. Levin*** (12-872)
**Question Presented:**

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.
**Summary:**

The Age Discrimination in Employment Act (ADEA) makes it unlawful for any employer to discriminate against an individual because of age, and gives employees the right to sue for the alleged discrimination. Before filing suit, however, an individual must first file a

charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which must seek to conciliate the charge. The ADEA also precludes an award of punitive damages and affords only a special administrative remedy for high-ranking state employees. Section 1983 of Title 42 provides a cause of action to persons whose constitutional rights have been violated. It does not does not contain any of the ADEA's procedural and remedial limitations specified above. The question presented in this case is whether state and local government employees may avoid the ADEA's remedial regime and instead bring age discrimination claims directly under the Equal Protection Clause and section 1983.

Respondent Harvey Levin was terminated from his position as Assistant Illinois Attorney General at the age of sixty-one and was replaced by a female attorney in her thirties. Respondent filed suit in federal district court, alleging age discrimination in violation of the ADEA, as well as the Equal Protection Clause via 42 U.S.C. § 1983. The district court denied a motion for qualified immunity.

The Seventh Circuit affirmed, holding that the ADEA does not preclude a section 1983 equal protection claim. In reaching that conclusion, the court relied on the absence of statutory language or legislative history indicating any congressional intent to preclude such a claim. It also relied on the substantial substantive differences between an ADEA claim and a constitutional claim. The court acknowledged that the ADEA provides a comprehensive remedial scheme for statutory violations, but it concluded that this was insufficient to preclude a section 1983 constitutional claim.

Petitioner argues that the ADEA precludes a section 1983 constitutional claim for age discrimination. Petitioner relies on the principle that a comprehensive statutory scheme precludes a claim under section 1983 when the statutory scheme would be undermined by allowing such a claim. That principle is controlling here, petitioner contends, because allowing an employee to sue under section 1983 for unconstitutional age discrimination would permit an employee to circumvent the ADEA's procedural and remedial limitations. In particular, petitioner argues, it would permit employees to avoid the ADEA's notice and conciliation requirements, its punitive damages bar, and its administrative remedy for high-level state and local government employees.

**Decision Below**:
692 F.3d 607 (7th Cir. 2012)

**Petitioners' Counsel of Record:**
Michael A. Scodro, Solicitor General of Illinois

**Respondent's Counsel of Record:**
Edward R. Theobald, Law Offices of Edward R. Theobald

***Schuette v. Coalition to Defend Affirmative Action*** (12-682)

**Question Presented:**

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions.

**Summary:**

The Michigan constitution prohibits preferential treatment in admissions to public universities based on race, removing authority universities previously had to consider race in admissions to further diversity. In *Hunter v. Erickson* and *Washington v. Seattle School District No. 1*, the Court held that it is unconstitutional under the Equal Protection Clause for states to restructure the political process to make it more difficult for racial minorities to obtain policies

that are in their interests. At issue in this case is whether Michigan's constitutional prohibition on preferential treatment violates the equal protection principle established in *Hunter* and *Seattle*.

In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan Law School's use of race in admissions to further diversity. Following that decision, Michigan voters adopted Proposal 2, which amended Michigan's constitution to prohibit race-based preferences in admissions to state universities. The Coalition to Defend Affirmative Action filed suit, challenging the constitutionality of Proposal 2. The district court upheld its constitutionality.

The en banc Sixth Circuit reversed, holding that Proposal 2 violates the equal protection principle established in *Hunter* and *Seattle*. The court read those decisions to invalidate an enactment that: (1) targets a program that operates primarily to benefit minorities, and (2) reorders the political process in a way that places special burdens on a minority group's ability to achieve its objectives through that process. The court concluded that the race-based admissions policies targeted by Proposal 2 operate primarily to benefit minorities because they enhance minorities' educational opportunities. It further concluded that the amendment placed special burdens on a minority group's ability to achieve its goals because it eliminated the ability of minority groups to seek race-based admissions policies from university boards, leaving a constitutional amendment as the only option.

Petitioner argues that the Michigan constitution's prohibition on preferential admissions does not violate the Equal Protection Clause. First, it argues that *Hunter* and *Seattle* apply only to enactments that burden a minority group's ability to obtain equal treatment, not to enactments that prohibit preferential treatment. Second, it argues that the Michigan constitution does not restructure the political process because the authority to adopt race-conscious admissions policies was previously exercised by politically unaccountable faculty members, not elected boards. Third, it argues that the prohibition on preferential treatment was not enacted with a discriminatory intent. Finally, it argues that, to the extent that *Seattle* condemns policies that prohibit preferential treatment, it should be overruled.

**Decision Below:**
701 F.3d 466 (6th Cir. 2012) (en banc)
**Petitioner's Counsel of Record:**
John J. Bursch, Michigan Solicitor General
**Respondents' Counsel of Record:**
Charles J. Cooper, Cooper & Kirk, PLLC
Leonard M. Niehoff, Honigman Miller Schwartz and Cohn, LLP
Mark D. Rosenbaum, ACLU Foundation of Southern California
Stephanie R. Setterington, Varnum LLP
George B. Washington, Scheff, Washington & Driver, P.C.

## Recess Appointments Clause

***National Labor Relations Board v. Noel Canning*** (12-1281)
**Questions Presented:**

(1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

(2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

(3) Whether the President's recess-appointment power may be exercised when the Senate

is convening every three days in *pro forma* sessions.

**Summary:**

The Recess Appointments Clause provides that "[t]he President shall have the power to fill up all vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the end of their next session." This case presents the following questions: (1) whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate; (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, but arose earlier; and (3) whether the President's recess-appointment power may be exercised when the Senate is in *pro forma* sessions.

In 2012, when the first session of the 112th Congress ended and the second began, there were three vacancies on the National Labor Relations Board (NLRB), leaving it without a quorum. For several weeks, the Senate had *pro forma* sessions with no business conducted. During that period, the President invoked the Recess Appointments Clause to fill the three NLRB vacancies. Shortly thereafter, the NLRB affirmed an order of an Administrative Law Judge finding that respondent Noel Canning committed an unfair labor practice.

The D.C. Circuit reversed, holding that the President did not have authority under the Recess Appointments Clause to make the three NLRB appointments. First, the court concluded that the Recess Appointments Clause authorizes the President to fill vacancies only during "inter-session" recesses, *i.e.*, recesses that occur between the end of one enumerated session of Congress and the beginning of the next. The court reasoned that the phrase "the Recess" necessarily refers to a single recess, excluding the multiple recesses that may occur during an enumerated session. Second, the court concluded that the President may fill a vacancy only if it arose during that same recess. The court reasoned that the term "happen" means arise, not happens to exist, excluding the power to appoint during a vacancy if the vacancy arose at an earlier time. With respect to both holdings, the court emphasized that a broader reading would give the President the power to circumvent the Constitution's advice and consent requirement. The court did not address respondent's argument that the Senate is not in recess when it has *pro forma* sessions with no business conducted.

The government first argues that the President has the power to fill vacancies during intra-session recesses. In support of that argument, the government contends that that the term recess was understood at the time of the Framing to refer to both inter-session and intra-session recesses, the President is no less in need of officers to fulfill his constitutional responsibilities during an intra-session recess, and that Presidents have long filled vacancies during intra-session recesses. The term "the Recess," the government argues, refers to the entire class of recesses, not a single specific recess. The government next argues that the President has the power to fill vacancies that exist during a recess, even if they first arose earlier. In support of that argument, the government contends that that the term "happen" means "happens to exist," not "arise," that Presidents have long interpreted the term in that way, and that doing so furthers the Recess Appointments Clause's purpose of allowing vacancies to be filled at all times. At respondent's suggestion, the Court added the question whether the Senate is in recess during *pro forma* sessions, and the government has not yet addressed that issue.

**Decision Below:**

705 F.3d 490 (D.C. Cir. 2013)

**Petitioner's Counsel of Record:**

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

**Respondents' Counsel of Record:**
Noel J. Francisco, Jones Day
James B. Coppess, American Federation of Labor and Congress of Industrial Organizations

## Treaty Power and Commerce Clause

***Bond v. United States*** (12-158)
**Questions Presented:**

(1) Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations?

(2) Can the provisions of the Chemical Weapons Convention Implementation Act, codified at 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*?

**Summary:**

In *Missouri v. Holland*, the Court held that a treaty prohibition on the taking of migratory birds was valid, even though the federal government would not otherwise have had authority to prohibit such conduct. *Holland* also held that, because the treaty was valid, Congress's statutory prohibition on the taking of migratory birds was valid under the Necessary and Proper Clause. The Chemical Weapons Convention, an international treaty, prohibits the use of chemical weapons for non-peaceful purposes. To implement the Treaty, Congress enacted 18 U.S.C. § 229(a)(1), which makes it unlawful for any person knowingly to use any chemical weapon for non-peaceful purposes. The questions presented in this case are whether the statutory prohibition on the use of chemical weapons would be constitutional as applied to a local domestic dispute, and if so, whether the Act should be interpreted not to apply to such a dispute.

Petitioner Carol Anne Bond's best friend Myrlinda Haynes had a sexual relationship with Ms. Bond's husband and became pregnant. Distraught, Bond obtained chemicals online and from her employer that could be lethal if administered in sufficiently high doses. Bond went to Haynes's home and spread chemicals on Haynes's car door, mailbox, and apartment doorknob, and Haynes suffered a chemical burn to her thumb. Bond was prosecuted for knowingly using a chemical weapon not intended for peaceful purposes. Bond pleaded guilty while reserving her right to appeal.

The Third Circuit affirmed Bond's conviction. The court first held that Bond's conduct fell within the prohibition on the use of toxic chemicals without a peaceful purpose. The court then held that the prohibition was valid under the Treaty Power and the Necessary and Proper Clause. The Court interpreted *Holland* to give Congress plenary power under the Necessary and Proper Clause to implement a valid treaty, even if the statute would otherwise constitute an intrusion into the legislative domain of the states.

Petitioner argues that Congress's power to implement a valid treaty under the Necessary and Proper Clause does do not give Congress an unlimited police power to regulate local activity that is otherwise within the state's domain. Petitioner argues that *Holland* does not support such a federal police power, but instead, considered and weighed the state and federal interests at issue. Because prosecution of petitioner's crime does not advance the purposes of the treaty, and

intrudes on the state's core interest in local crime, petitioner argues, the statute would be unconstitutional if it reached petitioner's conduct. To avoid that result, petitioner argues, the statute should be interpreted to apply only to acts of terrorism.

**Decision Below:**
681 F.3d 149 (3d Cir. 2012)
**Petitioner's Counsel of Record:**
Paul D. Clement, Bancroft PLLC
**Respondent's Counsel of Record:**
Donald B. Verrilli, Jr., Solicitor General of the United States

# *Criminal Law*

## Federal Statutory Offenses

### Aiding or Abetting Use of a Firearm

***Rosemond v. United States*** (12-895)
**Question Presented:**

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (2), requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

**Summary:**

Section 924(c)(1)(A) of Title 18 provides a sentencing enhancement to any person convicted of using a firearm during and in relation to a drug trafficking crime. Under the aiding or abetting statute, 18 U.S.C. § 2(a), a person who aids or abets a violation of Section 924(c)(1)(A) is also guilty of that offense. At issue in this case is whether aiding and abetting liability under section 924(c)(1)(A) requires proof that the defendant intentionally facilitated or encouraged the principal's use of the firearm or whether the government need only show that the defendant actively participated in a drug trafficking crime and knew that the principal used a firearm.

Petitioner Justus Rosemond and Ronald Joseph arranged a drug sale to two buyers. When one of the buyers seized the drugs and fled, either petitioner or Joseph fired shots in his direction. Petitioner was indicted for using a firearm, or aiding and abetting the use of a firearm, during and in relation to a drug trafficking offense. The government tried petitioner on two alternative theories, one of which was that petitioner fired the shots, and the other of which was that petitioner aided and abetted Joseph's firing of the shots. The trial court instructed the jurors that an aiding and abetting conviction requires knowledge that a cohort used a firearm as well as knowing and active participation in the drug trafficking crime. The jury found petitioner guilty without specifying which of the government's theories it accepted.

The Tenth Circuit affirmed. The court held that a defendant is liable for aiding and abetting the use of a firearm if he (1) consciously participates in a drug trafficking crime, and (2) knows that his cohort used a firearm during the commission of the crime. The Court rejected

petitioner's argument that the government was required to prove that he intentionally facilitated or encouraged the use of the firearm.

Petitioner argues that aiding and abetting liability under section 924(c)(1)(A) requires proof that he intentionally encouraged or facilitated the use of a firearm, not simply that he participated in a drug trafficking crime and knew that a firearm was used. In support of that argument, petitioner relies on the plain language of the aiding or abetting statute, basic principles of accomplice liability, and the need to ensure that an accomplice is punished to the same extent as the principal only when he is equally culpable.

**Decision Below:**
695 F.3d 1151 (10th Cir. 2012)
**Petitioner's Counsel of Record:**
John P. Elwood, Vinson & Elkins LLP
**Respondent's Counsel of Record:**
Donald B. Verrilli Jr., Solicitor General of the United States

## Distribution of Drugs Causing Death

***Burrage v. United States*** (12-7515)
**Questions Presented:**

(1) Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.

(2) Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the sole cause of death of a person.

**Summary**:

Under 21 U.S.C. § 841(b)(1), the minimum sentence for distribution of certain controlled substances, including heroin, is increased to 20 years if death "results from" use of such a substance. The first question in this case is whether section 841(b)(1) imposes strict liability for death caused by the defendant's conduct, without a foreseeability or proximate cause requirement. The second question is whether death "results from" the defendant's conduct when the heroin distributed "contributed to" death, but was not the sole cause.

Petitioner Burrage sold one gram of heroin to Joshua Banka. Banka used the heroin that day and was found dead in the morning. Expert evidence established that the heroin petitioner sold to Banka contributed to Banka's death, but the experts could not determine definitively whether Banka would have died from the other drugs found in his system if he had not taken the heroin. Over petitioner's objection, the jury instructions stated that the government was required to prove that heroin was a "contributing cause" of Banka's death. The jury was further instructed that a "contributing cause" is a factor that plays a part in producing the result even if it is not the primary cause. The jury found petitioner guilty of distribution of heroin resulting in death.

The Eighth Circuit affirmed. The court held that section 841(b)(1) does not require proof of proximate cause or foreseeability, but instead simply requires the government to show that death "results from" use of the distributed substance. The court further held that the "results from" requirement is satisfied by proof that that the distributed substance "contributed to" death.

Petitioner first argues that section 841(b)(1) requires proof of proximate cause or foreseeability. In support of that argument, petitioner relies on the general rule that criminal statutes require proof of *mens rea*. Petitioner also asserts that failing to require foreseeability or

proximate cause leads to absurd consequences. For example, a defendant would be held responsible for the death of someone intent on committing suicide, even when the defendant carefully instructs the person on a safe dosage. Petitioner alternatively argues that the "contributing cause" instruction is inconsistent with traditional "but for" causation. Under the traditional "but for" standard, petitioner argues, there was insufficient evidence to sustain his conviction because the experts could not say that but for ingestion of heroin Banka would not have died.

**Decision Below:**
687 F.3d 1015 (8th Cir. 2012)

**Petitioner's Counsel of Record:**
Angela L. Campbell, Dickey & Campbell Law Firm, PLC

**Respondent's Counsel of Record:**
Donald B. Verrilli, Jr., Solicitor General of the United States

## Possession of Child Pornography

***Paroline v. United States*** (12-8561)

**Question Presented:**

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

**Summary:**

When a person is guilty of the possession of child pornography, he is obligated to pay restitution of the "full amount of the victim's losses." *See* 18 U.S.C. § 2259. A "victim" is defined as an "individual harmed as a result of a commission of a crime." The victim's "losses" include five specified categories of loss, plus a catch-all category of "other losses suffered by the victim as a proximate result of the offense." At issue in this case is what causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under section 2259.

Petitioner pleaded guilty to possession of child pornography. He possessed at least two images of Amy, whose uncle sexually abused her as a child. Amy moved for restitution of $3.4 million in damages under 18 U.S.C. § 2259. The district court denied her motion.

The en banc Fifth Circuit reversed. The court first held that the five specific categories of loss do not require proof of proximate cause. In reaching that conclusion, the court relied on the rule of the last antecedent, under which a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. The court next held that when a defendant, along with others, has contributed to a victim's losses, the court may hold the defendant jointly and severally liable for all losses. The court remanded to the district court for a determination of the full amount of Amy's losses.

Petitioner argues that section 2259 contains a proximate cause requirement for all categories of losses. Under that requirement, petitioner argues, he cannot be held responsible for harm and losses caused by the person who physically abused the child or the persons who distributed her pornographic images. Instead, petitioner argues, a possessor of child pornography should have to contribute little to the restitution pool.

**Decision Below:**
701 F.3d 749 (5th Cir. 2012) (en banc)

**Petitioner's Counsel of Record:**
Stanley G. Schneider, Schneider & McKinney, P.C.
**Respondents' Counsel of Record:**
Paul G. Cassell, S.J. Quinney College of Law, University of Utah
Robin E. Schulberg, Robin E. Schulberg, LLC
Donald B. Verilli Jr., Solicitor General of the United States

## Trespass on a Military Installation

***United States v. Apel*** (12-1038)
**Question Presented:**

Whether 18 U.S.C. 1382, which prohibits a person from reentering a military installation after a commanding officer has ordered him not to reenter, may be enforced on a portion of a military installation that is subject to a public roadway easement.

**Summary:**

Section 1382 of Title 18 prohibits any person "within the jurisdiction of the United States" from entering a military reservation for any purpose prohibited by law. It also prohibits any person from reentering "such" military reservation after having been removed by an officer or commander. The question presented in this case is whether section 1382 may be enforced on a portion of a military installation that is subject to a public roadway easement.

Vandenberg Air Force Base in California is the site of missile- and space-launch facilities, and is generally closed to the public. Highway 1 crosses the base and is owned by the Air Force, but the Air Force has granted roadway easements to California and Santa Barbara County. The Air Force therefore exercises concurrent jurisdiction over that area with the State of California and Santa Barbara. The Air Force has set aside an area for public protesting that falls within the Highway 1 easement. The Air Force barred respondent John Apel from the Base, including the protest area, after he trespassed on the base. Notwithstanding that barment order, respondent reentered the protest area three times. Respondent was tried and convicted for violating section 1382.

The Ninth Circuit reversed. The court held that section 1382 applies only to areas over which the United States exercises an exclusive right to possession. Because of the Highway 1 easement, the court concluded, the United States does not have an exclusive right to possess the protest area. The court therefore concluded that respondent's entry onto that area did not violate section 1382.

The government argues that, under the plain language of section 1382, it applies to any area "within the jurisdiction of the United States," not to any area within its exclusive possession. Because the granting of an easement does not remove an area from the "jurisdiction of the United States," the government argues, section 1382 applies to such areas. That is particularly true in the case of the Highway 1 easement, the government argues, because that easement specifically provides that the area is subject to the rules and regulations that the base commander prescribes.

**Decision Below**:
676 F.3d 1202 (9th Cir. 2012)

**Petitioner's Counsel of Record**:
Donald B. Verrilli, Jr., Solicitor General of the United States
**Respondent's Counsel of Record:**
Erwin Chemerinsky, University of California, Irvine School of Law

## Fifth Amendment – Due Process

***Kaley v. United States*** (12-464)
**Question Presented:**

When a post-indictment, *ex parte* restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

**Summary:**

Following an indictment, 18 U.S.C. § 853(e), authorizes a district court to freeze a defendant's forfeitable assets without giving the defendant an opportunity to challenge the grand jury's finding of probable cause. In *United States v. Monsanto*, the Supreme Court upheld the constitutionality of a pretrial order freezing assets based on a finding of probable cause, even when the assets are needed to retain counsel of choice. The Court did not decide whether the Constitution requires that a defendant have the opportunity to challenge the grand jury's finding of probable cause. That question is presented by this case.

Petitioners Kerri and Brian Kaley were the targets of a grand jury investigation. Petitioners retained counsel for $500,000 to litigate the case through trial. To raise the funds, petitioners obtained a $500,000 home equity loan, and used that money to buy a certificate of deposit. A grand jury subsequently indicted petitioners for conspiring to traffic in stolen prescription medical devices and money laundering. The indictment notified petitioners that, in the event of conviction, the government would seek all forfeitable property. The government then moved ex parte to restrain the certificate of deposit to prevent its dissipation before the conclusion of trial, and the district court entered the order. Petitioners moved to vacate the order to permit them to retain counsel of choice. Petitioners did not dispute that the certificate of deposit was (for the most part) traceable to property allegedly involved in the offense, but sought an evidentiary hearing to challenge the grand jury's finding of probable cause. The district court declined to permit petitioners to challenge the grand jury's finding of probable cause.

The Eleventh Circuit affirmed, holding that that due process does not require that the defendant have an opportunity to challenge the grand jury's finding of probable cause. The court relied on the Supreme Court's holding in *Costello v. United States* that a defendant does not have a pretrial right to challenge the evidentiary sufficiency of a grand jury indictment. The court added that permitting such a challenge would force the government to a choice of prematurely revealing its evidence and foregoing a restraint that might be necessary to avoid the dissipation of forfeitable property.

Petitioners contend that the Due Process Clause requires that they be given a pretrial hearing to challenge the grand jury's finding of probable cause. Petitioners rely on the *Matthews v. Eldridge* balancing test, which considers the private interest affected, the risk of an erroneous deprivation, and the government's interest. Petitioners argue that the private interest affected is substantial because the freezing of assets absolutely precludes them from engaging counsel of their choice; they argue that the risk of error is high because an indictment is based on a one-

sided ex parte hearing; and they argue that government's interest is minor because the government will have to release much of its evidence through pretrial discovery in any event.

**Decision Below:**
677 F.3d 1316 (11th Cir. 2012)

**Petitioners' Counsel of Record:**
Howard Srebnick, Black, Srebnick, Kornspan, & Stumpf, P.A.

**Respondent's Counsel of Record:**
Donald B. Verrilli Jr., Solicitor General of the United States

## Fifth Amendment – Self-Incrimination

***Kansas v. Cheever*** (12-609)

**Question Presented:**

When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

**Summary:**

In *Estelle v. Smith* and *Buchanan v. Kentucky*, the Supreme Court held that court-ordered psychiatric evaluations of criminal defendants implicate the Fifth Amendment and cannot be introduced at trial when the defendant does not initiate the exam or put his mental capacity into issue by presenting psychiatric evidence. The question presented in this case is whether, by presenting evidence of "voluntary intoxication" as a defense to capital murder, a defendant waives his Fifth Amendment privilege, allowing prosecutors to introduce results of his court-ordered mental evaluation as rebuttal.

Respondent Cheever shot and killed a police officer who had come to his home to arrest him on an outstanding warrant. Cheever was a user of methamphetamine and had consumed methamphetamine on the day of the shooting. Cheever was prosecuted federally, and when he asserted his intent to raise a defense that his consumption of methamphetamine made him incapable of forming the intent to murder, the federal court ordered him to undergo a mental evaluation. The federal case ended in mistrial, and Cheever was prosecuted in state court. At trial, Cheever presented expert testimony that that his consumption of methamphetamine precluded him from forming the intent to murder. To counter that evidence, prosecutors introduced the testimony of the person who conducted Cheever's court-ordered mental evaluation. Cheever was convicted and sentenced to death.

The Kansas Supreme Court reversed Cheever's capital murder conviction and death sentence, holding that introduction of evidence derived from his court-ordered mental evaluation violated his Fifth Amendment privilege. The court held that, under Kansas law, a defendant waives his Fifth Amendment privilege against the introduction of evidence from a court-ordered examination when he introduces evidence of a "mental disease or defect," but not when he introduces evidence of "voluntary intoxication." The difference, the court explained, is that a mental disease or defect is permanent, whereas voluntary intoxication is only temporary. Because Cheever asserted only voluntary intoxication as a defense, the court concluded, he did not waive his Fifth Amendment privilege against introduction of evidence based on the court-ordered mental evaluation.

Kansas argues that Cheever waived his Fifth Amendment privilege when he submitted expert evidence that his consumption of methamphetamine precluded him from forming the intent to murder. Kansas argues that *Smith* and *Buchanan* allow the government to introduce evidence from a court-ordered mental evaluation any time the defendant presents evidence that his mental status precludes his conviction, regardless of whether the evidence concerns a mental disease or defect or voluntary intoxication. Kansas further argues that Fifth Amendment waiver is governed by federal law, not state law, rendering it irrelevant that Kansas law does not treat the introduction of evidence relating to voluntary intoxication as a waiver.

**Decision Below:**
284 P.3d 1007 (Kan. 2012)
**Petitioner's Council of Record:**
Stephen R. McAllister, Solicitor General of Kansas
**Respondent's Council of Record:**
Neal Kumar Katyal, Hogan Lovells US LLP

## Fourth Amendment – Search and Seizure

***Fernandez v. California*** (12-7822)
**Question Presented:**

Proper interpretation of *Georgia v. Randolph*, 547 U.S. 103 (2006), specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection, while physically present, to a warrantless search is a continuing assertion of 4th Amendment rights which cannot be overridden by a co-tenant.

**Summary:**

In general, police may rely on an occupant's consent to conduct a warrantless search of the occupant's house. In *Georgia v. Randolph*, however, the Court held that an occupant's consent does not authorize police to conduct a warrantless search when a physically present co-occupant objects. The question in this case is whether the objection of a physically present occupant precludes the police from obtaining consent to conduct a warrantless search from a co-occupant after the objecting occupant has been arrested and removed from the scene.

Petitioner Walter Fernandez committed an assault with a deadly weapon and fled to his apartment. Police went to Fernandez's apartment and asked for permission to search it, but Fernandez refused. After police arrested Fernandez, Roxanne Rojas, a co-occupant, consented to a search of the apartment. During that search, the officers discovered gang paraphernalia, a knife, and a shotgun. Petitioner moved to suppress that evidence, arguing that the search violated the Fourth Amendment under *Randolph*. The trial court denied the motion to suppress, and petitioner was convicted of assault with a deadly weapon.

The California Court of Appeal affirmed, holding that police could rely on Rojas' consent because Fernandez was absent when Rojas consented. The court reasoned that *Randolph* drew a firm line between cases in which a co-occupant is present and objecting and cases in which an objecting co-occupant has been lawfully arrested and is therefore not present when consent is obtained. The court also relied on the need for police to take advantage of legitimate law enforcement opportunities, the burden of seeking affirmative consent from a co-occupant who is no longer present, and the absence of any social custom against relying on the consent of one co-occupant when the other is not present.

Petitioner argues that *Randolph* precluded police from relying on Rojas' consent. Once a

physically present occupant registers an objection to a search of his apartment, petitioner argues, that objection remains effective under *Randolph* absent an objective manifestation that the objector has changed his mind.

**Decision Below:**
208 Cal.App.4th 100 (Cal. App. 2d Dist. 2012)

**Petitioners' Counsel of Record:**
Jeffrey Fisher, Stanford Law School Supreme Court Clinic

**Respondent's Counsel of Record:**
Louis Ward Karlin, Office of the Attorney General, California

## Habeas Corpus – Anti-Terrorism and Effective Death Penalty Act

***Burt v. Titlow*** (12-414)

**Questions Presented:**

(1) Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA [(the Antiterrorism and Effective Death Penalty Act of 1996)] in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

(2) Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

(3) Whether *Lafle*r [*v. Cooper*, 132 S. Ct. 1376 (2012),] always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

**Summary:**

In *Lafler v. Cooper*, the Supreme Court held that defendants asserting ineffective assistance of counsel in the context of a rejected or withdrawn guilty plea must show that but for counsel's deficient advice they would have pleaded guilty. The Court further held that, once such a violation is shown, a court must exercise discretion to impose a remedy that is tailored to the violation without unnecessarily infringing on competing interests. Under AEDPA, a federal court must defer to a state court's determination that counsel's performance was not defective unless that determination is unreasonable. The questions presented in this case are whether the appellate court gave proper deference to the state court when it determined that counsel gave constitutionally defective advice; whether the defendant's testimony alone is sufficient to establish that the defendant would have accepted the plea but for the defective advice; and whether *Lafler* always requires a state trial court to resentence a defendant and do so in a way that "remedies" the violation of the defendant's constitutional right.

Respondent Vonlee Titlow was charged with first-degree murder for helping her aunt murder her uncle. Titlow pleaded guilty to manslaughter pursuant to a plea agreement that provided for a 7 to 15 year sentence. After the plea but before sentencing, Titlow proclaimed her innocence and decided she did not want to plead guilty. She therefore discharged her first attorney and hired a second attorney who assisted her in withdrawing her plea. A jury then convicted Titlow of second-degree murder, and she was sentenced to 20 to 40 years. Titlow brought an ineffective assistance of counsel claim, alleging that her second attorney was ineffective because he advised her to withdraw her plea. The state trial court rejected Titlow's claim and the Michigan Court of Appeals affirmed. The federal district court denied Titlow's

habeas petition.

The Sixth Circuit reversed. The majority first concluded that Titlow's new attorney was constitutionally ineffective in assisting Titlow in withdrawing her plea because he did so without retrieving her case file from the first attorney. The court next held that counsel's deficient performance prejudiced Titlow because Titlow originally accepted the plea bargain and testified that she would not have withdrawn the plea but for counsel's advice. Based on those determinations, the court conditionally granted habeas relief, giving the state 90 days to reoffer the plea agreement. The court further directed that if the state chose to reoffer the plea agreement and Titlow chose to accept, the state trial court may then exercise its discretion to remedy the constitutional violation.

The state first argues that the Sixth Circuit erred in failing to defer to the state trial court's reasonable determination that her second counsel did not engage in deficient performance. The state next argues that a criminal defendant may not establish prejudice through her own uncorroborated post-trial testimony, but must instead submit additional objective evidence that she would not have withdrawn her plea but for counsel's purportedly deficient performance. Finally, petitioner argues that, under *Lafler*, a state trail court retains discretion to reject a reoffered plea bargain and leave intact the sentence imposed after trial.

**Decision Below:**

680 F.3d 577 (6th Cir. 2012)

**Petitioner's Counsel of Record:**

John J. Bursch, Michigan Solicitor General

**Respondent's Counsel of Record:**

Valerie Newman, State Appellate Defender Office

***White v. Woodall*** (12-794)

**Questions Presented:**

(1) Whether the Sixth Circuit violated 28 U.S.C. §2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

(2) Whether the Sixth Circuit violated the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

**Summary:**

The Antiterrorism and Effective Death Penalty Act (AEDPA), precludes habeas relief unless the state court's decision is contrary to, or involved an unreasonable application of clearly established law. The first question presented in this case is whether the Supreme Court's decisions in *Carter v. Kentucky*, *Estelle v. Smith*, and *Mitchell v. United States* clearly establish that a trial court is required to provide a no adverse inference instruction during the penalty phase of a capital trial when the defendant has pleaded guilty to the crime and all aggravating circumstances. In *Brecht v. Abrahamson*, the Court held that a court may not grant habeas relief unless an error had a "substantial and injurious effect or influence in determining the jury's verdict." The second question in this case is whether any error in failing to give an adverse inference instruction was harmless in light of the overwhelming evidence of guilt and aggravating circumstances.

Robert Woodall pleaded guilty to the kidnapping, rape, and murder of a 16-year-old girl

as well as all the aggravating factors needed to sentence him to death. He chose not to testify at the penalty phase of his trail, and the state court declined his request to instruct the jury to draw no adverse inferences from the decision not to testify. The jury then sentenced him to death. Woodall filed a habeas petition alleging that the trial court violated his Fifth Amendment right against self-incrimination by failing to give the no adverse inference instruction. The district granted Woodall's habeas petition.

The Sixth Circuit affirmed, holding that the failure to instruct the jury was a violation of his Fifth Amendment rights and that there was grave doubt as to the harmlessness of that error. The Circuit read *Carter v. Kentucky*, *Estelle v. Smith*, and *Mitchell v. United States*, to clearly establish a right to a no adverse inference instruction during the penalty phase of a capital trial, even when the defendant has already pleaded guilty. The court also declined to hold that the error was harmless because the jury had authority to reject the death penalty despite the evidence of guilt and aggravating circumstances.

The State argues that *Carter*, *Smith*, and *Mitchell* do not clearly establish a rule of law applicable to Woodall's case and that AEDPA therefore precludes habeas relief. In particular, the State argues that none of those cases involved a circumstance in which the defendant pleaded guilty to the crime and all aggravating circumstances, and that *Mitchell* expressly left open whether silence could bear on a jury's determination of lack of remorse. The State further argues that the overwhelming evidence of Woodall's guilt and the atrocity of his crime establish that any error in failing to give an adverse inference instruction was harmless.

**Decision Below:**
685 F.3d 574 (6th Cir. 2012)
**Petitioner's Counsel of Record:**
Susan Roncarti Lenz, Office of the Attorney General, Frankfort, Kentucky
**Respondent's Counsel of Record:**
Laurence E. Komp, Law Office of Laurence E. Komp, Manchester, Missouri

# *Environmental Law*

## Clean Air Act

***Environmental Protection Agency v. EME Homer City Generation*** (12-1182)
***American Lung Association v. EME Homer City Generation*** (12-1183)
**Questions Presented:**

(1) Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

(2) Whether States are excused from adopting SIPs [(state implementation plans)] prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

(3) Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

**Summary:**

The Clean Air Act (CAA) requires the EPA to establish National Ambient Air Quality

Standards NAAQS) for particular pollutants. The CAA then requires States to adopt state implementation plans (SIPs) that meet the NAAQS for their states. In a "good neighbor" provision, the CAA also requires an upwind State's SIP to prohibit emissions that "contribute significantly" to downwind States' failure to meet their SIPs. If a State fails to adopt an SIP or submits an inadequate SIP, the CAA requires the EPA to issue a federal implementation plan (FIP) for that State. In the Transport Rule, the EPA issued an FIP that addressed the emission of pollutants in 28 upwind States that the EPA had previously found not to have submitted an adequate SIP. The Transport Rule uses a methodology that considers both air quality and cost-effectiveness to determine a State's obligations. The questions presented in this case are whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule on which it granted relief; whether States are excused from adopting such a plan until after the EPA has adopted a rule quantifying each State's interstate pollution prevention obligations; and, whether the EPA properly considered the cost of pollution reduction when interpreting the statutory term "contribute significantly."

State entities and private power companies (respondents) challenged the validity of the Transport Rule in the D.C. Circuit, and that court invalidated it. The court first held that the CAA requires the EPA to limit the obligations of each upwind State to its proportionate share of downwind pollution. Because the Transport Rule does not embody that proportionate share principle, the court concluded, it violates the CAA. The court also held that a State's duty to submit an SIP addressing interstate pollution does not arise until the EPA defines a State's pollution prevention obligation. Because the EPA's failure-to-submit findings preceded the EPA's definition of the States' obligations, the court concluded, the EPA lacked authority to impose an FIP.

The EPA and the American Lung Association first argue that the court of appeals lacked jurisdiction to consider the claim that the EPA acted prematurely in adopting an FIP. They argue that those challenges should have been made when the EPA issued final decisions on the States' failure to submit adequate SIPS, not through a collateral attack on the Transport Rule. Petitioners further argue that the CAA unambiguously imposes an obligation on the States to submit SIPs within three years of the EPA's issuance of a NAAQS, an obligation that is not contingent on the EPA defining a State's emission prevention obligation. Petitioners next argue that the court lacked jurisdiction to consider the claim that the CAA imposes a proportionate share requirement because that objection was not made during the public comment period. Finally, petitioners argue that the CAA does not unambiguously impose a strict proportionality requirement, and that the EPA's mixed air-quality and cost-effectiveness approach is reasonable and therefore entitled to *Chevron* deference.

**Decision Below:**

696 F.3d 7 (D.C. Cir. 2012)

**Petitioners' Counsel of Record:**

Donald B. Verrilli Jr., Solicitor General of the United States (12-1182)
Sean H. Donahue, Donahue & Goldberg, LLP (12-1183)

**Respondents' Counsel of Record:**

Brendan K. Collins, Ballard Spahr LLP
Peter D. Keisler, Sidley Austin LLP
Bill L. Davis, Assistant Solicitor General of Texas
Barbara D. Underwood, Solicitor General of New York

# *Federal Practice and Procedure*

## Abstention

***Sprint Communications Company v. Jacobs*** (12-815)

**Question Presented:**

Whether the Eighth Circuit erred by concluding, in conflict with decisions of nine other circuits and this Court, that *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive" but also when there is a related state proceeding that is, instead, "remedial."

**Summary:**

In *Younger v. Harris*, the Supreme Court held that a federal court may not ordinarily enjoin an ongoing criminal enforcement proceeding. The Court has since expanded *Younger* abstention to certain state civil enforcement proceedings. The question presented in this case is whether *Younger* abstention is warranted not only when there is a related state proceeding that is "coercive," but also when there is a related state proceeding that is "remedial."

Windstream, an Iowa telecommunications company, charges petitioner Sprint to connect Voice over Internet Protocol (VoIP) calls to Windstream customers. Windstream's authority to make these access charges depends on whether VoIP is a telecommunications service or an information service under the 1996 Telecommunications Act. Petitioner filed a complaint with the Iowa Utilities Board (IUB), seeking a declaration that it had a right to withhold payment under the existing tariff. It asserted that the IUB did not have authority to resolve the underlying federal law issue because the FCC has authority over that issue. The IUB nonetheless asserted authority to resolve the federal law issue and concluded that Sprint was required to pay the charges. Petitioner then filed suit in federal district court, asserting that the IUB lacked authority to determine the validity of the charges under federal law. It also filed a petition to review the IUB decision in Iowa state court. The federal district court dismissed the case on abstention grounds.

The Eighth Circuit affirmed the district court's decision to abstain, but vacated the judgment of dismissal. The court held that *Younger* abstention was appropriate because petitioner sought to interfere with an ongoing state proceeding in which the state had an important interest. In particular, the court concluded that the state has an important interest in intrastate utility rates, and that an injunction against the IUB's order requiring payment of access charges would interfere with that interest.

Petitioner argues that *Younger* abstention does not apply in this case. First, petitioner relies on the general rule that federal courts have a virtually unflagging obligation to decide cases brought before them. Second, petitioner argues that the purposes of *Younger* abstention do not apply because the relief it seeks would not interfere with a state enforcement proceeding. Third, petitioner argues that *Younger* applies only to coercive proceedings, not to remedial proceedings. Finally, petitioner contends that *Burford v. Sun Oil Co.* governs when a federal court should abstain in deference to a non-coercive proceeding, and *Burford* abstention is not appropriate here.

**Decision Below**:

690 F.3d 864 (8th Cir. 2012)

**Petitioner's Counsel of Record:**
Christopher J. Wright, Wiltshire & Grannis LLP
**Respondents' Counsel of Record:**
David J. Lynch, General Counsel, Iowa Utilities Board

## Class Action Fairness Act

***Mississippi, ex rel. Hood v. AU Optronics Corp.*** (12-1036)
**Question Presented:**

Whether a state's *parens patriae* action is removable as a "mass action" under the Class Action Fairness Act when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint.

**Summary:**

The Class Action Fairness Act (CAFA) permits removal of "mass actions." CAFA defines "mass actions" as "civil actions in which the monetary relief claims of 100 or more persons are proposed to be tried jointly." The question presented in this case is whether a state *parens patriae* action is removable as a CAFA "mass action" when the state is the sole plaintiff, the claims arise under state law, and the state has authority to assert all claims in the complaint, including monetary claims on behalf of its citizens.

Mississippi sued respondents in state court, alleging that they engaged in price fixing of liquid crystal display (LCD) panels. The State sought injunctive relief, civil penalties, restitution for its own losses, and punitive damages; it also sought restitution for losses suffered by consumers. Respondents removed the suit to federal court on the grounds that it was a "mass action" under CAFA. The district court remanded the case to state court.

The Fifth Circuit reversed. The court held that a claim-by-claim analysis is necessary to determine whether an action is a "mass action." Under that approach, the court determines the real party in interest for each claim. Applying that approach, the court determined that the "real parties in interest" with respect to Mississippi's monetary restitution claims included both the state and more than 100 consumers of LCD products. The court therefore concluded that Mississippi's action was a "mass action" under CAFA removable to federal court.

Mississippi argues that a *parens patriae* suit is not removable as a "mass action" simply because more than 100 citizens will benefit from the action. Instead, it argues that as long as the state is the sole named plaintiff, the suit is not a mass action unless the state is merely a nominal plaintiff. In support of that argument, Mississippi relies on CAFA's textual reference to multiple "plaintiffs" who propose to try their cases "jointly," as well as to background *parens patriae* principles that treat a state as the real party in interest unless none of the relief benefits the state.

**Decision Below:**
701 F.3d 796 (5th Cir. 2012)
**Petitioner's Counsel of Record:**
Jim Hood, Attorney General of Mississippi
**Respondents' Counsel of Record:**
Christopher M. Curran, White & Case LLP

## Civil Procedure

***Atlantic Marine Construction Co. v. U.S. District Court, Western District of Texas*** (12-929)
**Questions Presented:**

(1) Did the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22 (1988), change the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)?

(2) If so, how should district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause?

**Summary:**

The federal venue statute, 28 U.S.C. § 1391(e), provides that venue is proper in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Under 28 U.S.C. § 1406(a), when an action is brought in the "wrong" venue, a court is required to dismiss the action or to transfer it to a court in which venue is proper. Under 28 U.S.C. § 1404(a), when an action is brought in a proper venue, a court has discretion to transfer the case to another proper forum based on the convenience of parties and witnesses and the interest of justice. At issue in this case is whether the parties' contractual agreement to litigate disputes in a particular forum renders a different forum that is otherwise proper under section 1391(e) the "wrong" venue within the meaning of section 1406(a), requiring automatic dismissal or transfer under that provision. This case also presents the question whether, assuming a court has discretion under section 1404(a) to transfer or retain the action, the party seeking to avoid a forum-selection clause has the burden to show that the clause should not be enforced.

In 2009, petitioner Atlantic Marine entered into a contract with J-Crew. That agreement provided that all disputes would be resolved in Norfolk, Virginia. J-Crew nonetheless filed suit against petitioner for breach of contract in the Western District of Texas, a proper venue under section 1391(e). Relying on the forum-selection clause, petitioner asserted that J-Crew had filed suit in the "wrong" venue, and therefore moved to dismiss under section 1406(a). Petitioner alternatively moved for a transfer to Norfolk, Virginia under section 1404(a). The district court denied both motions.

Petitioner sought a writ of mandamus from the Fifth Circuit, but the court denied the petition. Relying on *Stewart Organization, Inc. v. Ricoh Corp.*, the court held that a forum-selection clause does not render a venue that is proper under section 1391(e) the "wrong" venue within the meaning of section 1406(a). Instead, the court held that a court should consider the forum-selection clause as a significant factor in deciding whether to transfer the case under section 1404(a). The court further held, however, that the burden of showing that a transfer is warranted remains on the party seeking a transfer.

Relying on the plain meaning of the term "wrong," petitioner argues that a venue is "wrong" within the meaning of section 1406(a) not only when it is an improper venue under section 1391(e), but also when the parties have contractually bargained for a different forum. If transfer were instead governed by section 1404(a), petitioner argues, it would encourage forum shopping because when a case is transferred under section 1404(a), the law of the original forum transfers with the case. Petitioner alternatively contends that, even if section 1404(a) were applicable, the party seeking to avoid enforcement of the forum-selection clause should have the burden to establish that a transfer is justified by an extraordinary circumstance. Otherwise, petitioner contends, parties would have an incentive to routinely breach their agreements to

litigate in a particular forum.
**Decision Below:**
701 F.3d 736 (5th Cir. 2012)
**Petitioners' Counsel of Record:**
William S. Hastings, Locke Lord LLP
**Respondents' Counsel of Record:**
William R. Allensworth, Allensworth & Porter, LLP

***DaimlerChrysler AG v. Bauman*** (11-965)
**Question Presented:**

Whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

**Summary:**

General jurisdiction refers to a court's authority to exercise jurisdiction over a defendant even when the defendant's contacts with the forum state are unrelated to the plaintiff's claim. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court held that a court may exercise general jurisdiction over foreign corporation consistent with due process only when the corporation's contacts with the forum are so "continuous and systematic" that it "is fairly regarded as at home." The question in this case is whether a court may exercise general jurisdiction over a foreign corporation based on the fact one of its subsidiaries performs services on its behalf in the forum state.

Respondents, twenty-two Argentine residents, sued petitioner Daimler AG in federal district court in California, alleging that Mercedes-Benz Argentina, a Daimler AG subsidiary, aided Argentina in committing human rights violations against respondents and their relatives. Respondents brought suit under the Alien Tort Statute, the Torture Victims Protection Act, and California and Argentina law. Daimler AG is a German company that does not do business in California. Respondents nonetheless sought to establish general jurisdiction over Daimler AG in California based on the fact that Mercedes-Benz USA LLC (MBUSA), a Daimler AG subsidiary, sells Daimler AG vehicles in California. The district court dismissed respondents' complaint for lack of personal jurisdiction.

The Ninth Circuit reversed, holding that a court may exercise general jurisdiction over a foreign corporation when one of its subsidiaries acts as its "agent" in the forum state. The court established a two-part agency test. First, the subsidiary must perform a role that is so important that, if the subsidiary went out of business, the corporation would either sell the product itself or do so through a new representative. Second, the corporation must have the right to control the subsidiary. Applying this two-part test, the court concluded that MBUSA is an agent of Daimler AG. The court further concluded that the exercise of general jurisdiction was reasonable because Daimler AG extensively interjected itself into the California market through MBUSA, and U.S. courts have a strong interest in serving as a forum for the vindication of human rights.

Petitioner contends that a court may exercise general jurisdiction over a foreign corporation based on the contacts of one of its subsidiaries only when the subsidiary is an alter ego of the corporation. An agency relationship alone, petitioner contends, is not sufficient. Petitioner further contends that even if an agency relationship were sufficient, MBUSA is not its agent because the parties have disclaimed such a relationship, there is no fiduciary duty, and Daimler AG does not exercise operational control over MBUSA. Finally, petitioner contends that the exercise of general jurisdiction in this case is unreasonable because it involves foreign

plaintiffs suing a foreign defendant for activities in a foreign country and because it impinges on the sovereign interests of Germany and Argentina in resolving the dispute.

**Decision Below**:
644 F.3d 909 (9th Cir. 2011)

**Petitioner's Counsel of Record:**
Theodore B. Olson, Gibson, Dunn & Crutcher LLP

**Respondents' Counsel of Record:**
Terrence P. Collingsworth, Conrad and Schrerer, LLP

***Walden v. Fiore*** (12-574)

**Questions Presented:**

(1) Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

(2) Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district.

**Summary:**

A state may exercise personal jurisdiction over a defendant if the defendant "expressly aimed" his actions toward that state. The first question in this case is whether the "expressly aimed" requirement is satisfied when the defendant's sole connection to the forum state is that the defendant targeted a person known to have strong connections to that state. Under 28 U.S.C. § 1391(b)(2), a judicial district is an appropriate venue for a suit when "a substantial part of the events or omissions giving rise to the claim occurred in that district." The second question in this case is whether § 1391(b)(2) authorizes venue in a district where the plaintiff suffered harm when all of the defendant's allegedly unlawful conduct took place in a different district.

While traveling from Puerto Rico through Atlanta, Georgia, on their way to their residences in Las Vegas, Nevada, respondents Fiore and Gibson were stopped by federal law enforcement. Officers searched respondents' bags and found $97,000, which they seized as suspected drug proceeds. After respondents provided proof that their money was lawfully obtained through gambling, petitioner Walden allegedly provided a false affidavit in Georgia to assist in forfeiting the money in Georgia. The money was ultimately returned to respondents in Las Vegas seven months after its seizure. Respondents then brought a *Bivens* action in the District of Nevada against Walden and three other DEA agents, alleging that Walden and the other agents had violated their Fourth Amendment rights. The district court dismissed the case against Walden for lack of personal jurisdiction.

The Ninth Circuit reversed. It held that the "expressly aimed" requirement for personal jurisdiction is satisfied when the defendant targets a person known to have substantial connections to the forum state. Walden knew that respondents had substantial connections to Nevada, the court concluded, because he knew that respondents resided and conducted business in Nevada and that seizure of the money would disrupt their business there. The court also held that venue was proper in Nevada. The court reasoned that the venue statute is satisfied when the plaintiff suffers harm in a district even when all allegedly unlawful conduct occurs in a different district.

Walden argues that the "expressly aimed" requirement is not satisfied merely because the

defendant targets a person known to have connections to the forum state. That test, petitioner contends, improperly focuses on the plaintiff's connections to the forum state, rather than the defendant's. Under the proper inquiry, petitioner contends, a Nevada court could not exercise personal jurisdiction over him, because his allegedly unlawful conduct occurred entirely in Georgia, and the effects of his conduct in Nevada were merely incidental to respondents' presence there. Petitioner also argues that Nevada was not a proper venue for respondents' action because all of the events or omissions giving rise to the claim occurred in Georgia. The location of the harm, petitioner contends, is not a relevant factor in determining venue.

**Decision Below:**
688 F.3d 558 (9th Cir. 2012)
**Petitioner's Counsel of Record:**
Jeffrey S. Bucholtz, King & Spalding LLP
**Respondents' Counsel of Record:**
Thomas C. Goldstein, Goldstein & Russell, P.C.
Robert A. Nersesian, Nersesian & Sankiewicz

## Final Judgment Rule – Contractual Attorney's Fees

***Ray Haluch Gravel Co. v. Central Pension Fund*** (12-992)
**Questions Presented:**

[W]hether a district court's decision on the merits that leaves unresolved a request for *contractual* attorney's fees is a "final decision" under 28 U.S.C. § 1291.

**Summary:**

Under 28 U.S.C. § 1291, federal courts of appeals have jurisdiction of appeals from all "final decisions" of federal district courts. In *Budinich v. Becton Dickinson & Co.*, the Court held that a district court's decision on the merits that left unresolved a request for statutory attorney's fees was a "final decision" under section 1291. At issue in this case is whether a decision on the merits that leaves unresolved a request for contractual attorney's fees is also a "final decision" within the meaning of section 1291.

In 2005, petitioner Ray Haluch Gravel Company entered into a collective bargaining agreement with the International Union of Operating Engineers. As part of that agreement, petitioner promised to remit contributions to a number of union-affiliated benefit plans (respondents). After conducting an audit of petitioner's books, respondents filed suit in federal district court for unpaid remittances and contractual attorney's fees. The court awarded respondents $27,000 in benefit contributions. The court later awarded to respondents more than $34,000 in attorney's fees. Respondents appealed both orders within 30 days of the award of attorney's fees. That appeal is timely with respect to the award of benefits contributions only if that award was not itself a final decision.

The First Circuit ruled that respondents' appeal of the award of benefits contributions was timely because that award was not a final decision. The court read the Supreme Court's decision *Budinich* to hold that a decision on the merits that leaves attorney's fees unresolved is a "final decision" only when the claim for attorney's fees is not part of the merits. . Because respondents sought contractual attorney's fees as an element of damages for breach, and the fees included time spent on collection efforts prior to suit, the court concluded that the attorney's fees sought by respondents were part of the merits.

Petitioner argues that *Budinich* established a bright-line rule that decisions on the merits that leave attorneys' fees unresolved are always "final decisions." Petitioner further argues that

that *Budinich* squarely rejected a fact-based distinction between attorney's fees that are part of the merits and attorney's fees that are not part of the merits as inconsistent with the practical approach that is necessary for determining finality.

**Decision Below:**
695 F.3d 1 (1st Cir. 2012)

**Petitioners' Counsel of Record:**
Dan Himmelfarb, Mayer Brown LLP

**Respondents' Counsel of Record:**
Stephanos Bibas, University of Pennsylvania Law School Supreme Court Clinic

## Standing – Lanham Act

***Lexmark International, Inc. v. Static Control Components, Inc.*** (12-873)

**Question Presented:**

Whether the appropriate analytic framework for determining a party's standing to maintain an action for false advertising under the Lanham Act is (1) the factors set forth in *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* (*AGC*), 459 U.S. 519, 537-45 (1983), as adopted by the Third, Fifth, Eighth, and Eleventh Circuits; (2) the categorical test, permitting suits only by an actual competitor, employed by the Seventh, Ninth, and Tenth Circuits; or (3) a version of the more expansive "reasonable interest" test, either as applied by the Sixth Circuit in this case or as applied by the Second Circuit in prior cases.

**Summary**:

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), creates a civil cause of action for anyone who believes that he or she is or is likely to be damaged by an act of false advertising. The question presented in this case involves the proper test for determining who has standing to maintain such an action. The possibilities are: (i) only competitors alleging unfair competition (the categorical test); (ii) any person who can show a reasonable interest that is likely to be damaged by false advertising (the reasonable interest test); or (iii) a balancing test that weighs whether the alleged injury is of the type Congress sought to redress, whether the alleged injury is direct or indirect, whether the party is proximate or remote to allegedly illegal conduct, whether damages are speculative, and whether there is a risk of duplication or complexity in apportioning damages (the *AGC* test).

Petitioner Lexmark manufactures laser printers, which require toner cartridges to print. Lexmark's printers are only compatible with its own style of cartridges. Respondent Static Control makes and sells the components necessary to remanufacture Lexmark toner cartridges. Lexmark advertises that Static Control's cartridges infringe its patents and that licensing agreements prohibit remanufacturing of Lexmark toner cartridges. When Lexmark sued Static Control for violations of federal law, Static Control filed a counterclaim alleging that Lexmark engaged in false advertising in violation of the Lanham Act, damaging its business and reputation. The district court dismissed Static Control's Lanham Act counterclaim for lack of standing.

The Sixth Circuit reversed. It held that a party has standing to maintain a Lanham Act false advertising claim if it satisfies the reasonable interest test, *i.e.*, if it can show (1) a reasonable interest to be protected against the alleged false advertising, and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising. Applying that test, the Sixth Circuit concluded that Static Control has standing to sue Lexmark

for false advertising because it sufficiently alleged that Lexmark's statements harmed its business reputation and sales.

Petitioner argues that in addition to satisfying Article III standing requirements, a Lanham Act plaintiff must also satisfy prudential standing requirements. Petitioner argues that prudential standing is a background principle against which all statutes are enacted, and nothing in the Lanham Act precludes its application. Petitioner further argues that the reasonable interest test tracks only Article III standing requirements, and fails to account for prudential standing limitations. Finally, petitioner argues a plaintiff's role as a competitor should be a significant factor in the prudential standing analysis.

**Decision Below:**
697 F.3d 387 (6th Cir. 2012)
**Petitioner's Counsel of Record:**
Steven B. Loy, Stoll Keenon Ogden
**Respondent's Counsel of Record:**
Seth D. Greenstein, Constantine Cannon LLP

# *Other Public Law*

## Bankruptcy

***Executive Benefits Insurance Agency v. Arkison*** (12-1200)
**Questions Presented:**

(1) Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

(2) Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

**Summary:**

In *Stern v. Marshall*, the Supreme Court held that Article III precludes Congress from authorizing bankruptcy courts to decide cases involving private rights. The questions presented in this case are: (1) whether Article III precludes bankruptcy courts from adjudicating cases involving private rights on the basis of litigant consent, and, if so, whether consent may be implied when the statutory scheme fails to provide notice that consent is required; and (2) whether a bankruptcy judge may submit proposed findings of fact and conclusions of law to a federal district court in a "core" proceeding.

Bellingham Insurance Agency, Inc. (BIA) filed a bankruptcy petition in bankruptcy court. Respondent, Peter Arkison, the trustee, brought an adversary proceeding against petitioner Executive Benefits Insurance Agency, alleging a fraudulent transfer. Petitioner demanded a jury trial, which the district court interpreted as a request to withdraw the referral to the bankruptcy court. Petitioner later moved to defer consideration of its motion until the bankruptcy court acted on respondent's motion for summary judgment. The bankruptcy court subsequently granted respondent's motion for summary judgment, and the district court affirmed the bankruptcy court's judgment.

The Ninth Circuit affirmed. First, the court held that, under *Stern*, Article III precludes Congress from authorizing a bankruptcy court to decide a fraudulent conveyance claim. The

court next held that a bankruptcy judge nonetheless has power to issue proposed findings of fact and conclusions of law pursuant to its statutory authority "to hear and determine" a core proceeding. The court then held that because the Article III guarantee of adjudication by a federal court serves primarily personal rather than structural goals, a party may consent to a bankruptcy court's adjudication of a claim involving private rights. Finally, the court concluded that petitioner impliedly consented to the bankruptcy court's adjudication of respondents' fraudulent conveyance claim.

Petitioner argues that Article III precludes a bankruptcy court from adjudicating a claim involving private rights based on a litigant's consent. In support of that argument, petitioner contends that Article III's limitation on the authority of a bankruptcy court serves core separation of powers principles, and not merely the interests of the parties. In the alternative, petitioner contends that a party can consent through litigation conduct only when the statutory scheme notifies litigants that their consent is required. Because the bankruptcy statute fails to provide such notice, petitioner argues, consent cannot be inferred from litigation conduct. Finally, petitioner argues that bankruptcy courts have no authority to submit proposed findings of fact and conclusions of law to district courts in core proceedings. The authority to "hear and determine" a case, petitioner argues, necessarily contemplates a final decision.

**Decision Below:**
702 F.3d 553 (9th Cir. 2012)

**Petitioner's Counsel of Record:**
Douglas Hallward-Driemeier, Ropes & Gray LLP

**Respondent's Counsel of Record:**
John A. E. Pottow, University of Michigan Law School

***Law v. Siegel*** (12-5196)

**Questions Presented:**

(1) Does the Ninth Circuit Court of Appeals' memorandum directly conflict with an opinion by other Circuit Courts of Appeals and the Supreme Court?

(2) Does the bankruptcy court would allow the surcharge to extent to [sic] debtor's constitutionally protected homestead property?

**Summary**:

The Bankruptcy Code exempts certain property from the estate to prevent its liquidation or distribution. In 11 U.S.C. § 105(a), the Code authorizes a bankruptcy court to issue any order necessary or appropriate to carry out the provisions of the Code. The question presented in this case is whether a bankruptcy court has authority under section 105(a) to surcharge a debtor's exempt property to compensate the estate for costs attributable to the debtor's misconduct.

Petitioner Stephen Law filed for bankruptcy and listed his home as his sole asset. Petitioner listed two liens on the house, and claimed the homestead exemption. The combined value of the liens and the exemption meant that the house could not be used as a source to satisfy petitioner's debts. One of the two liens, however, was fictitious. The trustee filed a motion to surcharge petitioner's homestead exemption to compensate for the costs associated with establishing petitioner's fraud. The bankruptcy court granted the motion, and the Bankruptcy Appellate Panel affirmed.

The Ninth Circuit affirmed. It held that a bankruptcy court has inherent authority to surcharge a debtor's exempt property to compensate the estate for the costs imposed by the debtor's misconduct and to protect the integrity of the bankruptcy process.

Petitioner argues that a bankruptcy court lacks authority to surcharge exempt property.

Petitioner argues that Congress has specifically identified the limited circumstances in which a debtor may be deprived of an exemption, and a bankruptcy court has no authority to use its equitable authority to create additional grounds for revoking an exemption.

**Decision Below:**
435 Fed. Appx. 697 (9th Cir. 2011)

**Petitioner's Counsel of Record**:
Matthew S. Hellman, Jenner & Block LLP

**Respondent's Counsel of Record**:
David Suror, Ezra Brutzkus Gubner LLP

## Fair Housing Act

***Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*** (11-1507)

**Question Presented**:

Are disparate impact claims cognizable under the Fair Housing Act?

**Summary**:

The Fair Housing Act (FHA) provides that it is unlawful to "refuse to sell or rent" or "otherwise make unavailable or deny" a dwelling to any person because of race. A regulation issued by the Department of Housing and Urban Development (HUD) interprets the FHA to bar practices that have a disparate effect on minorities regardless of whether there is proof of discriminatory intent. The question presented in this case is whether disparate impact claims are cognizable under the FHA or whether the FHA instead requires proof of discriminatory intent.

Mount Holly Gardens is a predominantly African-American and Hispanic neighborhood in the Township of Mount Holly, New Jersey. After the Gardens became blighted, the Township of Mount Holly (petitioner) adopted a plan to redevelop it by demolishing the homes and rebuilding the neighborhood. Gardens residents (respondents) filed suit in federal district court, alleging that the redevelopment plan had a disparate impact on minority residents in violation of the Fair Housing Act. In particular, they alleged that a far higher percentage of minority residents than white residents in Mount Holly would be adversely affected by the Gardens redevelopment plan, and that there are ways to reduce blight in the Gardens without demolishing and rebuilding the neighborhood. The district court granted summary judgment to petitioner.

The Third Circuit reversed. It held that the FHA prohibits disparate impact discrimination as well as intentional discrimination. It further held that respondents' had established a *prima facie* case of disparate impact, that petitioner had shown that its plan furthered the legitimate interest of alleviating blight, and that issues of fact remained on whether there was a less discriminatory alternative for alleviating blight. It therefore remanded the case to the district court for further consideration of that issue.

Petitioner contends that the FHA prohibits only intentional discrimination and does not reach practices that merely have a disparate effect on minorities. Petitioner relies on the plain language of the FHA, which does not contain the "affect" language that the Supreme Court relied on in interpreting Title VII's prohibitions against employment discrimination to reach practices with a discriminatory effect. Petitioner further argues that Congress's failure to amend the FHA to include disparate impact claims when it amended the Civil Rights Act demonstrates that Congress intended to exclude such claims under the FHA. Finally, petitioner argues that allowing disparate impact claims would render illegal many legitimate governmental activities designed to improve the general welfare of the community, including legitimate efforts to alleviate blight.

**Decision Below**:
658 F.3d 375 (3d Cir. 2011)
**Petitioners' Counsel of Record:**
Maurice James Maley Jr., Maley & Associates, P.C.
**Respondents' Counsel of Record:**
William James DeSantis, Ballard Spahr LLP
Gaetano Mercogliano, Sweeney & Sheehan
Olga D. Pomar, South Jersey Legal Services, Inc.

## Hague Convention on Civil Aspects of International Child Abduction

***Lozano v. Alvarez*** (12-820)
**Question Presented**:

Whether a district court considering a petition under the Hague Convention for the return of an abducted child may equitably toll the running of the one-year filing period when the abducting parent has concealed the whereabouts of the child from the left-behind parent.

**Summary**:

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) provides that when a child is wrongfully abducted and the left-behind parent initiates judicial proceedings within one year of the wrongful abduction, the child shall be returned. It further provides that when proceedings have commenced after the expiration of the one-year period, the court shall order return of the child unless the child is settled in its new environment. The question presented in this case is whether the one-year period is subject to equitable tolling when the abducting parent has concealed the whereabouts of the child from the left-behind parent.

Petitioner Manuel Jose Lzono and respondent Diana Lucia Montoya Alvarez are the parents of a child born in England. Claiming abuse, respondent left petitioner and took her child with her, and eventually moved to New York. Petitioner unsuccessfully attempted to locate respondent and his child. Sixteen months after the abduction, petitioner filed suit in federal district court, seeking return of the child to England. The district court denied the petition.

The Second Circuit affirmed. It held that the one-year period in the Convention is not subject to equitable tolling. The court reasoned that unlike a statute of limitations, the one-year period does not foreclose suit, but merely permits a court to consider whether the child is settled in a new environment. Applying equitable tolling, the court concluded, would defeat the Convention's purpose of allowing the court to consider the child's best interest in remaining in the country after one year.

Petitioner argues that the one-year period is subject to equitable tolling when a child is wrongfully abducted. Such tolling is necessary, petitioner contends, in order to further the Convention's purpose of deterring child abduction. Petitioner further argues that the principle of equitable tolling applies beyond the context of statutes of limitation.

**Decision Below**:
697 F.3d 41 (2d Cir. 2012)
**Petitioner's Counsel of Record:**
Shawn Patrick Regan, Hunton & Williams LLP
**Respondent's Counsel of Record:**
Lauren A. Moskowitz, Cravath Swain & Moore LLP

## Immigration

***Mayorkas v. Cuellar De Osorio*** (12-930)

**Questions Presented:**

(1) Whether Section 1153(h)(3) [of the Immigration and Nationality Act] unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary.

(2) Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3).

**Summary:**

Under the Immigration and Nationality Act (INA), U.S. citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the U.S. The family member sponsored by the petitioner is the "primary beneficiary." A primary beneficiary's unmarried child can be a "derivative beneficiary" as long as he is under 21. A derivative beneficiary is entitled to the same status and priority of consideration as the primary beneficiary. Because only a limited number of visas are granted each year, there are often long waits between filing and visa availability. During the waiting period, a child who qualified as a derivative beneficiary may have passed his or her 21st birthday (aged out), and therefore no longer qualify for derivative status. To address the delay between filing and approval, 8 U.S.C. § 1153(h)(1) provides that the age of the child is reduced by the number of days during which a petition was pending before it was approved. To address the longer delay between approval and visa availability, 8 U.S.C. § 1153(h)(3) provides that if, after the (h)(1) reduction, the child remains 21 years old or older, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date."

The Board of Immigration Appeals (the Board) interprets section 1153(h)(3)'s automatic conversion and priority retention rule not to apply to new petitions filed by a different family member than the one who filed the original petition. For example, if a citizen sister files the original petition on behalf of her brother as primary beneficiary, and her brother's minor son is a derivative beneficiary, a subsequent application by the brother on behalf of his adult son would not get the benefit of automatic conversion and priority retention. At the same time, the original application could not be converted because the sister does not have a qualifying relationship with her nephew. In contrast, if a lawful permanent resident father petitions on behalf of his minor son, and the son ages out, the original application would be converted into an application on behalf of the adult son. The question presented in this case is whether the Board's interpretation of section 1153(h)(3) is entitled to *Chevron* deference.

Respondents are parents of aged-out children who were denied the benefit of automatic conversion and priority retention. They filed suit in federal district court, alleging that the Board's interpretation is inconsistent with the INA. The district court ruled in favor of the government.

An en banc panel of the Ninth Circuit reversed. The court held that the INA unambiguously grants automatic conversion and priority date retention to all aged-out derivative beneficiaries, and the Board's rule is therefore not entitled to *Chevron* deference. The court relied on the interrelationship between the subsections of section 1153(h). In particular, the court reasoned that because the automatic conversion and priority retention rule in section 1153(h)(3) refers back to the age calculation rule in section 1153(h)(1), the age calculation rule refers to

petitions covered by section 1153(h)(2), and section 1153(h)(2) covers all petitions in which a child is a derivative beneficiary, the automatic conversion and priority retention rule applies to all children who are derivative beneficiaries.

The government argues that Board's interpretation is reasonable and therefore entitled to *Chevron* deference. In support of the Board's interpretation, the government first relies on the textual reference to "an appropriate category" for conversion. For an original petition filed by a citizen sister for her alien brother and his alien minor son, the government explains, there is no "appropriate category" for conversion because a citizen cannot petition for a visa on behalf of a nephew. Second, the government relies on the need for the conversion to take place "automatically." If, in the above example, the brother files a new application on behalf of his son, no conversion could take place "automatically," the government argues, because there is necessarily a gap in time between when the brother obtains a visa and when he would become eligible to file an application on behalf of his son. Third, the government relies on the phrase "convert." That term, the government argues, has a settled meaning in immigration law: a seamless reclassification of a single petition from one currently valid category to another currently valid category. Finally, the government argues that interconnections between the various subsections relied on by the court of appeals are insufficient to establish that section 1153(h)(3) unambiguously covers all aged-out derivative beneficiaries, rather than the subset whose original petitions can be converted into an appropriate category automatically.

**Decision Below:**
695 F.3d 1003 (9th Cir. 2012) (en banc)

**Petitioners' Counsel of Record:**
Donald B. Verrilli Jr., Solicitor General of the United States

**Respondents' Counsel of Record:**
Mark C. Fleming, Wilmer Cutler Pickering Hale & Dorr LLP

## Indian Law

***Michigan v. Bay Mills Indian Community*** (12-515)

**Questions Presented**:

(1) Whether a federal court has jurisdiction to enjoin activity that violates [the Indian Gaming Regulatory Act (IGRA)] but takes place outside of Indian lands.

(2) Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

**Summary**:

The IGRA authorizes Indian Tribes to conduct class III gaming (casino-style gaming) pursuant to a Tribal-State compact. Such activities may occur only on Indian lands. Under 27 U.S.C. § 2710(d)(7)(A)(ii), a federal court has jurisdiction to enjoin a class III gaming activity located on Indian lands and conducted in violation of a Tribal-State compact. A federal court also has jurisdiction under 28 U.S.C. § 1331 over any claim arising under federal law. The first question presented in this case is whether a federal court has jurisdiction to enjoin Indian gaming activity that violates the IGRA but takes place off Indian lands. The second question is whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating the IGRA off Indian lands.

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan. The Tribe and the State entered into a Tribal-State compact that permits class III gaming on the Tribe's reservation, but prohibits such gaming off tribal lands. Bay Mills received funds from an

Act of Congress in satisfaction of a judgment entered by the Indian Claims Commission. Under the Act, the funds must be held in trust and earnings from the trust may be used only for improvements on tribal land or the consolidation and enhancement of tribal landholdings. Bay Mills used earnings from the trust to purchase land in Vanderbilt, Michigan, 100 miles away from the tribe's reservation, and then began operating a casino on that land. The State then filed suit against Bay Mills, alleging that operation of the Vanderbilt casino violated the Tribal-State compact because the casino was not on Indian lands. The district court found that the Vanderbilt casino was not on Indian lands, and issued an injunction against its continued operation.

The Sixth Circuit vacated the injunction, holding that the district court did not have jurisdiction to adjudicate the State's claims. The court explained that the State's allegation that the Vanderbilt casino was not on Indian lands defeated jurisdiction under section 2710(d) because that provision gives federal courts jurisdiction to prevent illegal gaming only when it is conducted on Indian lands. The court of appeals further held that while it had jurisdiction under section 1331 over the State's federal common law claims, Bay Mills had sovereign immunity from those claims. It reasoned that while Congress abrogated tribal immunity in section 2710(d), it did so only with respect to claims that the Tribe was conducting illegal gaming on Indian lands.

The State argues that the court has jurisdiction to adjudicate the State's claim under section 1331. In particular, the State argues that section 1331 gives a federal court jurisdiction over all claims arising under federal law, its claim that Bay Mills is operating the Vanderbilt casino in violation of the IGRA arises under federal law, and nothing in section 2710(d) purports to withdraw federal question jurisdiction. The State further argues that the IGRA waives tribal sovereign immunity from such claims. At bottom, the State argues that it makes no sense to say that Congress provided for jurisdiction to enjoin illegal gaming on Indian lands, but failed to provide for jurisdiction to enjoin illegal gaming off Indian lands.

**Decision Below**:
695 F.3d 406 (6th Cir. 2012)

**Petitioner's Counsel of Record**:
John J. Bursch, Michigan Solicitor General

**Respondents' Counsel of Record**:
Neal Katyal, Hogan Lovells US LLP