From:	Verrilli, Jr., Donald B. (OSG) (b) (6)
To:	Yancey, Valerie Hall (OSG) (b) (6)
Cc:	(b) (6)
Bcc:	
Subject:	RE: OSG Protocol on Passing of Justice Scalia
Date:	Mon Feb 15 2016 13:24:17 EST
Attachments:	

(b) (5)

-----Original Message-----
From: Yancey, Valerie Hall (OSG)
Sent: Monday, February 15, 2016 12:32 PM
To: Verrilli, Jr., Donald B. (OSG)
Cc: (b) (6)
Subject: OSG Protocol on Passing of Justice Scalia

Don:

(b) (5)

Sent from my iPad

From:	Stewart, Malcolm L (OSG) (b) (6)
To:	(b) (6)
Cc:	
Bcc:	
Subject:	Re: (b)
Date:	Mon Feb 15 2016 13:34:04 EST
Attachments:	

Thanks, (b) (6).

Sent from my iPhone

On Feb 15, 2016, at 1:24 PM, (b) (6) wrote:

Thanks, Malcolm.

(b) (5)

From: Stewart, Malcolm L (OSG)
Sent: Monday, February 15, 2016 12:54 PM
To: (b) (6)
Subject: (b) (6)

(b) (6),

(b) (6)
(b) (5)

Malcolm

(b) (5)

From:	Steven Goldblatt (b) (6)
To:	Verrilli, Jr., Donald B. (OSG) (b) (6)
Cc:	
Bcc:	
Subject:	Corporate Counsel Institute--March 11, 2016 10:50 AM -12:05 PM
Date:	Mon Feb 15 2016 11:27:38 EST
Attachments:	2016 CCI Business Law Cases_Draft_swsshgfinalwithcomment.docx

Don and Paul-I am starting the agenda setting process for the March CCI program and following our regular format. This year we again have seventy-five minutes allotted to us and the next step is to pick the cases to be discussed. Paul usually starts that process and that is what I propose we do this time. As he has described it in past years, "what has worked well in the past is to agree on a handful of topics/cases to discuss, and have one us of take the lead for say 7 minutes and the other to follow up with either another case or broader "color commentary" on the topic." Then, the other person takes the lead on the next topic and so on." I will follow that approach unless you want to change it but I think we will want to start with some reflection on the loss of Justice Scalia and what it means both this Term and in the future. I will add that to the possible discussion topics below.

Here are what I think are the possibilities. I was overinclusive to give you choices. In the past we have allotted time for an overview of the entire term followed by three areas for selected practice areas (e.g., patent, antitrust, employment). Patents, ACA, and class actions look like possibilities this time but you may want to combine areas for one or more of the three slots. Wrap-up comments at the end are optional. Once we resolve the cases to be discussed, I will propose an agenda with time allocations and you can adjust it as you wish.

Possible discussion areas:

1. The loss of Justice Scalia

2. Affordable Care Act cases

Zubik v. Burwell
Priests for Life v. Burwell
Roman Catholic Archbishop of Washington v. Burwell
Little Sisters of the Poor Home for the Aged v. Burwell
East Texas Baptist University v. Burwell
Southern Nazarene University v. Burwell
Geneva College v. Burwell

3.Class Actions—Tyson Foods, Campbell-Ewald, Spokeo, Microsoft v. Baker
4.Arbitration—DirectTV, MHN
5.FSIA—OBB
6.Patents—Stryker/Halo, Cuozzo
7.Securities—Merrill-Lynch, Salman
8.Gov Contracting—Universal Health Services

9.Bankruptcy-Husky International
10. ERISA-Gobeille, Montanile, Amgen

Although I know neither of you need it, I have attached a copy of the case summaries to this email for cert grants through January 16, 2016. That document will go the the group attending the Institute but it is subject to further revision and removal of comments. As always, thanks for doing this. Steve

Steven H. Goldblatt Professor of Law
Director, Appellate Litigation Program
Faculty Director, Supreme Court Institute
Georgetown University Law Center
(b) (6)

This communication may contain privileged and confidential attorney client information or attorney work product information. Unauthorized disclosure or use of this communication is prohibited. If you have received this communication in error, please delete it and contact the sender immediately. Thank you.

null
Last Modified: Mon Feb 15 11:27:38 EST 2016

DRAFT 2/16/16 for internal use only

United States Supreme Court October Term 2015 Business Law Cases[1] For Use With the 2015 CCI Program, Supreme Court Review

Introduction

The Supreme Court is expected to decide over eighty cases this Term with 75 oral arguments calendared as of January 26, 2016. As of mid-January 2016, thirty-seven of these cases are relevant to the business community and are summarized here. That is a significant percentage of the docket but, as we have cautioned before, it does not mean that the Court is more or less "pro" business than it has been in the past, and the outcomes in "business" cases can have an adverse effect on business interests. Indeed, where both sides of the case are corporations, the outcome cannot necessarily be meaningfully characterized as either for or against business interests. What can be said with some assurance is that the relative number of business cases on the Court's docket in recent Terms reflects the Court's level of interest in reviewing business cases. Perceived importance, of course, is the critical factor that drives the decision to grant or deny review and the recurring number of patent cases is perhaps indicative of the impact of the technology "revolution" on our society. This Term several bankruptcy cases are on the docket along with multiple ERISA, class action, Federal Arbitration Act, and Affordable Care Act cases. The February, 2016 death of Associate Justice Antonin Scalia will also have a great impact on the docket this Term and on the nation.

The discussion in March will focus on the Court's general approach to business cases and the cases under review this Term that are of particular interest to the business community. Brief descriptions of the business-related cases on the docket follow.

---

[1] © 2016, Supreme Court Institute (SCI), Georgetown University Law Center. Adapted and expanded by Professor Steven H. Goldblatt, SCI Faculty Director, from the SCI 2015 Term Preview Report for use at the 2016 Corporate Counsel Institute (CCI). May be reproduced by CCI with attribution to SCI.

Cases where certiorari was granted after January 17, 2016 are not included here.

DRAFT 2/16/16 for internal use only

Table of Contents

Affordable Care Act **4**
Zubik v. Burwell *4*
Priests for Life v. Burwell *4*
Roman Catholic Archbishop of Washington v. Burwell *4*
Little Sisters of the Poor Home for the Aged v. Burwell *4*
East Texas Baptist University v. Burwell *4*
Southern Nazarene University v. Burwell *4*
Geneva College v. Burwell *4*

Article III **6**
Spokeo, Inc. v. Robins *6*

Attorney's Fees **7**
CRST Van Expedited, Inc. v. EEOC *7*

Banking **9**
Hawkins v. Community Bank of Raymore *9*

Bankruptcy **10**
Puerto Rico v. Franklin California Tax-Free Trust *10*
Acosta-Febo v. Franklin *10*
Husky International Electronics, Inc. v. Ritz *11*

Class Actions **12**
Campbell-Ewald Company v. Gomez *12*
Tyson Foods, Inc. v. Bouaphakeo *13*
Microsoft Corp. v. Baker *14*

Employment Discrimination **15**
Green v. Brennan *15*

ERISA **16**
Gobeille v. Liberty Mutual Insurance Company *16*
Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan *17*

False Claims Act **18**
Universal Health Services v. United States ex. rel. Escobar *18*

Federal Arbitration Act **19**
DIRECTV, Inc. v. Imburgia *19*
MHN Government Services, Inc. v. Zaborowski *20*

Federal Power Act **21**
Federal Energy Regulatory Commission v. Electric Power Supply Association *21*
EnerNOC, Inc. v. Electric Power Supply Association *21*
Hughes v. Talen Energy Marketing *22*
CPV Maryland, LLC v. PPL EnergyPlus, LLC *22*

DRAFT 2/16/16 for internal use only

Federal Practice and Procedure 24
Americold Realty Trust v. ConAgra Foods, Inc. 24
Menominee Indian Tribe of Wisconsin v. United States 24

First Amendment-Public Employee Union Dues 25
Friedrichs v. California Teachers Association 25

Foreign Sovereign Immunities Act 27
OBB Personenverkehr AG v. Sachs 27

Government Contracting 28
Kingdomware Technologies, Inc v. United States 28

Patents 29
Stryker Corp. v. Zimmer, Inc. 29
Halo Electronics, Inc. v. Pulse Electronics, Inc. 29
Cuozzo Speed Technologies, LLC v. Lee 30

Securities 31
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning 31

RICO 33
RJR Nabisco, Inc. v. The European Community 33

FAIR LABOR STANDARDS ACT 33
Encino Motorcars, Llc. v. Navarro 33

DRAFT 2/16/16 for internal use only

CASE SUMMARIES

Affordable Care Act

Zubik v. Burwell (14-1418)
consolidated with
Priests for Life v. Burwell (14-1453)
Roman Catholic Archbishop of Washington v. Burwell (14-1505)
Little Sisters of the Poor Home for the Aged v. Burwell (15-105)
East Texas Baptist University v. Burwell (15-35)
Southern Nazarene University v. Burwell (15-119)
Geneva College v. Burwell (15-191)

Questions Presented:

Zubik: Whether the HHS Mandate and its "accommodation" violate the Religious Freedom Restoration Act by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.

Priests for Life: Whether the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious organizations violates the Religious Freedom Restoration Act.

Roman Catholic Archbishop of Washington: Whether the Religious Freedom Restoration Act ("RFRA") allows the government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacents, and sterilization.

Little Sisters of the Poor Home for the Aged: (1) Whether the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate[s] either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*; and (2) whether HHS satisf[ies] RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees.

East Texas Baptist University: Whether the availability of a regulatory option for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate[s] either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*

Southern Nazarene University: Whether the alternative means for nonprofit religious employers to comply with the ACA's contraceptive-coverage mandate alters *Hobby Lobby*'s substantial-burden analysis or identification of a free exercise violation under RFRA.

DRAFT 2/16/16 for internal use only

Geneva College: Whether, under *Hobby Lobby*, the Mandate's imposition of seamless abortifacent coverage on objecting religious nonprofit organizations' health plans substantially burdens religious exercise and violates RFRA.

Summary:

These seven cases that were consolidated by the Court concern the contraceptive mandate under the Affordable Care Act in relation to the accommodation scheme for non-profit religious organizations to provide birth control. The Court will determine whether this mandate violates the Religious Freedom Restoration Act ("RFRA") by substantially burdening the nonprofits' exercise of religion. *Little Sisters* raises the additional question of whether a religious non-profit, which provides healthcare through a "church plan," "a benefit plan established by a church to serve its employees and other nonprofit religious organizations" must provide coverage when HHS has acknowledged "it lacks authority to compel … church plan[s] to comply with the obligation to provide contraceptive coverage that arises if an employer that utilized that plan self-certifies." The Court adopted the briefing proposal submitted by the parties that consolidates *Zubik*, *Priests for Life*, and *Roman Catholic Archbishop of D.C.* for briefing. The other four cases will be addressed in a second brief.

Petitioners contend the contraceptive mandate violates RFRA, as "there should be no doubt that the contraceptive mandate imposes a substantial burden on petitioners' religious exercise." Petitioners object to the ACA's "accommodation" "to relieve the obligation to pay for abortifacent and contraceptive coverage … '[as] unlike the full exemption for religious employers,' it does not relieve the obligation to *facilitate* such coverage." Petitioners assert religious non-profits are forced to "take specific actions that they believe immorally facilitate the delivery of coverage for abortifacents, contraceptives, and sterilization services." The "accommodation" includes "executing and submitting a form", which Petitioners argue does not "totally remov[e]" them from a process of providing coverage they find objectionable.

Respondents, all represented by the Solicitor General claim that the decision of the seven circuit courts below should be affirmed because "the accommodation is entirely consistent with RFRA and with [the] Court's decision in *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014)." Respondents argue that "[b]ecause the "accommodation transfers those obligations [to provide health services Petitioners find objectionable] to third parties" "the accommodation does not substantially burden the exercise of religion under RFRA."

Decision Below (*Zubik*):
778 F.3d 422 (3d. 2015)
Petitioner's Counsel of Record:
Paul M. Pohl, Jones Day
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Decision Below (*Priests for Life*):
772 F.3d 229 (D.C. Cir. 2014)
Petitioner's Counsel of Record:
Robert Joseph Muse, American Freedom Law Center
Respondent's Counsel of Record:

Donald B. Verrilli, Jr., Department of Justice

Decision Below (*Roman Catholic Archbishop of Washington*):
772 F.3d 229 (D.C. Cir. 2014)
Petitioner's Counsel of Record:
Noel J. Francisco. Jones Day
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Decision Below (*Little Sisters of the Poor Home for the Aged*):
794 F.3d 1151 (10th Cir. 2015)
Petitioner's Counsel of Record:
Paul D. Clement, Bancroft PLLC
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Decision Below (*East Texas Baptist University*):
793 F.3d 449 (5th Cir. 2015)
Petitioner's Counsel of Record:
Paul D. Clement, Bancroft PLLC
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Decision Below (*Southern Nazarene University*):
No. 13-1540, 2015 WL 4232096 (10th Cir. July 14, 2015)
Petitioner's Counsel of Record:
David A. Cortman, Alliance Defending Freedom
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Decision Below (*Geneva College*):
778 F.3d 422 (3d Cir. 2015)
Petitioner's Counsel of Record:
David A. Cortman, Alliance Defending Freedom
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Article III

Spokeo, Inc. v. Robins (No. 13-1339)

Question Presented:

Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.

DRAFT 2/16/16 for internal use only

Summary:

The Fair Credit Reporting Act (FCRA) imposes obligations on "consumer reporting agencies" with respect to the consumer information they transmit. It requires such agencies to follow certain procedures to ensure the accuracy of reports, issue notices to providers and users of information, and post toll-free numbers that consumers can call to request reports. It also limits when such agencies can furnish consumer reports to employers. The Act provides that plaintiffs claiming a willful violation may seek statutory damages. The issue in this case is whether alleging a violation of a statute is sufficient to satisfy Article III's injury-in-fact requirement when the plaintiff alleges a violation of his statutory rights, and the right is individualized, rather than collective, but there is no allegation of concrete harm.

Petitioner Spokeo, Inc. operates a "people search engine" that aggregates personal information about individuals from public sources, and presents that information in a searchable format for its users. Respondent Thomas Robins sued petitioner in federal court, claiming that petitioner willfully violated the FCRA provisions discussed above. Respondent specifically alleged that petitioner inaccurately reported that he is married, rather than single, that he has more professional and educational experience than he has, and that he is better off financially than he is. Respondent sought statutory damages. The district court dismissed respondent's complaint for failure to satisfy Article III's injury-in-fact requirement.

The Ninth Circuit reversed. The court held that respondent's allegation that petitioner violated the FCRA provisions discussed above satisfied Article III's injury-in-fact requirement. The court reasoned that Congress may confer Article III standing on a plaintiff when the plaintiff alleges a violation of his rights, and not the rights of others, and the right at issue protects individual, rather than collective interests. Those conditions were satisfied here, the court concluded, because respondent alleged that petitioner violated his statutory rights, and because respondent's interest in the handling of his credit information is individualized rather than collective.

Petitioner argues that Congress's creation of a statutory right cannot erase the Article III requirement that a plaintiff must demonstrate that he personally suffered concrete harm. Because respondent alleged only a violation of his statutory rights, and did not allege that the statutory violation caused concrete harm, petitioner contends, respondent failed to satisfy Article III's injury-in-fact requirement. Petitioner further argues that in order to preserve the FCRA's constitutionality, the "willful violation" provision should be interpreted to allow a plaintiff to claim statutory damages only if he can demonstrate actual harm.

Decision Below:
742 F.3d 409 (9th Cir. 2014)
Petitioner's Counsel of Record:
Andrew J. Pincus, Mayer Brown LLP
Respondent's Counsel of Record:
William S. Consovoy, Consovoy McCarthy Park PLLC

<u>Attorney's Fees</u>

CRST Van Expedited, Inc. v. EEOC (14-1375)

Questions Presented:

Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k).

Summary:

Under review here is "the Eighth Circuit's reversal of the award of fees and costs" in a "sexual harassment case brought by the Equal Employment Opportunity Commission ("EEOC") under Title IV. The EEOC alleged that many female truck drivers employed by CRST, a long-haul trucking firm, had experienced sexual harassment on the job and that the company had violated Title VII by tolerating this behavior." Accordingly, the Commission sought both injunctive relief, punitive, and compensatory damages on behalf of the female drivers. Though the Eighth Circuit affirmed the district court's grant of summary judgment to the defendant, it reversed the award of "fees and costs to CRST as a prevailing defendant" due to an Eighth Circuit "rule limiting civil rights fee awards to cases involving rulings 'on the merits.'"

Petitioner contends it should be awarded fees because EEOC failed to "comply with ... pre-suit requirements" Congress put in place "to protect courts and employers from the cost and disruption of the EEOC's assertion of unfounded claims by requiring that the EEOC not file suit until after it has investigated, found reasonable cause, and attempted to avoid litigation through conciliation." Therefore, Petitioner asserts "failure to sufficiently investigate and conciliate is 'a failure to satisfy an element' of the EEOC's claim," thus the district court's dismissal was a "ruling on the merits."

The EEOC asserts that the Eighth Circuit's conclusion that "petitioner cannot obtain attorney's fees under 42 U.S.C. § 2000e-5(k) based on a ruling that the EEOC failed to sufficiently investigate and conciliate" should be upheld because "that ruling was not a determination of the merits of the sex-discrimination claim." Because "'[p]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits'" and as "the district court did not address the merits of the EEOC's claims of sex discrimination with respect to the claimants from whom the EEOC failed to sufficiently investigate and conciliate", there was no finding on the merits against EEOC and awarding attorney's fees is inappropriate.

Decision Below:
774 F.3d 1169 (8th Cir. 2015)
Petitioner's Counsel of Record:
Paul M. Smith, Jenner & Block LLP
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Department of Justice

Banking

Hawkins v. Community Bank of Raymore (14-520)

Questions Presented:

DRAFT 2/16/16 for internal use only

(1) Are "primarily and unconditionally liable" spousal guarantors unambiguously excluded from being [Equal Credit Opportunity Act (ECOA)] "applicants" because they are not integrally part of "any aspect of a credit transaction"?

(2) Did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women?

Summary:

The ECOA makes it unlawful for a creditor to discriminate against an "applicant" for credit on the basis of marital status. It further provides that an "aggrieved applicant" may bring suit for violations of the ECOA. Pursuant to statutory authority to issue regulations, the Federal Reserve Bank (FRB) issued a regulation that generally prohibits a lender from requiring the spouse of a borrower, or the spouse of an owner of the borrower, to guarantee a loan. The FRB regulation also defines "applicant" to encompass spousal guarantors for purposes of that rule. The question presented is whether the FRB's interpretation of "applicant" as including spousal guarantors is reasonable and therefore controlling under *Chevron.*

Respondent Community Bank of Raymore loaned money to PHC Development, LLC (PHC), a company owned by Gary Hawkins and Chris Patterson. As part of the loan agreement, respondent not only required Hawkins and Patterson to guarantee the loans, but also required their wives (petitioners) to do so. When PHC defaulted on the loan, respondent demanded payment from petitioners. Petitioners sued respondent in federal court, alleging that respondent violated the ECOA by requiring them to sign the guaranties. Respondent counterclaimed, seeking enforcement of the guaranties, and petitioners asserted the alleged ECOA violation as an affirmative defense. The district court dismissed petitioners' claim and struck their affirmative defense.

The Eighth Circuit affirmed. The court held that a guarantor clearly does not qualify as an "applicant" solely by virtue of executing a guarantee. The court reasoned that the Act defines "applicant" as a person who "applies for credit," and that a guarantor does not apply for credit absent participation in the loan application process. Because the court concluded that the term "applicant" unambiguously excludes guarantors who do not participate in the loan application process, it refused to defer to the FRB's contrary interpretation.

Petitioners contend that the FRB reasonably interpreted the term "applicant" to include spousal guarantors and that its interpretation is therefore controlling under *Chevron*. Petitioners argue that guarantors can readily be viewed as applying for credit because they request (at least implicitly) that credit be extended to the borrower. Petitioners also contend that the FRB's interpretation furthers the ECOA's goal of eliminating lending practices that discriminate based on marital status because it protects spouses from being required to assume an unwanted liability and protects their ability to maintain an independent credit history.

Decision Below:
761 F.3d 937 (8th Cir. 2014)
Petitioners' Counsel of Record:
John M. Duggan, Duggan Shadwick Doerr & Kurlbaum LLC
Respondent's Counsel of Record:
Greer S. Lang, Lathrop & Gage, LLP

DRAFT 2/16/16 for internal use only

Bankruptcy

Puerto Rico v. Franklin California Tax-Free Trust (15-233)
consolidated with
Acosta-Febo v. Franklin (15-255)

Question Presented:

Whether Chapter 9 of the federal Bankruptcy Code, which does not apply to Puerto Rico, nonetheless preempts a Puerto Rico statute creating a mechanism for the Commonwealth's public utilities to restructure their debts.

Summary:

The Court consolidated these cases that both concern Puerto Rico's new debt restructuring law, the "Recovery Act" which the First Circuit struck down as inconsistent with federal bankruptcy laws. Petitioners argue that "unlike the fifty States ... [Puerto Rico] lacks access to any legal mechanism to restructure the debts of its public utilities[,]" as "since 1984, the federal Bankruptcy Code has precluded Puerto Rico from authorizing its 'municipalities'—including, as relevant here, its public utilities—from restructuring their debts under Chapter 9 of the Code." Petitioners argue that Puerto Rico's inability to restructure debts under federal law should not preclude restructuring debts under the law of the Commonwealth. Petitioners assert the First Circuit's holding places Puerto Rico in "the worst of both worlds" as the Commonwealth "is not entitled to the *benefits* of Chapter 9, but remains subject to [its] *burdens.*" Petitioners argue Puerto Rico's ability to restructure its debts is particularly "crippling" as "[s]ince 2009, Puerto Rico has been in a declared state of fiscal emergency."

Respondents contend the First Circuit's holding should be affirmed and that Puerto Rico's "Recovery Act" is "clearly" preempted by federal law Chapter 9.Respondents point out "[t]he Bankruptcy Code defines 'State' to include Puerto Rico for all purposes" "except for the purpose of defining who may be a debtor under chapter 9." However, "[b]ecause Section 903(1) [where debtor eligibility requirements under the Code are set forth] has nothing to do with 'defining who may be a debtor under chapter 9,' the 'State' laws that Section 903(1) prohibits include those of Puerto Rico." Respondents assert "[a] contrary construction would violate the established maxim that, where Congress explicitly enumerates a single exception to the rule, additional exceptions should generally not be inferred. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)."

Decision Below (*Puerto Rico*):
805 F.3d 322 (1st Cir. 2015)
Petitioner's Counsel of Record:
Christopher Landau, P.C., Kirkland & Ellis LLP
Respondents' Counsels of Record:
Theodore B. Olson and Matthew D. McGill, Gibson, Dunn & Crutcher LLP
Thomas Moers Mayer, Kramer Levin Naftalis & Frankel LLP

Decision Below (*Acosta-Febo*):
805 F.3d 322 (1st Cir. 2015)
Petitioner's Counsel of Record:

Martin J. Bienenstock, Proskauer Rose LLP
Respondents' Counsels of Record:
Theodore B. Olson and Matthew D. McGill, Gibson, Dunn & Crutcher LLP
Thomas Moers Mayer, Kramer Levin Naftalis & Frankel LLP

Husky International Electronics, Inc. v. Ritz (14-145)

Questions Presented:

Whether the "actual fraud" bar to discharge under Section 523(a)(2)(A) of the Bankruptcy Code applies only when the debtor has made a false representation, or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor.

Summary:

At issue here is the proper application of the "actual fraud" bar under 11 U.S.C. § 523(a)(2)(A) or the Bankruptcy Code in the context of Chapter 7 bankruptcy. "The Bankruptcy Code bars the discharge 'of any debt ... for money ... obtained by ... [1] false pretenses, [2] a false representation, or [3] actual fraud.'" Petitioner contends that "the First and Seventh Circuits have held that the 'actual fraud' bar applies where an individual debtor deliberately obtains money through a fraudulent-transfer scheme that is actually intended to cheat a creditor. But in an acknowledged circuit split, the Fifth Circuit held as a matter of law that there can be no 'actual fraud' unless the debtor makes a false representation to the creditor. Petitioner claims the Fifth Circuit's decision creates a way for "dishonest debtors to cheat creditors through deliberate fraudulent-transfer schemes, and then to escape liability through discharge in bankruptcy."

Respondent urges adoption of the Fifth Circuit's interpretation of § 523(a)(2)(A) because "section 523(a)(2)(A) plainly does not bar discharge of a debt that is not the product of a misrepresentation that induced the creditor to part with money, property, services, or credit." Respondent notes "[a]s [the] Court has recognized, the evident purpose of section § 523(a)(2)(A) is to bar discharge of a debt 'that follows a transfer of value or extension of credit induced by falsity of fraud.' *Field v. Mans*, 516 U.S. 59, 66 (1995)." Here, Respondent contends, "there is no allegation that the debtor induced the creditor to transfer any value or credit at all, let alone employed any fraud to do so. Instead, the only claim is that the debtor employed a fraudulent conveyance to help a third party avoid its own debt to the creditor."

Decision Below:
787 F.3d 312 (5th Cir. 2015)
Petitioner's Counsel of Record:
Shay Dvoretzky, Jones Day
Respondent's Counsel of Record:
Erin E. Murphy, Bancroft PLLC

Class Actions

Campbell-Ewald Company v. Gomez (14-857)

DRAFT 2/16/16 for internal use only

Questions Presented:

(1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

(2) Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

(3) Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

Summary:

In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court assumed without deciding that an unaccepted offer of full relief moots an individual's claim for relief. It then held that the mooting of an individual's claim moots a collective action under the Fair Labor Standards Act. The first two questions in this case are: (1) whether a case becomes moot when the plaintiff receives an offer of complete relief on his claim; and (2) whether the answer to that question changes when the plaintiff asserts a class action claim under Rule 23, but receives an offer of complete relief before any class is certified. In *Yearsley*, the Supreme Court established a doctrine of derivative sovereign immunity under which a government contractor is entitled to immunity from suit for work performed under the contract. The third question in this case is whether *Yearsley* immunity is restricted to claims arising out of property damage caused by public works projects.

The U.S. Navy contracted with petitioner Campbell-Ewald to develop a recruitment campaign via text message, and petitioner contracted with a third-party to deliver the text. After receiving the recruitment message, respondent Gomez filed suit against petitioner in federal district court, alleging that the sending of the message without his consent violated the Telephone Consumer Protection Act (TCPA). Petitioner sought relief for himself as well as the class of all other persons sent the recruitment message without consent. Before respondent moved for class certification, petitioner offered him complete relief on his individual claim. After respondent refused the offer, petitioner sought to dismiss the case as moot, but the district court denied that motion. The district court subsequently entered judgment in favor of petitioner based on derivative sovereign immunity.

The Ninth Circuit affirmed the district court's mootness ruling and reversed its derivative sovereign immunity ruling. The court of appeals held that when a plaintiff seeks relief for himself and for a class of similarly situated persons, an offer of full relief on the individual claim does not moot either the individual claim or the class claim. The court also held that, under *Yearsley*, derivative sovereign immunity applies only to claims arising out of property damage caused by public works projects.

Petitioner contends that an offer for full relief mooted respondent's individual claim because the offer eliminated his personal stake in the outcome. Petitioner further contends that respondent's class claim did not keep the case from becoming moot because a class does not acquire a protected legal status until it is certified. Petitioner argues that, if the case is not moot, it is entitled to derivative sovereign immunity. Petitioner contends that *Yearsley* protects any government contractor who performs duties within the scope of delegated authority.

DRAFT 2/16/16 for internal use only

Decision Below:
768 F.3d 871 (9th Cir. 2014)
Petitioner's Counsel of Record:
Gregory G. Garre, Latham & Watkins, LLP
Respondent's Counsel of Record:
Jonathan F. Mitchell, Stanford University

Decision:

In a 6-3 decision, the Court affirmed the holding that an unaccepted settlement offer does not render a case moot and that a federal contractor is not immune from suit when he violates the Telephone Consumer Protection Act and the government's explicit directions.

Tyson Foods, Inc. v. Bouaphakeo (14-1146)

Questions Presented:

(1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

(2) Whether a class action may be certified or maintained under Rule 23(b)(3), or a collection action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Summary:

Under Federal Rule 23(b), a court may certify a class action where "questions of law or fact common to class members predominate over any questions affecting only individual members." Under the FLSA, plaintiffs may sue "for and on behalf" of themselves and other employees who have been denied overtime pay under the Act. The first question in this case is whether a class action or collective action may be certified when liability and damages are determined using statistical evidence of the amount of damages owed to the average employee in a sample. The second question in this case is whether a class action or collective action may be certified or maintained when the class contains hundreds of individuals who were not injured.

Respondents work for petitioner Tyson Foods, Inc. They filed suit alleging that petitioner failed to pay them overtime for donning and doffing protective equipment and other associated activities, in violation of state law and the FLSA. Employees at the plant spent different amounts of time donning and doffing equipment, and many did not work overtime at all. The district court nonetheless certified the state law claim as a class action, and certified the FLSA claim as a collective action, allowing respondents to prove liability and damages based on statistical evidence that calculated damages for each employee based on the amount of damages owed to the average employee in a sample.

The Eight Circuit affirmed. The court held that individual differences in the amount of time spent donning and doffing did not preclude certification of a class action or collective action because petitioner had a specific donning and doffing policy that applied to all class members, all class members worked at the same plant using similar equipment, and statistical evidence on the damages owed to the average employee in a sample raised a permissible inference on the amount

owed to each employee.

Petitioner argues that a court may not certify a class action or a collective action when the common proof of liability and damages is statistical evidence of the damages owed to the average employee in a sample. Petitioner contends that when, as here, there is variation in the amount of time worked by class members, and many members of the class did not work overtime at all, liability and damages must be determined on an individual basis. In support of that contention, petitioner relies on the holding in *Wal-Mart v. Dukes* that liability and damages cannot be determined through a formula that masks individual differences, and the holding in *Comcast v. Behrend* that courts must deny class certification when expert models are flawed.

Decision Below:
765 F.3d 791 (8th Cir. 2014)
Petitioner's Counsel of Record:
Carter G. Phillips, Sidley Austin LLP
Respondents' Counsel of Record:
Scott Michelman, Public Citizen Litigation Group

Microsoft Corp. v. Baker (15-547)

Question Presented:

Petition GRANTED limited to the following Question: Whether a federal court of appeals has jurisdiction under both Article III and 28 U. S. C. §1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.

Summary: This case poses the question whether plaintiffs who are denied class certification by a district court must go to trial and reach a final judgment in their individual cases before they can appeal the denial of the class certification. That is the rule in several circuits but some courts of appeals allow the plaintiffs to dismiss their individual actions and immediately appeal the denial of class certification as a final judgment. In granting review, the Court reframed the question presented in terms of both Article III jurisdiction and statutory appellate jurisdiction that is limited to appeals of "final decisions."

Decision Below:

797 F.3d 607 (9th Cir. 2015)

Petitioner's Counsel of Record:
Stephen M. Rummage, Davis Wright Tremaine, LLP
Respondents' Counsel of Record:
Darren T. Kaplan, Stueve Siegel Hanson, LLP

Employment Discrimination

Green v. Brennan (14-613)

DRAFT 2/16/16 for internal use only

Question Presented:

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

Summary:

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an employee because of his race. Under Title VII's constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is treated as an unlawful termination. To bring a Title VII claim, an employee must first file an administrative complaint within a specified time period. The question in this case is whether the filing period for a constructive discharge claim begins when an employee resigns, or at the time of the employer's last allegedly discriminatory act giving rise to the resignation.

Petitioner worked as a postmaster for Englewood, CO. When petitioner was denied a promotion, he filed an administrative complaint of discrimination with a Postal Service EEO counselor. After the complaint was filed, petitioner's superiors alleged that petitioner had engaged in serious criminal conduct, and placed him on unpaid suspension. Petitioner subsequently signed an agreement under which he could either choose to retire or accept a position that paid much less and was much further away. Petitioner ultimately chose to resign. Petitioner contacted an EEO counselor, alleging constructive discharge in retaliation for his protected Title VII conduct. The administrative charge was timely if the filing period began with petitioner's resignation, but untimely if it began when petitioner signed the agreement. Petitioner subsequently filed suit in federal court against respondent, the Postmaster General, alleging constructive discharge. The district court dismissed petitioner's complaint of constructive discharge on the ground that his administrative complaint was untimely.

The Tenth Circuit affirmed, holding that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" that is said to have given rise to the resignation, not from the resignation itself. The court rejected the date-of-resignation rule on the ground that it would allow employees to indefinitely delay the date of accrual.

Petitioner argues that the filing period for a constructive discharge claim begins on the date of resignation. Petitioner relies on the background rule that a limitation period begins only when the plaintiff has a complete and present cause of action. Because resignation is a necessary element of a constructive discharge claim, petitioner argues, the filing period for such a claim does not begin to run until the employee resigns. Petitioner also contends that the date-of-resignation rule is superior to the last-discriminatory-act rule because it is far easier to administer, and more appropriate for a scheme initiated by laypersons. Finally, petitioner argues that the date-of-resignation rule does not give employees an incentive to delay the date of accrual because any appreciable delay will weaken the merits of a constructive discharge claim.

Decision Below:

760 F.3d 1135 (10th Cir. 2014)

Petitioner's Counsel of Record:

Brian Wolfman, Stanford Law School Supreme Court Litigation Clinic

Respondent's Counsel of Record:

Donald B. Verrilli, Jr., Solicitor General of the United States
Court-Appointed Amicus Curiae:
Catherine M.A. Carroll, Wilmer Cutler Pickering Hale and Dorr LLP

ERISA

Gobeille v. Liberty Mutual Insurance Company (14-181)

Question Presented:

Did the Second Circuit – in a 2-1 panel decision that disregarded the considered opinion advanced by the United States as amicus – err in holding that [the Employee Retirement Income Security Act (ERISA)] preempts Vermont's health care database law as applied to the third-party administrator for a self-funded ERISA plan?

Summary:

ERISA governs most health care benefit plans and imposes various reporting requirements on plans. ERISA also preempts state laws that "relate to" any employee benefit plan covered by the statute. The Supreme Court has held that a state law relates to an ERISA plan if it has a connection with or reference to such a plan. A Vermont healthcare database statute requires health insurers, including any third-party administrator, to file health care claims, enrollment information, and other related health care information. The question presented is whether the Vermont statute is preempted by ERISA as applied to the third-party administrators for self-funded ERISA plans.

Respondent Liberty Mutual Insurance is the administrator of an ERISA self-insured health plan covering Vermont residents, and has contracted with Blue Cross to serve as the plan's third-party administrator. Pursuant to the Vermont database statute, a Vermont state official subpoenaed Blue Cross, seeking claims data and other required information for Vermont's database. At respondent's direction, Blue Cross refused to comply with the subpoena. Respondent then filed suit in federal court, claiming that ERISA preempts the Vermont statute as applied to third-party administrators of self-funded ERISA plans. The district court ruled in favor of Vermont.

The Second Circuit reversed, holding that ERISA preempts Vermont's database statute. The court reasoned that the Vermont statute has a connection with an ERISA plan because, given ERISA's own reporting requirements, Vermont's statute intrudes into an area of core ERISA concern. While not every state reporting requirement is preempted, the court concluded, Vermont's reporting requirements cross the line because they are burdensome, time-consuming, and risky.

Vermont contends that its healthcare database statute is not preempted by ERISA. It argues that its statute does not intrude into an area of core ERISA concern because it requires the collection of data in order to improve the quality of health care, not to monitor plan administrators' responsibilities to fiduciaries. It further argues that state laws that impose administrative burdens are preempted only when the burden is so acute that it forces an ERISA plan to adopt a certain scheme of coverage or effectively restricts its choice of insurers. In this case, Vermont argues, respondent failed to show that the Vermont statute has anything more than a minor effect on costs, much less that it will cause a change in the plan.

Decision Below:
746 F.3d 497 (2d Cir. 2014)
Petitioner's Counsel of Record:
Bridget C. Asay, Office of the Attorney General of Vermont
Respondent's Counsel of Record:
Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan (14-723)

Question Presented:

Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim?

Summary:

ERISA authorizes the fiduciary of an ERISA plan to seek appropriate equitable relief from a plan participant to enforce the terms of the plan. The Supreme Court has held that a fiduciary seeking reimbursement from a plan participant may obtain an equitable lien on a particular fund that is in the participant's possession, but may not obtain recovery from the participant's general assets. The question presented in this case is whether a fiduciary may obtain an equitable lien when the particular fund identified by the fiduciary has been dissipated by the time suit is filed.

Petitioner Robert Montanile was seriously injured in a car accident with a drunk driver. Petitioner recovered medical expenses of $121,044.02 from National Elevator Industry Health Benefit Plan. After petitioner settled his claims against the drunk driver for $500,000, the Board of Trustees of the Plan (respondent) sought reimbursement under a provision of the plan entitling it to "first reimbursement" of any "award, judgment, [or] settlement." By then, petitioner had spent most of the $500,000 he received and retained significantly less than $121,044.02. The district court granted summary judgment in respondent's favor.

The Eleventh Circuit affirmed. The court held that an equitable lien immediately attached to the proceeds from petitioner's settlement and that petitioner's dissipation of the funds could not destroy that lien.

Petitioner argues that, under Supreme Court precedent and general equitable principles, a plan fiduciary seeking reimbursement from a participant must identify a particular fund that is in the participant's possession at the time of suit. When the fund identified has been dissipated, petitioner contends, the claim is necessarily one for legal relief.

Decision Below:
593 Fed.App'x 903 (11th Cir. 2014)
Petitioner's Counsel of Record:
Rachana A. Pathak, Stris & Maher LLP
Respondent's Counsel of Record:
Neal Kumar Katyal, Hogan Lovells US LLP

Decision:

In an 8-1 decision the Court reversed and remanded, holding "[w]hen an ERISA-plan participant wholly dissipates a third-party settlement on nontraceable items, the plan fiduciary may not bring suit under §502(a)(3) to attach the participant's separate assets." The Court further held "[p]lan fiduciaries are limited by §502(a)(3) to filing suits 'to obtain … equitable relief.'"

False Claims Act

Universal Health Services v. United States ex. rel. Escobar (15-7)

Questions Presented:

(1) Whether the "implied certification" theory of legal falsity under the FCA – applied by the First Circuit below but recently rejected by the Seventh Circuit – is viable; and (2) whether, if the "implied certification" theory is viable, a government contractor's reimbursement claim can be legally "false" under that theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuits; or whether liability for a legally "false" reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits.

Summary:

At issue here is the application of "implied certification" under the False Claims Act. The question posed is whether a government contractor impliedly certifies that it has met all contractual requirements, including relevant regulations and statutes when it submits a claim for payment. Here, the First Circuit held that the FCA was violated where the Medicaid provider submitted a claim for payment for services rendered where the provider failed to comply with state regulations related to proper supervision of its staff. The First Circuit held that the FCA is violated in these circumstances, because the regulations were material to the contract payments. The First Circuit, while declining to adopt the differing rules used in other circuits, did not require an express representation that all regulatory requirements were met in order to state a FCA claim in a case where services were rendered.

Petitioners argue that Circuits which "allow FCA claims to go forward based on violations of statutes, regulations, and contractual provisions, even where the services for which the contractor sought reimbursement were provided, and even where the contractor, in submitting a claim for reimbursement, did not expressly certify compliance with the statute, regulation or contractual provision" "recognize the implied certification theory" and therefore "have opened the door to potentially limitless liability under the FCA." Petitioners also assert that even in the Second and Sixth Circuits, which do recognize the "implied certification theory of FCA liability[,]" dismissal would have been affirmed as implied certification "is only viable if it is based on an alleged violation of a statute, regulation, or contractual provision that is expressly designated a condition of payment."

Respondents contend the First Circuit's holding should be upheld because "states can properly condition Medicaid reimbursement on a provider's compliance with qualification of supervision requirements, and that the FCA applies to providers who knowingly skirt such regulations but nonetheless present claims to Medicaid officials." Respondents also note that the First Circuit disclaimed reliance on the "implied certification" theory used in other circuits and found that compliance with the regulations in question here were a material condition for payment.

DRAFT 2/16/16 for internal use only

Decision Below:
780 F.3d 504 (1st Cir. 2015)
Petitioner's Counsel of Record:
M. Miller Baker, McDermott Will & Emery LLP
Respondent's Counsel of Record:
Thomas M. Greene, Elizabeth Cho Greene LLP

Federal Arbitration Act

DIRECTV, Inc. v. Imburgia (14-462)

Question Presented:

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act (FAA) requires the application of state law preempted by the FAA.

Summary:

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempts state laws that condition the enforceability of an arbitration agreement on the availability of class-wide arbitration. The question in this case is whether an arbitration agreement that incorporates state law on the enforceability of class action waivers encompasses state law preempted under *Concepcion.*

DIRECTV's Customer Agreement provides for binding arbitration of disputed claims and prohibits class action arbitration. The Agreement further provides that if "the law of your state" would find the agreement to dispense with class arbitration unenforceable, the entire arbitration agreement is unenforceable. Finally, the Agreement specifies that it is governed by the FAA. Customers of DIRECTV (respondents) filed class actions against petitioner DIRECTV in California Superior Court, alleging that petitioner improperly charged early termination fees. Because California law made class action waivers unenforceable, petitioner did not seek to compel arbitration. Following *Concepcion's* invalidation of that state law, however, petitioner moved to compel arbitration. The California Superior Court denied the motion.

The Court of Appeal affirmed. It held that the Agreement's reference to the "law of your state" is most naturally read to incorporate state law even if that law is preempted by the FAA. It further held that this specific reference to state law constitutes an exception to the Agreement's more general reference to the FAA as the governing law. The court therefore concluded that the Agreement incorporates California's prohibition on class action waivers, even though that law is preempted under *Concepcion.*

Petitioner contends that, in context, the Agreement's incorporation of state law necessarily refers to state law that is in force, not to some hypothetical state law that has been preempted. That is particularly true, petitioner argues, because the Agreement expressly makes the FAA the

governing law. Because the FAA preempts California's prohibition on class action waivers, petitioner argues, that prohibition cannot stand as a barrier to the enforcement of the parties' agreement to arbitrate.

Decision Below:
170 Cal.Rptr.3rd 190 (Ct. App. 2014)
Petitioner's Counsel of Record:
Christopher Landau, Kirkland & Ellis LLP
Respondents' Counsel of Record:
Thomas C. Goldstein, Goldstein & Russell, P.C.

Decision:

In a 6-3 decision, the Court reversed and remanded, holding in favor of Petitioners position that although California law is incorporated in the agreement, California's prohibition on class action waivers, does not render the present agreement to arbitrate unenforceable because that provision is preempted by federal law. The Court further held "[b]ecause the California Court of Appeal's interpretation is preempted by the Federal Arbitration Act, the court must enforce the arbitration agreement."

MHN Government Services, Inc. v. Zaborowski **(14-1458)**

Questions Presented:

Whether California's arbitration-only severability rule is preempted by the [Federal Arbitration Act].

Summary:

This case concerns whether California courts unfairly disfavor enforcing agreements to arbitrate. "The Federal Arbitration Act ("FAA") provides that an arbitration agreement shall be enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract' 9 U.S.C. § 2." Petitioners allege "California law applies one rule of contract severability to contracts in general, and a separate rule of contract severability to agreements to arbitrate." They contend that California case law authorizes courts to strike down arbitration agreements containing more than one unlawful provision notwithstanding the fact that the agreement contains a severability clause. In contrast, California's general contract law grants discretion to sever the offending provisions and enforce the contract. Petitioners claim that "[t]he arbitration-only rule disfavors arbitration and applies even when the agreement contains an express severability clause." Petitioners further contend the "application in this case conflicts with binding precedent of [the] Court and with opinions of four other courts of appeals."

Respondents insist Petitioners are "mistaken" in their assertion that "California's severance doctrine … conflicts with precedent from [the] Court and other courts of appeals, and … with the [FAA] … by discriminating against arbitration." Respondents argue "California's severance doctrine derives from statutes that apply to all contracts and from cases dealing with contracts of various sorts—not just arbitration agreements." Respondents contend "the doctrine neither requires nor prohibits severance, but instead vests discretion in the trial court" in the case of "multiple unconscionable provisions" to refuse to enforce the contract.

Decision Below:

DRAFT 2/16/16 for internal use only

2014 WL 7174222 (Dec. 17, 2014)
Petitioner's Counsel of Record:
Robert M. Loeb, Orrick, Herrington & Sutcliffe LLP
Respondent's Counsel of Record:
Jahan C. Sagafi, Outten & Golden LLP

Federal Power Act

Federal Energy Regulatory Commission v. Electric Power Supply Association (14-840)
linked with
EnerNOC, Inc. v. Electric Power Supply Association (14-841)

Questions Presented:

(1) Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reduction in electricity consumption and to recoup those payments through adjustments to wholesale rates.

(2) Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious.

Summary:

Wholesale market operators pay electricity users to reduce their consumption, an activity referred to as "demand response." Those payments are then recouped in the wholesale rate. The Federal Energy Regulatory Commission (FERC) promulgated a rule establishing a methodology that wholesale-market operators must use to compute the compensation for demand response commitments. In promulgating the rule, FERC invoked its authority under the Federal Power Act to regulate any practice that affects wholesale rates. The questions presented are whether FERC has statutory authority to promulgate a demand response rule, and whether the particular methodology FERC established is arbitrary and capricious.

Organizations representing electricity generators and others (respondents) sought judicial review of FERC's rule in the D.C. Circuit. Certain companies involved in the demand response market (petitioning companies) intervened in support of the rule. The D.C. Circuit vacated the rule, holding that FERC lacks statutory authority to regulate demand response payments. The court reasoned that States retain exclusive authority to regulate the retail market, and thatdemand response is part of the retail market. The court added that FERC's interpretation has no limiting principle and would authorize FERC to regulate other markets that affect wholesale rates, such as the steel, fuel, and labor markets. The court also concluded that, even assuming FERC has statutory authority to regulate demand response payments, FERC's methodology for doing so is arbitrary and capricious.

FERC and the petitioning companies argue that the rule falls within FERC's authority to regulate practices that affect wholesale rates. Unlike the markets identified by the court of appeals, petitioners contend, demand response payments directly affect wholesale rates because they are recouped in the wholesale rate paid by wholesale purchasers in the wholesale market. The Supreme Court added the second question on whether FERC's methodology is arbitrary and capricious. It apparently did so to eliminate any prudential or jurisdictional barrier to reviewing

the court of appeals' decision.

Decision Below:
753 F.3d 216 (D.C. Cir. 2014)
Petitioners' Counsel of Record:
Donald B. Verrilli, Jr., Solicitor General of the United States (14-840)
Carter G. Phillips, Sidley Austin LLP (14-841)
Respondents' Counsel of Record:
Paul D. Clement, Bancroft PLLC

Decision:

In a 6-2 decision, the Court reversed and remanded holding that "[t]he FPA provides FERC with the authority to regulate wholesale market operators' compensation of demand response bids[,]" that "the practices at issue directly affect wholesale rates[,]" and that the "FERC has not regulated retail sales." The Court added that "taken together, these conclusions establish that … [FERC's rule] complies with FPA's plain terms." The Court further held a "contrary view would conflict with the FPA's core purposes." The Court also held that "FERC's decision to compensate demand response providers at LMP—the same price paid to generators—instead of at LMP-G, is not arbitrary and capricious."

Hughes v. Talen Energy Marketing (14-614)
consolidated with
CPV Maryland, LLC v. PPL EnergyPlus, LLC (14-623)

Questions Presented:
***Hughes*:**

(1) Whether, when a seller offers to build generation and sell wholesale power on a fixed-rate contract basis, does the [Federal Power Act] field-preempt a state order directing retail utilities to enter into the contract; and (2) whether the [Federal Energy Regulatory Commission's] acceptance of an annual regional capacity auction preempts states from requiring retail utilities to contract at fixed rates with sellers who are willing to commit to sell into the auction on a long-term basis.

***CPV Maryland, LLC*:**

(1) Whether, where, as a result of a state-directed procurement, the contract price to build and operate a power plant is the developer's bid price, and may result in payments beyond what the developer earns selling the plant's capacity in the FERC-supervised auction, is the program "field preempted" as a State's attempt to set interstate wholesale rates; and (2) whether a state-directed contract to support construction of a power plant is "conflict preempted" because its long-term pricing structure provides incentives different from the incentives provided by prices generated in the FERC-supervised yearly capacity auction.

Summary:

Hughes and *CPV Maryland, LLC* were consolidated for decision by the Court. The cases concern "The Federal Power Act (FPA) [,which] splits authority among states, utilities, and the Federal Energy and Regulatory Commission (FERC). States regulate generation facilities and retail utility power purchases, but may not set wholesale rates. Wholesale energy sellers set their own rates while FERC has exclusive jurisdiction to review them and determine their legality." In

both *Hughes* and *CPV Maryland, LLC*, the Fourth Circuit held Maryland's scheme where "its retail utilities [would] contract with" CPV Maryland "to build a power plant and make its capacity and out-put available to the whole electricity market for twenty years" and "[i]n exchange, CPV would receive fixed contract rates and stable revenues that it would not obtain without a contract" was preempted by the FPA.

Petitioners disagree with "[t]he Fourth Circuit's theory that Maryland entered the federal field by somehow setting rates for the the wholesale sale capacity" and argue its holding "rests on a misunderstanding about what it means to 'set' a rate." Petitioners explain the Fourth Circuit's decision "is based on two … flawed premises; first, that a state engages in wholesale rate-setting when it compels retail utilities to contract with the winning bidder in a power-supply solicitation; and, second, that the rate established by the operator of a centralized wholesale power market is the only legal rate for sales in the market—precluding sellers from setting different rates or selling on other terms, subject to review by the [FERC]." Petitioners argue that these premises "reflect fundamental misunderstandings of the FPA's rate-setting machinery and [the] Court's uniform precedent, under which utility sellers set initial FPA rates and can do so by contract, subject to FERC review." Petitioners further contend that if the "premise[s] were true, then states could not direct retail utilities to buy *any* FERC-jurisdictional product from a state-chosen seller … [and] long-term contracts for power sales in central wholesale markets would be illegal, undermining key sources of market stability and essential support for investment." Petitioners argue the Fourth Circuit's "field-and conflict-preemption holdings" will "gravely threaten the states' police power to regulate electric power supplies by overseeing retail utilities' contracts and rates."

Respondents agree with the Fourth Circuit's conclusion that "states simply do not have the authority to set the rates and terms of wholesale transactions." Respondents assert "[i]ntrusions on FECR's exclusive jurisdiction over wholesale rates do not come much clearer than [in the present case]."

Decision Below (*Hughes*):
753 F.3d 467 (4th Cir. 2014)
Petitioner's Counsel of Record:
Scott H. Strauss, Spiegel & McDiarmid LLP
Respondent's Counsel of Record:
Paul Clement, Bancroft PLLC

Decision Below (*CPV Maryland, LLC*):
753 F.3d 467 (4th Cir. 2014)
Petitioner's Counsel of Record:
Clifton S. Elgarten, Crowell & Moring LLP
Respondent's Counsel of Record:
Paul Clement, Bancroft PLLC

Federal Practice and Procedure

Americold Realty Trust v. ConAgra Foods, Inc. (14-1382)

DRAFT 2/16/16 for internal use only

Questions Presented:

Whether the Tenth Circuit wrongly deepened a pervasive circuit split among the federal circuits regarding whether the citizenship of a trust for purposes of diversity jurisdiction is based on the citizenship of the controlling trustees, the trust beneficiaries, or some combination of both.

Summary:

This case poses the issue of how a court should determine the citizenship of a trust for the purposes of determining whether the court has diversity jurisdiction. The Tenth Circuit "join[ed] the minority of courts" and "held the jurisdictional inquiry extends, at a minimum, to the citizenship of a trust's beneficiaries in addition to its trustees' citizenship," which resulted in destruction of party diversity in this particular case.

Petitioners assert the Tenth Circuit's "test for determining the jurisdiction of a trust for diversity purposes" problematically departs from "[t]he vast majority of circuits ... [which] look to the citizenship of the trustees – the actors that actually control the actions of the trust." They contend that the Tenth Circuit's adoption of the "minority position" "would unfairly close the federal courts to trusts, one of the most commonly used business entities responsible for billions of dollars in annual commerce." They claim that "the Court should adhere to its longstanding practice of looking to the citizenship of trustees, who—both at common law and in modern practice—hold legal title to the property of the trust and accordingly are tasked with managing the trust's assets, including through the conduct of litigation."

Respondents believe the "case presents [a] straightforward question" and "under [the] Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990) ... citizenship is measured by the entity's beneficial members" and not by the citizenship of the trustees.

Decision Below:
776 F.3d 1175 (10th Cir. 2015)
Petitioner's Counsel of Record:
Michael D. Pospisil, Edgar Law Firm LLC
Respondent's Counsel of Record:
John M. Duggan, Duggan Shadwich Doerr & Kurlbaum LLC

Menominee Indian Tribe of Wisconsin v. United States (14-510)

Question Presented:

Whether the D.C. Circuit misapplied this Court's *Holland* [*v. Florida*] decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for the filing of Indian Self-Determination Act claims under the Contract Disputes Act?

Summary:

Holland v. Florida established that equitable tolling of a non-jurisdictional statute of limitations is warranted when a party shows (1) reasonable diligence in pursuing its rights, and (2) that some extraordinary circumstance interfered with timely filing. At issue in this case is whether the Tribe satisfied the *Holland* requirements for equitable tolling.

In *Cherokee Nation v. Leavitt*, the Supreme Court held that the government was obligated

to pay in full the support costs specified in contracts entered into under the Indian Self-Determination and Education Assistance Act. Following *Cherokee*, petitioner Menominee Tribe of Wisconsin filed claims with the Indian Health Service (IHS) for underpayments. The IHS denied the claims on the ground that they were untimely under the Contract Disputes Act's six-year limitations period. The Tribe sought judicial review in federal district court. The district court ultimately entered judgment for the government, rejecting the Tribe's claim for equitable tolling of the limitations period.

The D.C. Circuit affirmed, holding that the obstacles the Tribe faced were of its own making and not the result of any external extraordinary circumstance. The court explained that petitioner's expectation that it would be a member of the *Cherokee* class was unjustified, and that the prospect that the government would deny the claims did not prevent petitioner from taking the minimal steps required to file them. The court concluded that other circumstances, such as the government's trust relationship, were not external obstacles that prevented the Tribe from bringing its claims.

Petitioner argues that it was entitled to equitable tolling under *Holland*. It contends that under *Holland*, a court may not focus solely on one of the two *Holland* factors, but must instead analyze each factor by taking into account the other. Petitioner further argues that *Holland* requires a showing that an extraordinary circumstance interfered with timely filing, not that an external *obstacle* prevented a timely filing. Under the proper *Holland* analysis, petitioner argues, equitable tolling was warranted.

Decision Below:
764 F.3d 51 (D.C. Cir. 2014)
Petitioner's Counsel of Record:
Geoffrey D. Strommer, Hobbs Straus Dean & Walker LLP
Respondents' Counsel of Record:
Donald B. Verrilli, Jr., Solicitor General of the United States

Decision:

In a 9-0 decision, the Court affirmed holding that "[e]quitable tolling does not apply to the presentment of petitioner's [contract] claims[,]" where the claims were presented in an untimely manner. The Court further held that none of Petitioners' excuses for delayed presentation of claims constituted "extraordinary circumstances" for the purposes of availing themselves of equitable tolling.

First Amendment-Public Employee Union Dues

Friedrichs v. California Teachers Association **(14-915)**
Questions Presented:

(1) Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1997), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

(2) Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

DRAFT 2/16/16 for internal use only

Summary:

In *Abood*, the Supreme Court held that state laws that require public employees to pay union fees for expenses related to collective bargaining (agency shop arrangements) do not violate the First Amendment. *Abood* further held that States may require public employees to pay union fees for expenses unrelated to collective bargaining (nonchargeable fees) as long as employees may opt out by affirmatively objecting to them. The first question in this case is whether *Abood* should be overruled, and agency shop arrangements invalidated under the First Amendment. The second question in this case is whether opt-out requirements for nonchargeable speech violate the First Amendment.

California law authorizes school districts to require public school teachers to either join a union or pay a fee that may not exceed the fee for becoming a union member. The fee includes amounts both related and unrelated to collective bargaining. The union is required to calculate the amount for each, and give notice to employees that they may opt out of the nonchargeable fees by affirmatively objecting. Petitioners, public school teachers and the Christian Educators Association, filed suit in federal court against respondent Unions, challenging the agency shop and opt-out requirements as a violation of the First Amendment. California Attorney General Kamala Harris intervened. Relying on *Abood*, the district court entered judgment for respondents, and the Ninth Circuit summarily affirmed.

Petitioners contend that agency shop arrangements violate the First Amendment and that *Abood* should be overruled. Petitioners specifically argue that agency shop arrangements violate the principle that the government may not compel a person to subsidize speech by a third-party absent a sufficiently weighty justification. For purposes of that principle, petitioner contends, there is no difference between speech related to collective bargaining and speech that is unrelated to collective bargaining because both involve political speech designed to influence government decision-making. The government's interests in labor peace and preventing free riders, petitioners argue, are insufficient to justify compelled subsidization of political speech. Petitioners further contend that because *Abood* cannot be reconciled with numerous other First Amendment precedents, stare decisis considerations do not preclude its overruling. Finally, petitioners argue that, at the very least, opt-out requirements for nonchargeable fees violate the First Amendment by placing an unconstitutional burden on public employees.

Decision Below:
No. 13-57095 (9th Cir. Oct. 14, 2014) (Order)
Petitioners' Counsel of Record:
Michael A. Carvin, Jones Day
Respondents' Counsel of Record:
Jeremiah A. Collins, Bredhoff & Kaiser, PLLC

Foreign Sovereign Immunities Act

OBB Personenverkehr AG v. Sachs (13-1067)

Questions Presented:

(1) Whether, in determining whether an entity is an "agent" of a "foreign state" under the

first clause of the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA), the express definition of "agency" in the FSIA, the factors established in *First National Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, or common law principles of agency, control.

(2) Whether, under the first clause of the commercial activities exception of the FSIA, a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

Summary:

The FSIA grants immunity to foreign states, and defines a foreign state to include its agencies and instrumentalities. Under the FSIA, a foreign state is not immune from claims "based upon" commercial activity it conducts in the United States. The first question in this case is whether, in determining when the commercial activity of another entity is attributable to a foreign state, courts should apply the FSIA's definition of agency, the *Bancec* day-to-day control test, or common law agency principles. The second question is whether a tort claim for personal injuries sustained in connection with travel in Austria is "based upon" the ticket sale in the United States or the allegedly tortuous act in Austria.

Respondent Sachs, a California resident, purchased a Eurail pass over the internet from Rail Pass Experts (RPE), a Massachusetts travel agent. When respondent sought to use her ticket to board a train operated by petitioner OBB in Austria, she suffered injuries that required amputation of both of her legs. Respondent filed suit against OBB in federal district court, asserting tort claims under California law. As an agent or instrumentality of Austria, OBB asserted immunity under the FSIA. The district court dismissed the suit, rejecting respondent's claim that her suit fell within the commercial activity exception.

A Ninth Circuit panel affirmed, but the en banc court reversed. First, the court held that in determining whether the acts of a separate entity are attributable to a foreign state under the commercial activity exception, the FSIA requires application of common law agency principles. The court concluded that because RPE acted as OBB's common law agent, its activity in selling respondent a ticket in the United States is imputable to OBB. The court next held that a claim is "based upon" commercial activity in the United States when proof of such commercial activity is essential to proving one element of a claim. Because proof that respondent bought a ticket is necessary to establish an element of her tort claims against OBB, the court concluded, her claims are all "based upon" commercial activity in the United States.

Petitioner first argues that in determining when the acts of a separate entity are attributable to a foreign state, the FSIA definition of "agency" is controlling. Under that definition, a separate entity is an agency of a foreign state only when it is an organ of the foreign state or majority-owned. Alternatively, petitioner argues that the day-to-day control test derived from the Court's decision in *Bancec* is controlling. Under either approach, petitioner argues, RPE's actions may not be imputed to petitioner. Finally, petitioner argues that a claim is "based upon" an activity in the United States when the alleged tortious acts occurred in the United States. Because the alleged tortious acts in this case all occurred in Austria, petitioner argues, respondent's suit is not "based upon" commercial activity in the United States.

Decision Below:
737 F.3d 584 (9th Cir. 2013) (*en banc*)
Petitioner's Counsel of Record:

Juan C. Basombrio, Dorsey & Whitney LLP
Respondent's Counsel of Record:
Geoffrey Daniel Becker, Becker & Becker

Decision:
In a 9-0 decision, the Court reversed and held that Respondent's suit "falls outside the commercial activity exception" and is therefore barred by the Foreign Sovereign Immunity Act.

Government Contracting

Kingdomware Technologies, Inc v. United States (14-916)

Question Presented:
Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

Summary:
Federal law requires the Secretary of the Department of Veterans Affairs (VA) to set goals for the percentage of VA contracts that are awarded to veteran-owned small businesses. It further specifies that "for the purposes of meeting the goals," the VA "shall award" contracts to veteran-owned small businesses whenever there is a "reasonable expectation" that two or more veteran-owned small businesses will bid for the contract at a fair and reasonable price, a procedure known as "the rule of two." The question presented in this case is whether the VA is required to follow the rule of two for every contract, or whether it need not follow that rule as long as the goals it has established are met.

The VA awarded a contract for certain services for medical centers to a non-veteran-owned small business without first researching whether two veteran-owned small businesses could offer a fair and reasonable price. Petitioner, a veteran-owned small business, filed a bid protest with the Government Accountability Office (GAO). The GAO upheld the protest, but the VA declined to follow the GAO's nonbinding ruling. Petitioner then filed a complaint with the United States Court of Federal Claims, challenging the VA's failure to follow the rule of two. The court ruled in favor of the government.

The Court of Appeals for the Federal Circuit affirmed. The Federal Circuit held that the statute unambiguously links the rule of two to the statutory requirement to meet the goals established by the VA. As long as the goals are met, the court concluded, the VA is not required to follow that rule.

Petitioner argues that the statute requires the VA to follow the rule of two for every contract. Petitioner contends that the term "shall" makes the rule of two mandatory, and that the phrase "for purposes of meeting the goals" is a prefatory clause that does not limit that mandatory duty. Petitioner further argues that unless the rule of two is mandatory for every contract, there is no practical way to determine when it is mandatory and when it is not.

Decision Below:
754 F.3d 923 (Fed. Cir. 2014)

DRAFT 2/16/16 for internal use only

Petitioner's Counsel of Record:
Thomas G. Saunders, Wilmer Cutler Pickering Hale and Dorr, LLP
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Solicitor General of the United States

Patents

Stryker Corp. v. Zimmer, Inc. (14-1520)
consolidated with
Halo Electronics, Inc. v. Pulse Electronics, Inc. (14-1513)

Questions Presented:

Stryker Corp.:

(1) Whether the Federal Circuit improperly abrogated the plain meaning of 35 U.S.C. § 284 by forbidding any award of enhanced damages unless there is a finding of willfulness under a rigid, two-part test, when this Court recently rejected an analogous framework imposed on 35 U.S.C. § 285, the statute providing for attorneys' fee awards in exceptional cases.

(2) Does a district court have discretion under 35 U.S.C. § 284 to award enhanced damages where an infringer intentionally copied a direct competitor's patented invention, knew the invention was covered by multiple patents, and made no attempt to avoid infringing the patents on that invention?

Halo Electronics:

Whether the Federal Circuit erred by applying a rigid, two-part test for enhancing patent infringement damages under 35 U.S.C. § 284, that is the same as the rigid, two-part test this Court rejected last term in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) for imposing attorney fees under the similarly-worded 35 U.S.C. § 285.

Summary:

Stryker Corp. and *Halo Electronics* were consolidated for argument and decision by the Court. The cases concern the Federal Circuit's two-part standard which requires proving a patent infringer's "willfulness" as a threshold for the award of enhanced and punitive damages under 35 U.S.C. § 284 (district courts "may increase ... damages up to three times the amount found or assessed). The Federal Circuit determined a prerequisite to awarding enhanced damages is "that a patentee prove by clear and convincing evidence that infringement was "willful," a two-part test which requires that (1) there was an objectively high likelihood that the infringer's actions constituted infringement, and (2) this likelihood was either known or so obvious that it should have been known to the accused infringer. Petitioners contend a discretionary, totality of the circumstances test, which the Federal Circuit employed before 2007, is compelled by § 284.

Petitioners in both cases ask the Court to reject the Federal Circuit's "rigid, two-part test" for enhanced damages, contending the Court "recently rejected an analogous framework imposed on 35 U.S.C. § 285" in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014). Petitioners also assert the language of 35 U.S.C. § 284 confers discretion on the district court to award enhanced damages, in spite of the patent infringer's intent, as "[t]he plain language of § 284 is silent as to willfulness." Petitioners argue that the Federal Circuit's "willfulness" standard is inadequate, as it "undermines the intended deterrent effect of § 284 by

immunizing patent infringers from enhanced damages so long as they present at least one plausible defense at the post-trial appellate stage."

Respondents contend the "governing tes[t]" in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) is "fundamentally different" from the "issue of enhanced damages under § 284." Whereas "[a]ttorney's fees are compensatory ... enhanced damages are punitive." Respondents further assert "Petitioner's proposed changes would ... undercut the Federal Circuit's ability to bring uniformity to the patent law."

Decision Below (*Stryker Corp.*):
782 F.3d 649 (Fed. Cir. 2014)
Petitioner's Counsel of Record:
Sharon A. Hwang, McAndrews, Held & Malloy, Ltd.
Respondent's Counsel of Record:
Donald R. Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner LLP

Decision Below (*Halo Electronics*):
769 F.3d 1371 (Fed. Cir. 2014)
Petitioner's Counsel of Record:
Craig E. Countryman, Fish & Richardson P.C.
Respondent's Counsel of Record:
Mark L. Hogge, Dentons US LLP

Cuozzo Speed Technologies, LLC v. Lee (No.15-446)

<u>Question Presented:</u>

In 2011, Congress enacted the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, which established a new post-grant adjudicatory process for challenges to the validity of patents. The Act created a body within the Patent and Trademark Office, called the Patent Trial and Appeal Board (Board), to hear those challenges as a quick and cost effective alternative to litigation. One of the new types of adjudicative proceedings, inter partes review (IPR), has been both unexpectedly popular and surprisingly lethal. Since the inception of IPR, patent challengers have filed over 3,400 petitions, and nearly 85% of the IPR proceedings to date have resulted in the cancellation of some or all claims in the patent under review. A primary reason for the high cancellation rate is that, although IPR was expressly designed to be a surrogate for litigation, the Board does not use the same claim construction standard as federal courts. Rather than construe the claim in an issued patent according to its plain and ordinary meaning, as a federal court would be required to do, the Board gives the claim its broadest reasonable interpretation, which is a protocol used by examiners in reviewing patent applications. Of course, the broader the interpretation of the claim, the more extensive the array of relevant prior art-and in turn the more likely that the claim will be held invalid in light of that prior art. Consequently, the Board's broad interpretation allows for differing determinations of validity in IPR proceedings and litigation. Over a dissent by Judge Newman, a divided panel of the Federal Circuit affirmed the Board's use of the broadest-reasonable-interpretation standard for claim construction. The panel majority also held that, even if the Board had exceeded its statutory authority in instituting an IPR proceeding

in the first place, the Board's decision to institute was judicially unreviewable. The court of appeals denied rehearing by a vote of 6-5, over a joint dissent by Chief Judge Prost and Judges Newman, Moore, O'Malley, and Reyna, as well as a separate dissent by Judge Newman. The five dissenting judges addressed the merits of, and would have rejected, the Board's claim construction standard.

The questions presented are as follows:

1. Whether the court of appeals erred in holding that, in IPR proceedings, the Board may construe claims in an issued patent according to their broadest reasonable interpretation rather than their plain and ordinary meaning.

2. Whether the court of appeals erred in holding that, even if the Board exceeds its statutory authority in instituting an IPR proceeding, the Board's decision whether to institute an IPR proceeding is judicially unreviewable.

Summary:

As described in the question presented this case poses two questions for review: the proper standard to be applied in inter parties review (IPR) of patents and whether the decision to institute IPR is subject to judicial review.

Decision Below:

793 F.3d 1268 (Fed Cir. 2015)

Petitioner's Counsel of Record:
Jeffrey B. Wall, Sullivan & Cromwell, LLP
Respondent's Counsel of Record:
Donald B. Verrilli, Jr., Solcitor General of the United States

Securities

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning (No. 14-1132)

Question Presented:
Whether § 27 of the Securities Exchange Act of 1934 provides federal jurisdiction over state-law claims seeking to establish liability based on violations of the Act or its regulations or seeking to enforce duties created by the Act or its regulations.

Summary:

Section 27 of the Securities Exchange Act of 1934 provides federal courts with exclusive jurisdiction over any suit brought to enforce any liability or duty created by the Act or its implementing regulations. The issue in this case is whether Section 27 extends federal jurisdiction to a suit that alleges a violation of an SEC regulation in support of a state law claim when proof of the federal violation is not a necessary element of the state law claim.

Shareholders of Escala Group (respondents) sued various financial institutions (petitioners) in New Jersey state court, alleging a variety of state law claims. In support of those claims, respondents alleged that petitioners had engaged in "naked" short sales of Escala's stock in violation of an SEC regulation known as Regulation SHO. Petitioners removed the case to federal district court, claiming "arising under" jurisdiction under 28 U.S.C. § 1331 and exclusive jurisdiction under Section 27. The district court held that it had jurisdiction under both provisions and denied respondents' motion to remand.

The Third Circuit reversed, holding that the district court lacked jurisdiction over respondents' claims. The court first held that respondents' claims did not arise under federal law for purposes of Section 1331 because proof of a violation of Regulation SHO was not a necessary element of any of respondents' state law claims. The court then held there was no jurisdiction under Section 27 either. The court reasoned that Section 27 is coextensive with Section 1331 for purposes of establishing jurisdiction, and that its sole effect is to make jurisdiction exclusive for those claims within its reach.

Petitioners argue that Section 27 extends jurisdiction to any suit in which a plaintiff chooses to rely on federal securities law in support of a state law claim, even if that reliance is not necessary to establish the state law claim. Petitioners contend that Section 27 is more expansive than Section 1331 in that respect, because it broadly applies to "any" suit "to enforce a liability or duty created" by the federal securities laws and lacks Section 1331's narrower "arising under" language.

Decision Below:
772 F.3d 158 (3d Cir. 2014)
Petitioners' Counsel of Record:
Jonathan D. Hacker, O'Melveny & Myers LLP
Respondents' Counsel of Record:
Brendan S. Maher, Stris & Maher LLP

RICO

RJR Nabisco, Inc. v. The European Community (No. 15-138)

Question Presented
Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially.

Summary:

This case poses the questions whether RICO applies extraterritorially and whether in a

private civil suit for treble damages, the plaintiff must show a domestic injury. Petitioner/defendant RJR Nabisco argues that such an injury must be shown and the United States supports that position for private lawsuits. They both argue that no such injury was shown here. The respondents contend that RICO applies extraterritorially and that a sufficient domestic connection was shown.

Decision Below

764 F.3d 129 (2d Cir. 2014)

Petitioners' Counsel of Record:
Gregory G. Katsas, Jones Day
Respondents' Counsel of Record:
David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

FAIR LABOR STANDARDS ACT

Encino Motorcars, Llc. v. Navarro

Question Presented
Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week. The FLSA exempts from its overtime requirements "any salesman, partsman, ormechanic primarily engaged in selling or servicing automobiles." Id. §213(b)(10)(A). Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims, concluding that a service advisor is a "salesman ... engaged in ... servicing automobiles" and is thus exempt from the FLSA's overtime requirements. The Ninth Circuit reversed, deferring to a Department of Labor interpretive regulation stating that service advisors are not exempt under §213(b)(10)(A) because they do not personally service automobiles. The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which hold that service advisors are exempt employees. Pet.App.11.

The question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

Summary:

DRAFT 2/16/16 for internal use only

As noted above, the question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements. There is a circuit split on the issue and a Department of Labor interpretive regulation that will require the COurt to resolve whether are not salesmen within the meaning of the FLSA because they do not sell or service automobiles.

Decision Below

780 F.3d 1267 (9th Cir. 2015)
Petitioners' Counsel of Record:
Paul D. Clement, Bancroft PLLC
Respondents' Counsel of Record:
Stephanos Bibas, University of Pennsylvania Law School, Supreme Court Clinic

From: Stewart, Malcolm L (OSG)
(b) (6)

To: (b) (6)

Cc:
Bcc:
Subject: (b) (5)
Date: Mon Feb 15 2016 12:54:04 EST
Attachments: (b) (5)

(b) (6),

(b) (6)
(b) (5)

Malcolm

null
Last Modified: Mon Feb 15 12:54:04 EST 2016