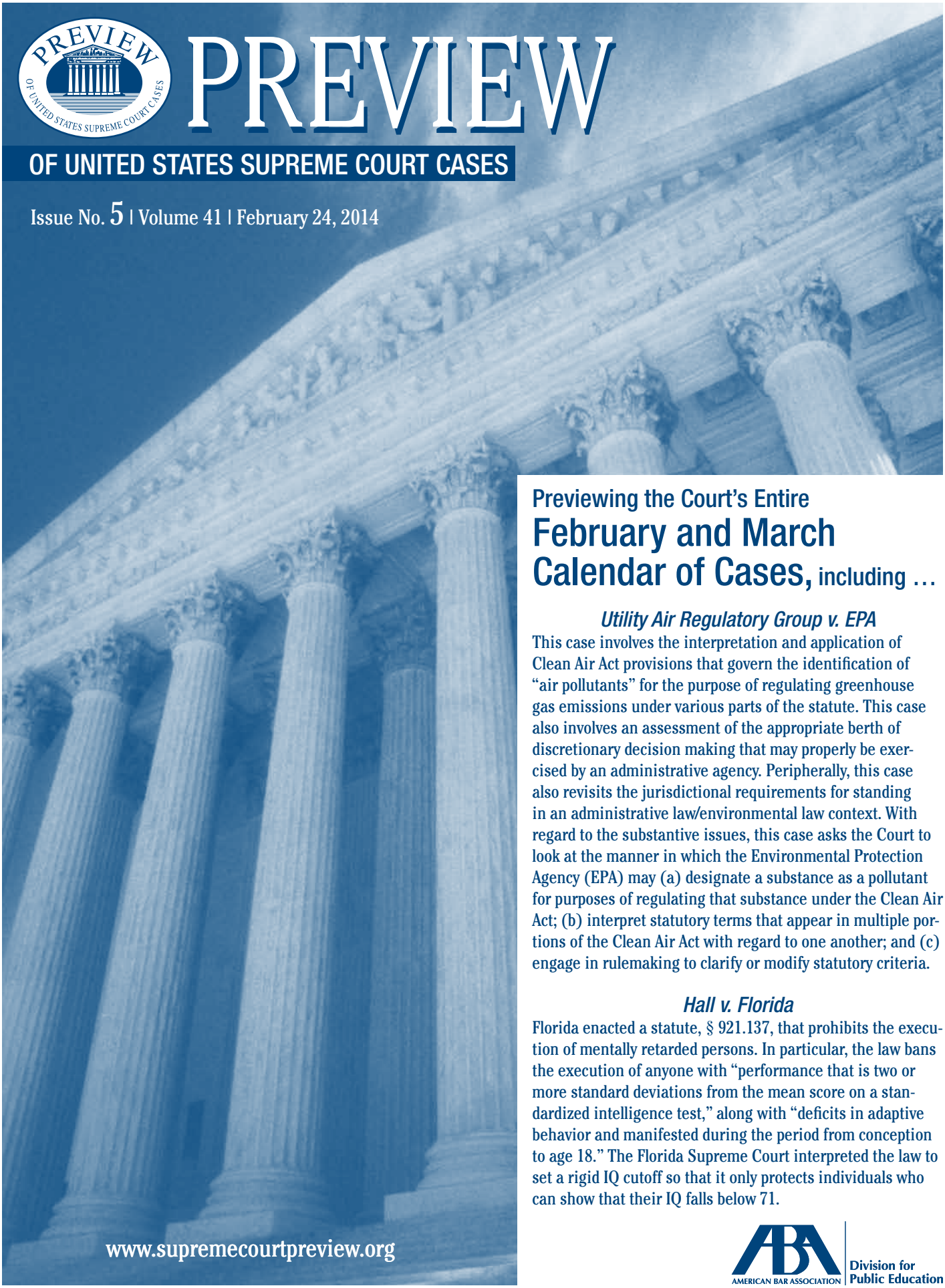
PREVIEW
OF UNITED STATES SUPREME COURT CASES

Issue No. 5 | Volume 41 | February 24, 2014



Previewing the Court's Entire
February and March Calendar of Cases, including …

Utility Air Regulatory Group v. EPA

This case involves the interpretation and application of Clean Air Act provisions that govern the identification of "air pollutants" for the purpose of regulating greenhouse gas emissions under various parts of the statute. This case also involves an assessment of the appropriate berth of discretionary decision making that may properly be exercised by an administrative agency. Peripherally, this case also revisits the jurisdictional requirements for standing in an administrative law/environmental law context. With regard to the substantive issues, this case asks the Court to look at the manner in which the Environmental Protection Agency (EPA) may (a) designate a substance as a pollutant for purposes of regulating that substance under the Clean Air Act; (b) interpret statutory terms that appear in multiple portions of the Clean Air Act with regard to one another; and (c) engage in rulemaking to clarify or modify statutory criteria.

Hall v. Florida

Florida enacted a statute, § 921.137, that prohibits the execution of mentally retarded persons. In particular, the law bans the execution of anyone with "performance that is two or more standard deviations from the mean score on a standardized intelligence test," along with "deficits in adaptive behavior and manifested during the period from conception to age 18." The Florida Supreme Court interpreted the law to set a rigid IQ cutoff so that it only protects individuals who can show that their IQ falls below 71.

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U.S. SUPREME COURT February and March 2014 CALENDAR

MONDAY	TUESDAY	WEDNESDAY
FEBRUARY 24	**FEBRUARY 25**	**FEBRUARY 26**
Utility Air Regulatory Group v. EPA; American Chemistry Council v. EPA; Energy-Intensive Manufacturers v. EPA; Southeastern Legal Foundation v. EPA; Texas v. EPA; Chamber of Commerce v. EPA	*Robers v. United States*	*Octane Fitness v. ICON Health & Fitness* *Highmark Inc. v. Allcare Health Management Systems*
MARCH 3	**MARCH 4**	**MARCH 5**
Hall v. Florida	*Plumhoff v. Rickard*	*Halliburton Co. and Lesar v. Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc.*

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Issue No. 5 | Volume 41

February 24, 2014

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A one-year subscription to *PREVIEW of United States Supreme Court Cases* consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present term, as well as briefly summarize decisions as they are reached. A special eighth issue offers a perspective on the newly completed term.

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- a sign-up for our weekly e-blasts highlighting all the merits and amicus briefs submitted to the Court and
- all the merits and amicus briefs for the February and March cases.

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What Offset Is Due a Defendant Who Owes Restitution and Returns Collateral That Secured a Fraudulent Transaction?

CASE AT A GLANCE

The defendant was a straw purchaser in two real estate sales, for which he was paid $500 per sale. The properties were foreclosed and the defendant pleaded guilty to one count of wire fraud. Under the Mandatory Victims Restitution Act, the defendant must pay restitution, offset by the value of any property that is returned, as of the date the property is returned. The U.S. Court of Appeals for the Seventh Circuit concluded that the defendant was not entitled to any offset until after the properties were sold, which was after the recession had caused a dip in the properties' value. The court ordered the defendant to pay the difference between the loan amounts and the proceeds of the third-party sales, approximately $219,000.

Robers v. United States
Docket No. 12-9012

Argument Date: February 25, 2014
From: The Seventh Circuit

by Barbara L. Jones
Minnesota Lawyer

ISSUE

How much does a defendant who owes restitution for a fraudulently obtained loan return by surrendering the collateral to the creditor?

FACTS

This case involves one of the myriad of loans made under relaxed lending standards that were followed by a nationwide mortgage fraud epidemic. Benjamin Robers was approached by two men who devised a scheme to purchase real estate, using Robers as a straw buyer; Robers was paid $500 for each transaction. He was 19 years old, had a G.E.D., and needed the money to purchase a lawnmower to start a landscaping business.

Robers borrowed $141,000 for property at 911 Grant Street, Lake Geneva, Wisconsin. It eventually went into default and the property was sold at a sheriff's sale to Fannie Mae, who transferred it to its loan insurer, Mortgage Guarantee Insurance Corporation (MGIC) for $159,214.91 in 2006. Robers also borrowed $330,000 for a piece of property at 900 Inlet Shores Drive, Delavan, Wisconsin. After Robers defaulted on that property, the mortgage holder sold the note for $330,000 to American Portfolio, also in 2006.

The properties were not resold immediately after the foreclosure, and the real estate market collapsed in 2006 and 2007. The Grant Street property was eventually sold in August 2007 for $118,000; the Inlet Shores property was sold in October 2008 for $164,000.

After Robers plead guilty to one count of wire fraud in connection with the purchases, the issue became how much Robers owed in restitution as part of his sentence. The district court adopted the government's arguments and ordered restitution in the amount of the outstanding balances on the home loans, plus interest and other expenses, for a total of $500,952 but offset by the $282,000 for which the victims, the lenders, sold the properties. Thus, the total restitution was $218,952.

The Seventh Circuit affirmed the restitution order. It reasoned that the property taken from the lenders was cash, not real estate, and that the cash was not returned until the collateral was sold. The court said that "property" had to mean the specific property—cash—lost by the victim because the word "property" had to have the same meaning throughout the statute.

The circuits are split on this question. The Second, Fifth, and Ninth Circuits have held that in a mortgage fraud case, the offset value should be based on the fair market value of the real estate collateral at the time of foreclosure, when the victim gets title to the real estate. The Third, Eighth, and Tenth Circuits (and a dissent in the Ninth) have concluded the offset value should be based on the eventual amount recouped by the victim following sale of the collateral real estate.

CASE ANALYSIS

This case analyzes the offset provision of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A(b)(1)(B)(ii), which states that a defendant must pay restitution in an amount equal to the value of the property lost minus the value of any part of the property that is returned, as of the date the property is returned. Both briefs are as much a study of grammar and syntax as they are substantive law.

The question is how a court should determine the value of returned collateral—in this case, real estate—for the purpose of computing the offset. Is the offset the value of the property on the day it is returned to the victim, even though it is a substitute for the original loss, which was cash? Or is the offset the value of the property when it is sold, thereby returning to the victim money?

Petitioner, Robers, argues that the statute clearly provides for the return of "substitute" property, i.e., collateral, if the original property's return is impossible, impracticable, or inadequate. For three reasons, petitioner argues the defendant's offset should be determined when the property or substitute property is returned: the word "returns" denotes payment of a debt but not necessarily a conveyance of the same property; Congress's use of the word "any" means that Congress intended to remove limitations on what property can be the "returned property"; and Congress provided for offset of property that is returned, and a foreclosure represents a return.

Furthermore, petitioner argues, excluding any offset at the time of the restitution order would create tension with state mortgage law, which values property as of the date the lenders take title, not the later sale date. It is not clear that these alleged tensions with Wisconsin mortgage law will be of concern to the high court.

Continuing, petitioner argues that § 3663A(d) requires courts to enforce the restitution law "in accordance with" 18 U.S.C. § 3664, which contemplates in-kind payments, in turn defined as the return or replacement of property. "[T]he provision for 'in-kind payments' makes clear that, at sentencing, a payment in a form other than the victim's original loss can constitute adequate return of the victim's property," petitioner argues. "In sum, reading §§ 3663A and 3664 together confirms that Congress intended for previous 'replacement of property' payments to be offset from restitution awards."

Petitioner also argues that the MVRA constrains restitution to damages proximately caused by the criminal behavior because a "victim" is a person directly and proximately harmed. (Proximate cause means that the defendant's actions so clearly and definitely resulted in the injury, without another interrupting cause, that the defendant should be liable.) That reading is consistent with fundamental principles of criminal law, concludes petitioner. A defendant's loan application is unlikely to be the direct cause of a drop in value of real estate. In this case, the collapse of the real estate market was a superseding cause, petitioner argues.

Petitioner also asserts that the Seventh Circuit's interpretation defeats the statute's dual purpose of making victims whole without granting them windfalls. If the restitution award can be reduced only after the victims resell the houses, a victim could have a windfall by collecting from the defendant and later selling the property. And, the restitution amounts for identical crimes would vary, based on later market movements outside the defendant's control.

If the statute does require a defendant to return the property originally lost, that is, the loan money, the defendant should still be entitled to a reduced restitution award because "any part" of the property is returned at sentencing, petitioner continues.

"Show me the money" is respondent's refrain throughout its brief. The government believes that this case turns on the meaning of the phrase "any part of the property that is returned," in § 3663A(b)(1)(B)(ii). Its argument begins, "Petitioner obtained *money* through his fraud and the victims did not receive *money* until the collateral was sold." (Emphasis in original.) That means the money that was lost by the real estate crash is a loss that falls on petitioner.

Continuing, respondent asserts that every statutory reference to "property" is a reference to the property that was lost, not to any substitute property. "Though a court may order a defendant to satisfy his restitution obligation with substitute property under § 3664, it may not grant an offset for substitute property when calculating the restitution amount that is due under § 3663A," respondent argues.

When the lenders took title to the properties, no part of the property that was lost was "returned," asserts the government. Returned, in this context, means the same property. "A man could not purchase a pair of pants from a store and later 'return' a sweater, expecting to receive in exchange the money he paid for the pants," respondent says.

The purpose of MVRA is to make victims whole, the government continues. It dismisses the argument that the victim has the capacity to determine when to sell the property and hence the amount paid for it, and thus should be bound by the sale proceeds. The victim has every incentive to maximize the money it receives from foreclosed real estate. According to respondent, under petitioner's view, the fraudulent defendant will enjoy the benefit of any gain in the property but the victim will bear the loss.

To be sure, respondent does write in a footnote that if the victim disposes of collateral in something other than a fair market transaction, the sales price may not reflect the value of the property.

Respondent avers that the complicated issue of proximate cause is simple in this case. It's clear to the government that petitioner's fraud, not the national mortgage market collapse, is the cause of the victim's losses. This could be considered a weakness in respondent's argument: Is there in fact no interruption or superseding cause, such as the lenders' decisions to wait to sell the property, or their choice to sell the property when and for how much they did?

Perhaps the government anticipates that when it notes that the Court has treated proximate cause as a "flexible concept that does not lend itself to 'a black letter rule that will dictate the result in every case.'" Respondent proposes the following test for determining proximate cause in the context of a restitution remedy: it "must reflect Congress' intent to fully compensate victims for their losses, while enabling sentencing courts to expeditiously determine restitution by excluding losses that are only tenuously linked to the offense."

SIGNIFICANCE

This case has not received much attention—there are no amicus briefs filed as this article was written. This case presents a strange fact pattern, because many people's sympathies would be with the defendant, not the banks. Some people believe that the financial industry "got away with" the events that led to the economic downturn.

Be that as it may, the Court is presented with the "mandatory" restitution act and is asked to interpret the statute. Common sense and the natural meaning of English might say that the property is returned, and the offset calculated, when the title is transferred. The lower courts' readings of the law might be the kind of hyper-technical parsing of the language that is not so endearing to nonlawyers. But the preferable public policy certainly could be to maximize restitution awards, as that appears to be the intent of the statute. Looking down the road, in most cases the loss should fall on the thief.

Additionally, the Court may well be reluctant to find that the mortgage crash broke the proximate cause chain. That could open the door to all kinds of alleged intervening causes, including future economic downturns, which would muddy the waters in any kind of case where causation is an issue. The "show me the money" analysis allows the Court to evade the causation question, which it may determine is for the best.

Barbara Jones is an attorney and managing editor of *Minnesota Lawyer* newspaper. She can be reached at barbarajones14@comcast.net or 651.587.7803.

PREVIEW of United States Supreme Court Cases, pages 202–204.

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Tracking the Term*

49 – Number of oral arguments

17 – Number of cases (granted full review and oral argument) decided

12 – Days of oral argument remaining

84 – Number of cases granted to date

*As of February 18, 2014

Greenhouse Gas Regulation Under the Clean Air Act: When Is a Pollutant a Pollutant?

CASE AT A GLANCE

This case involves the interpretation and application of Clean Air Act provisions that govern the identification of "air pollutants" for the purpose of regulating greenhouse gas emissions under various parts of the statute. This case also involves an assessment of the appropriate berth of discretionary decision making that may properly be exercised by an administrative agency. Peripherally, this case also revisits the jurisdictional requirements for standing in an administrative law/environmental law context. With regard to the substantive issues, this case asks the Court to look at the manner in which the Environmental Protection Agency (EPA) may (a) designate a substance as a pollutant for purposes of regulating that substance under the Clean Air Act; (b) interpret statutory terms that appear in multiple portions of the Clean Air Act with regard to one another; and (c) engage in rulemaking to clarify or modify statutory criteria.

Utility Air Regulatory Group v. EPA; American Chemistry Council v. EPA; Energy-Intensive Manufacturers v. EPA; Southeastern Legal Foundation v. EPA; Texas v. EPA; Chamber of Commerce v. EPA
Docket Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, 12-1272

Argument Date: February 24, 2014
From: The District of Columbia Circuit

by Amy Kullenberg
Ann Arbor, MI

FACTS

This case emerges from the shadows of Clean Air Act litigation that has been bouncing back and forth between the EPA and the federal courts for several years.

The most immediate legal genesis for this case is *Massachusetts v. EPA,* 549 U.S. 497, decided by the Supreme Court in April of 2007. However, the development of this case—as well as its significance—has also been heavily influenced by executive branch policy initiatives and congressional political maneuvers, which have been dovetailing during the last two decades.

Greenhouse Gas Regulation

By the late 1990's, considerable scientific and political attention had already been given to the subject of carbon dioxide emissions and climate change. Carbon dioxide was understood by this time to be one of several "greenhouse gases," the emissions of which were correlated with changes in climate patterns. The present case deals with six "greenhouse gases" (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride), which are long-lived and "well mixed" together in the atmosphere, and which, in the aggregate, cause or contribute to global climate change. *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency,* 684 F.3d 102 (D.C. Cir. 2012). Several domestic and global initiatives were undertaken during the 1990's to reduce the occurrence of greenhouse gas emissions—including the widely publicized Kyoto Protocol—but the political dissonance between U.S. branches of government prevented the domestic implementation of these initiatives.

In October of 1999, a group of private organizations filed a rulemaking petition under the Administrative Procedure Act with the then Clinton administration EPA, asking the EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." In relevant part, § 202(a)(1) provides that the EPA's administrator "shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

This rulemaking petition was filed, at least in part, in response to President Clinton's declination to have the United States join the Kyoto Protocol. Additionally, in April of 1998, one year before the petition for rulemaking was filed, Jonathan Z. Cannon, EPA's then general counsel, submitted a legal opinion to Carol M. Browner, EPA's then administrator, concluding that although the EPA had thus far declined to exercise the authority, "CO2 emissions are within the scope of EPA's authority to regulate."

Four years later, in September of 2003, after a change in presidential tenure, a reconfiguring of EPA leadership, an extensive review and comment period, and the commission of a new scientific study, the

now Bush administration EPA entered an order denying the 1999 petition for rulemaking. The order provided two reasons for denial: (1) the Clean Air Act does not authorize EPA to issue regulations relating to greenhouse gas emissions (the formal opinion of EPA's previous general counsels notwithstanding); and (2) even if the EPA *did* have authority to establish greenhouse gas emission standards, it would be unwise to do so at the present time. Specifically, the order of denial stated that greenhouse gases could not constitute "air pollutants" under the Clean Air Act, and that economic and policy considerations precluded U.S. regulation of greenhouse gases.

In response to EPA's rejection of the 1999 rulemaking petition, a consortium of states, local governments, and environmental organizations (including the Commonwealth of Massachusetts), filed suit in the United States Circuit Court for the District of Columbia. The D.C. Circuit denied the petition for judicial review. In the D.C. Circuit, the case was heard by a panel of three circuit court judges (Judges Randolph, Sentelle, and Tatel) who disagreed among themselves regarding (a) whether the court had jurisdiction to hear the case vis à vis whether petitioners had met constitutional standing requirements; (b) whether greenhouse gases could be categorized as "air pollutants" under the statutory language of Clean Air Act § 202(a)(1); and (c) whether the EPA's declination of the petition for rulemaking had resulted from a proper or improper exercise of its administrative discretion.

Petitioners subsequently sought and were granted appellate review from the United States Supreme Court.

Massachusetts v. EPA

In a 5-4 decision authored by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Supreme Court held that constitutional standing requirements had been satisfied—at minimum by the Commonwealth of Massachusetts—because the scientific evidence presented was sufficient to establish an *injury* (at minimum, loss of coastal land), a causal nexus between the *injury* and the alleged pollutants (greenhouse gases), and a reasonable likelihood that regulation of greenhouse gases would sufficiently redress at least a portion of the harms alleged.

The Court also held that greenhouse gases did qualify as an "air pollutant" under the statutory language of Clean Air Act § 202(a)(1). The Court then found that the Bush administration EPA had abused its discretion in declining the original petitions for rulemaking because (a) it had erroneously determined that greenhouse gases were, as a matter of law, not "air pollutants" under § 202(a)(1); (b) it had erroneously determined that it lacked authority to regulate greenhouse gases under the Clean Air Act; and (c) the EPA's reasons for declination did not conform to the statutory requirements for declining petitions for rulemaking.

Specifically, the Court found that once greenhouse gases could be properly categorized as "air pollutants" under the statute, the EPA was then *statutorily required* to engage in an "Endangerment Finding"—a scientific investigation of whether greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." (42 U.S.C. § 7521(a)(1)). The Court found that EPA had avoided its statutory duty to engage in the Endangerment Finding process, instead providing impermissible policy arguments in support of its decision not to regulate greenhouse gases: "[Once] EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do … EPA has refused to comply with this clear statutory command … Its action was therefore 'arbitrary, capricious, … or otherwise not in accordance with law.' 42 U.S.C. § 7606(d)(9)(A)."

After determining standing and ruling on the merits, the majority in *Massachusetts v. EPA* remanded the case back to EPA, with instructions for EPA to determine whether greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

The Court's dissenting block argued that the constitutional requirements for standing had not been met because plaintiff-petitioners had not shown an injury sufficiently particularized to them, had not shown an adequate causal nexus between greenhouse gases and alleged harm, and had not shown that the regulation of greenhouse gases would sufficiently redress the alleged harm. In other words, the dissenting block felt that the connection between greenhouse gas regulation and the amelioration of alleged harms was too speculative to support a legitimate hearing by the Court. The dissenting block also addressed the merits, writing that it was antithetical to the Clean Air Act to have greenhouse gases categorized as "air pollutants," and that the statute, by using the word "judgment" in § 202(a)(1), provided a reasonable basis for the EPA to decide not to regulate greenhouse gases.

EPA Action Following *Massachusetts v. EPA*

At this point, President Bush was in his final term in office, and the 2008 electoral cycle was in full swing. EPA's next major action in response to the Supreme Court's remand of *Massachusetts v. EPA* did not take place until after the 2008 presidential elections, and EPA leadership within the executive branch had changed.

Under the tenure of Lisa P. Jackson, President Obama's first-term EPA administrator, the EPA issued an Endangerment Finding for greenhouse gases on December 15, 2009, which "defined as a single 'air pollutant' an 'aggregate group of six long-lived and directly-emitted greenhouse gases' that are 'well mixed' together in the atmosphere and cause global climate change: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride." *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency*.

The Endangerment Finding, relying on a considerable body of scientific evidence, concluded that "motor-vehicle emissions of these six well-mixed gases 'contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.'"

Having identified greenhouse gases as air pollutants requiring regulation under Clean Air Act § 202(a)(1), the EPA next issued a "Tailpipe Rule," which set motor vehicle greenhouse gas emission standards for cars and light trucks. Under the terms of Clean Air Act § 202(a)(2), which states that "Any regulation prescribed under

paragraph (1) of this subsection (and any revision thereof) *shall* take effect *after* such period as the Administrator *finds necessary* to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period" (emphasis added), the EPA was able to defer the implementation of the Tailpipe Rule to allow for adequate technological development. Therefore, although promulgated in May of 2010, the EPA established the implementation date for the Tailpipe Rule as January 2, 2011, providing an 8-month period of adjustment before compliance would be required.

The EPA next determined that its regulation of greenhouse gas emissions under the Tailpipe Rule *automatically triggered* the need to *also* regulate greenhouse gas emissions under two other sections of the Clean Air Act—the Prevention of Significant Deterioration of Air Quality (PSD) program, and the Title V Stationary Source Operating Permit program (Title V).

Specifically, for the PSD program, EPA found that (a) any stationary source which met the statutory definition of "major emitting facility" under 42 U.S.C. § 7479(1) would be required to obtain a PSD permit as described in 42 U.S.C. § 7475; (b) the definition of "major emitting facility" in § 7479(1) encompasses any stationary source of any "air pollutants which emit, or have the potential to emit" a certain designated quantum of "any air pollutant"; (c) once greenhouse gases were subject to Clean Air Act regulation under the Tailpipe Rule, greenhouse gases automatically qualified as "air pollutants" under § 7479(1); and (d) therefore, any stationary source which emitted the statutorily designated quantum of greenhouse gases would be required to comply with PSD § 7475 permitting requirements going forward.

For the Title V program, EPA likewise found that (a) any stationary source which met the statutory definitions for "major source" under 42 U.S.C. § 7661(2) would be subject to Title V permitting requirements; (b) the definition of "major source" in § 7661(2) encompassed, *inter alia,* any "major stationary source" as defined in 42 U.S.C. § 7602; (c) the phrase "major stationary source" as defined in 42 U.S.C. § 7602(j) mean(s) "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)"; (d) the term "air pollutant" as defined in 42 U.S.C. § 7602(g), means "any air pollution agent or combination of such agents, including any physical, chemical, biological radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used"; (e) greenhouse gases had been categorized as "air pollutants" subject to Clean Air Act regulation, both by the terms of the Clean Air Act itself and by the United States Supreme Court; and (f) therefore, any stationary source which emitted the statutorily designated quantum of greenhouse gases would be required to comply with Title V permitting requirements going forward.

While investigating the relationship between greenhouse gas regulation under Title II (motor vehicle emissions) and greenhouse gas regulation under the PSD and Title V provisions of the Clean Air Act, EPA determined that the statutorily designated quantums identified in the PSD and Title V provisions were too small to apply meaningfully to the regulation of greenhouse gases for stationary sources. In other words, the statutorily identified quantums for pollution emissions under the PSD and Title V programs were in the 100 and 250 tons per year range, which Congress and EPA had determined was an appropriate range for the pollutants that were known to be emitted from stationary sources.

However, since greenhouse gases had not yet been identified as regulated pollutants at the time the PSD and Title V programs were created, and since EPA determined that greenhouse gases are typically emitted in far greater quantities than other PSD and Title V pollutants, EPA created the "Tailoring Rule," which modified the tons per year threshold—for the newly regulated greenhouse gases *only*—to a range of 75,000 to 100,000 tons per year.

The EPA created the Tailoring Rule to prevent, at least initially, thousands of previously unregulated entities from having to enter the PSD and Title V programs on the basis of their greenhouse gas emissions alone. In other words, EPA recognized that, before the Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule went into effect, there were thousands of entities in the United States which had not previously been required to participate in the PSD and Title V programs because, although they *did* emit the as-yet unregulated greenhouse gases, they did not emit other types of pollutants in amounts covered by the PSD and Title V programs. EPA did not want to force these entities into the PSD and Title V programs merely on the basis of their greenhouse gas emissions; therefore, EPA adjusted the regulatory threshold for greenhouse gas emissions to an amount (75,000–100,000 tons per year) that EPA estimated would exempt the majority of these smaller entities from the PSD and Title V program requirements.

Current Litigation

Once all four of these rules—the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule—had been published, a multitude of parties (including industry groups, states, think tanks, and nonprofit organizations) filed petitions for judicial review of these EPA regulations, contending that the EPA had erroneously interpreted the Clean Air Act, and otherwise acted arbitrarily and capriciously. These cases were consolidated by the D.C. Circuit, under the name of *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency.* (The plethora of cases that had been filed was consolidated, for D.C. Circuit purposes, into the following four Docket Numbers: 09-1322, 10-1073, 10-1092, 10-1167, each of which, in its own turn, represented the previous consolidation of over 10 other separate case filings. All together, *Coalition for Responsible Regulation, Inc. v. EPA* comprises nearly 100 separate docket numbers. The D.C. Circuit held oral arguments over the 2-day period of February 28 and 29, 2012.)

The D.C. Circuit issued its initial panel opinion on June 26, 2012, 684 F.3d 102 (2012). The panel, ruling per curiam, held that (a) EPA's Endangerment Finding was rational and legally permissible in view of the record assembled and used by EPA in making the Endangerment Finding determination; (b) EPA's Tailpipe Rule was rational and legally permissible in view of the record assembled and used by EPA in making the Tailpipe Rule, and that the EPA

had not abused its administrative discretion in creating the Rule or delaying its implementation to January 2, 2011; (c) once EPA had made its Endangerment Finding and enacted its Tailpipe Rule, it was statutorily authorized and required to regulate the newly defined pollutant "greenhouse gas" under the PSD and Title V programs; and (d) that although some plaintiffs-petitioners had standing to challenge EPA's *automatically triggers* determination, no industry or state party had standing to challenge either the Tailoring Rule or the Timing Rule itself, because no industry or state party could demonstrate that implementation of these two rules caused it to suffer an injury-in-fact.

The D.C. Circuit subsequently denied a petition for rehearing en banc on December 20, 2013. Judges Sentelle, Henderson, Rogers, Tatel, and Griffith concurred in the denial of rehearing. Judges Brown and Kavanaugh each authored dissenting statements.

The industry-state consortium subsequently petitioned for a writ of certiorari, which the U.S. Supreme Court granted on October 15, 2013. The Supreme Court limited its grant of certiorari to the following question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." The Court also allocated a total of one hour for oral argument.

ISSUES

Procedural Issues—Jurisdiction and Standing

In *Coalition for Responsible Regulation, Inc. v. EPA,* the immediate predecessor and progenitor to *Utility Air Regulatory Group v. EPA,* standing challenges were present. Specifically, the EPA alleged that industry-state parties lacked standing to challenge EPA's Timing and Tailoring Rules because these rules had the effect of ameliorating (rather than causing or enhancing) harms that industry-state petitioners would allegedly suffer as a result of having to regulate greenhouse gas emissions under the PSD and Title V permitting programs.

Although the standing issue was thoroughly briefed, argued, and discussed in *Coalition for Responsible Regulation, Inc. v. EPA,* the Supreme Court, in its October 15, 2013, order granting certiorari, seems to have taken the standing issue out of contention.

Therefore, it appears that at oral argument, the discussion will focus not on the jurisdictional aspect of standing, but rather on the "merits" issues of statutory construction and agency discretion.

Merits Issues—Statutory Construction and Agency Discretion

The substantive issues presented in *Utility Air Regulatory Group v. EPA* are similar to those addressed in its distant progenitor *Massachusetts v. EPA.* In both cases, the central substantive issue is whether the Obama administration EPA has (a) properly interpreted specific statutory language in the Clean Air Act; and (b) properly exercised its administrative decision-making authority.

CASE ANALYSIS

The central question in this case is whether EPA can legally defend its *automatically triggers* determination. The EPA's *automatically triggers* determination forms the basis for its Timing and Tailoring Rules, both of which are challenged by industry and state litigants.

According to the EPA, the Court's remand in *Massachusetts v. EPA* both authorized and required the EPA to determine whether an Endangerment Finding was scientifically required for greenhouse gases. Once the EPA had made its Endangerment Finding, it then had the authority to regulate greenhouse gases under Title II of the Clean Air Act (42 U.S.C. § 7521 et seq.) via the Tailpipe Rule. EPA goes on to argue that once greenhouse gases had been *initially* regulated under *any* portion of the Clean Air Act, the PSD and Title V provisions required that greenhouse gases *also be regulated* under the PSD and Title V programs. This is the step that is referred to as the *automatically triggers determination*—the step that links regulation of greenhouse gases under Title II of the Clean Air Act to regulation of greenhouse gases under other separate (but, EPA maintains, related) portions of the statute.

Industry and state litigants complain that EPA has improperly "piggy-backed" the regulation of greenhouse gases under Title II (motor vehicle emissions) of the Clean Air Act to the regulation of greenhouse gases under the act's PSD and Title V programs. Specifically, industry and state litigants allege that the meaning of "air pollutant" for the purposes of PSD and Title V regulation is statutorily distinct from the regulation of greenhouse gases under Title II of the act. Industry and state litigants further assert that Congress never intended the PSD and Title V programs to encompass the number and types of sources that would be susceptible to PSD and Title V requirements if greenhouse gases were to be regulated under these programs.

In support of its arguments, EPA relies on (a) the agency's historic interpretation of statutory provisions; (b) internal EPA guidance documents; and (c) declarations of legislative purpose made during the enactment of the Clean Air Act and its amendments.

As an example of internal agency guidance, and historical reliance on prior EPA interpretations, the EPA references the "Johnson Memo," a legal opinion issued on December 18, 2008, by then-outgoing EPA administrator Stephen Johnson formally titled "EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program." This memo described the EPA's position with respect to the manner in which a previously unregulated pollutant becomes subject to the PSD and Title V program requirements. According to this memo, the EPA had historically treated the "subject to regulation" language in PSD and Title V provisions as meaning subject to any CAA requirement establishing actual control of emissions, or as meaning subject to any properly enacted EPA rule that requires actual control of emissions. This memo established that EPA's interpretation of "subject to regulation" for purposes of PSD and Title V compliance was that "a pollutant is 'subject to regulation' only if it is subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant." This is referred to as the "actual control interpretation." After engaging in a formal rulemaking process, which included opportunity for public comment, the EPA issued a Notice on March 29, 2010, which reendorsed the "actual control interpretation," with minor modification. The substance of the minor modification forms

the basis for the Timing Rule, which EPA issued contemporaneously on April 2, 2010.

EPA further relies on the *Chevron* deference—a well-established judicial principle of administrative law. The basic principles of *Chevron* deference are (a) the reviewing court looks to the statutory language itself to determine whether the language is (or is not) ambiguous; (b) if the statutory language is not ambiguous, the agency is required to engage in a straightforward application of that language; (c) if the language is ambiguous, the agency is authorized to interpret the ambiguous statutory language to the best of its ability, and the reviewing court must defer to the agency's reasonable interpretation of the statutory language; and (d) the standard for review is whether or not the agency was arbitrary or capricious in its interpretations, actions, or inactions. In defense of its Tailoring and Timing Rules, the EPA also invokes the doctrines of "absurd results" and "administrative necessity," both of which, industry-state litigants argue, support their premise that the Clean Air Act never contemplated the regulation of greenhouse gases under either the PSD or Title V provisions.

In support of their arguments, industry and state litigants point to (a) differing sections of the Clean Air Act, which, in these litigants' view, employ different constructions of the same words and phrases, therefore making them nontransferable across different portions of the Clean Air Act; and (b) declarations of legislative purpose made during the enactment of the Clean Air Act and its amendments. Industry and state litigants also warn that allowing greenhouse gas regulation under the PSD and Title V programs will cause calamitous economic and social consequences.

SIGNIFICANCE

The significance of this case may be described in terms of legal, policy, and practical implications.

Legal and Policy Implications

Although they disagree regarding the legitimacy of its holding, both sides in this case acknowledge *Massachusetts v. EPA* as the governing law with respect to greenhouse gas regulation under the Clean Air Act. Therefore, the Court may revisit its analysis in *Massachusetts v. EPA,* with several possible outcomes: (1) the Court could hold to the basic tenets of *Massachusetts v. EPA,* but limit its scope of application to greenhouse gas regulation only under Title II (motor vehicle emissions) of the Clean Air Act; (2) the Court could reaffirm its decision in *Massachusetts v. EPA* and extend its application to allow regulation of greenhouse gas emissions throughout the Clean Air Act as a whole; or (3) the Court could (theoretically) vacate *Massachusetts v. EPA* and determine that the Clean Air Act does not, in fact, allow for the regulation of greenhouse gas emissions at all.

It is patently unlikely that the Court will reverse or vacate its holding in *Massachusetts v. EPA.* Although Justices Stevens and Souter have since retired from the Court, they have been replaced by Justices Sotomayor and Kagan, neither of whom seems likely to join the block of justices dissenting in 2007. To be sure, *Utility Air Regulatory Group v. EPA* presents ample opportunity for Chief Justice Roberts and Justice Scalia to revisit their dissents in *Massachusetts v. EPA;* however, a significant change to the status of *Massachusetts v. EPA* seems likely if, and only if, Justice Kennedy (who joined with the majority in 2007) were to change his position.

It *is* possible that the Court might shape a ruling that allows EPA to regulate greenhouse gas as a pollutant under 42 U.S.C. § 7521 but prevents EPA from regulating greenhouse gas as a pollutant under either the PSD or Title V programs. If this outcome occurs, and EPA subsequently determined that greenhouse regulation under PSD and Title V programs was still a valuable agency goal, it would likely have to either undertake a new rulemaking process (perhaps under the rubric of Clean Air Act § 166, 42 U.S.C. § 7476), or engage Congress to enact a greenhouse gas-specific statutory amendment to the Clean Air Act. Either task might prove daunting in a midterm election year.

It is also possible that the Court might find that all of EPA's regulations contain permissible statutory interpretations, and that the agency did not abuse its administrative discretion in the promulgation of any of these rules. Under the Court's long-standing *Chevron* deference standard, all four rules could then be implemented (and enforced) as written. Such an outcome would remain in place until at least a change in EPA leadership occurred.

A clue to how the Court might rule may exist in the question framed by the Court for consideration: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."

It is interesting that this question is framed in the *positive* rather than in the *negative*—i.e., the question reads "Whether the EPA *permissibly* determined. …" rather than "Whether the EPA *impermissibly* determined. …" This may suggest that the justices who voted to grant certiorari wanted to accept the case in order to clarify and buttress the holding in *Massachusetts v. EPA,* rather than to relinquish or diminish it.

Finally, the outcome of this case, in conjunction with the outcome of *EPA v. EME Homer City Generation* (Consolidated Dockets 12-1182 and 12-1183), argued on December 10, 2013, may have implications for how *Chevron* deference is applied in the Clean Air Act context going forward. Both *Utility Air Regulatory Group* and *EME Homer City* present direct challenges to EPA's interpretation of key phrases of the Clean Air Act. Both cases also involve challenges to EPA's interpretation of its own internal guidance documents. Therefore, it is possible that (in one or both opinions) the Court may create a nuanced departure from its traditional *Chevron* deference standard.

Practical Implications

In addition to the possible legal and policy implications, the Court's decision will also have practical ramifications. If the Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule are found to be valid as promulgated, both industry and state regulating authorities will need to organize their compliance infrastructures. For industry, this likely means acquiring assistance interpreting and navigating the permitting requirements and processes, which likely will result in an increase in operational costs that may, in turn, be passed on to consumers. For federal, state, and local regulating authorities, this likely means increasing capacity to administer

permitting, monitoring, and enforcement processes both for additional entities and for an additional set of pollutants. Either way, the outcome of this case likely will have some type of impact on job creation and development, the management of state revenues, and the environmental future of industrial enterprise.

CONCLUSION

All eyes administrative and environmental will be keenly watching the outcome of this case. The outcome may determine whether—and how—the EPA will be able to go forward with initiatives for greenhouse gas regulation. Given that this case should be decided before the November 2014 midterm elections occur, the outcome (either way) is likely to spark vigorous public debate, legislative activity, and, ultimately, another round of judicial review.

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PREVIEW of United States Supreme Court Cases, pages 205–211.

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In January, the Court heard a number of interesting cases. Below we highlight some of the more engaging comments between the justices and the advocates during *NLRB v. Noel Canning* (Docket No. 12-1281). *Noel Canning* asked the Court to determine whether the Recess Appointment Clause authorizes the president to make a recess appointment during a prolonged intrasession recess of the Senate when the Senate sits pro forma every three days.

Justice Stephen Breyer: I cannot find anything, so far, and I may have missed it—I'm asking—I can't find anything that says the purpose of this clause has anything at all to do with political fights between Congress and the President. To the contrary, Hamilton says that the way we're going to appoint people in this country is Congress and the President have to agree. Now, that's a political problem, not a constitutional problem, that agreement. And it was just as much true of President George Bush, who made six appointments that happened previously, as it is with President Obama, who's made four. All right? So where—and he says this clause is a supplement, a supplement, to the basic clause to take care of the timing problem. So, what have I missed? Where is it in the history of this clause, in its origination, that it has as a purpose to allow the President to try to overcome political disagreement?

General Donald B. Verrilli (Solicitor General, on behalf of the petitioner): I don't think that that's—I don't think that that's its purpose, but it is in the Constitution. The President has the authority to make appointments …

Justice Breyer: Well, if it isn't a purpose, can you give me an example where the language, particularly that word "happen"—I mean, your example is a good one but I don't think it applies, but that's a different matter. I can't—the language is over here. The number of appointments on "happen" is few. If you are worried about James Tobin, Congress has passed a law that can be taken as looking at a vacancy occurring when it occurs within 30 days of the beginning of the recess, which would have taken care of Tobin.

* * * *

Justice Elena Kagan: [T]hey'll phrase it differently, and we would be back here with the same essential problem, that you're asking us to peg this on a formality that the Senate could easily evade, and that suggests that it really is the Senate's job to determine whether they're in recess or whether they're not.

General Verrilli: I think there has to be a limit to that point, Justice Kagan, because, after all, what we're talking about here is a power that the Constitution gives to the President, the power in Article II, and the President has got to make the determination of when there's a recess.

Justice Sonia Sotomayor: But why? You're making an assumption, which is that the Senate has to take a recess, but the Senate could choose, if it wanted to, and I think there might be some citizens that would encourage it to, to never recess.

General Verrilli: Sure. Of course, it could.

Justice Sotomayor: And—and to work every day, which—lots of people do.

General Verrilli: That's true. They could—they could decide not to take a recess. (Laughter.)

* * * *

Mr. Miguel Estrada (on behalf of Senate Republican Leader Mitch McConnell, support respondents): What the Framers contemplated in coming up with a joint power of appointment was you have to act jointly. You have to play nice. And in a country of 300 million people, when the President wants a nominee and the Senate does not agree, it is always possible for the President to come up with another nominee who is even more qualified and acceptable to the Senate. The key here is acceptable to the Senate. He has to be able to proffer someone to the Senate that the Senate is willing to engage in a joint power of appointment for. ■

Does a State Violate the Prohibition on Execution of Persons with Mental Retardation When It Determines Mental Retardation Only by Reference to an IQ Test Score?

CASE AT A GLANCE

Florida enacted a statute, § 921.137, that prohibits the execution of mentally retarded persons. In particular, the law bans the execution of anyone with "performance that is two or more standard deviations from the mean score on a standardized intelligence test," along with "deficits in adaptive behavior and manifested during the period from conception to age 18." The Florida Supreme Court interpreted the law to set a rigid IQ cutoff so that it only protects individuals who can show that their IQ falls below 71.

Hall v. Florida
Docket No. 12-10882

Argument Date: March 3, 2014
From: The Supreme Court of Florida

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

INTRODUCTION

The Supreme Court ruled in *Atkins v. Virginia,* 536 U.S. 304 (2002), that the "mentally retarded should be categorically excluded from execution." The Court said that the traditional justifications for the death penalty did not apply to the mentally retarded. But the Court did not specifically define mental retardation. As a result, death-penalty states such as Florida have set their own definitions of mental retardation.

ISSUE

May a state, consistent with *Atkins,* ban the death penalty only for individuals who can show that their IQ falls below 71?

FACTS

Freddie Lee Hall was tried and convicted for the 1978 murder of Karol Hurst. He was sentenced to death. (Hall's codefendant, Mack Ruffin, also convicted of murder in a separate trial, was sentenced to life in prison.) Hall's conviction and sentence were upheld on direct appeal by the Florida Supreme Court.

Hall later filed a motion in the Florida courts to vacate his sentence based on mitigating evidence of his mental retardation and the brutal abuse he suffered as a child. (Hall filed this motion after the Supreme Court ruled in 1987 in *Hitchcock v. Dugger,* 481 U.S. 393, that capital defendants must be permitted to present nonstatutory mitigating evidence in the penalty phase of a capital trial.) The Florida Supreme Court vacated Hall's death sentence and remanded for a new sentencing proceeding.

At the resentencing hearing in December 1990, Hall presented uncontroverted evidence of his mental retardation. Hall's family members testified to his childhood mental disabilities, including difficulties understanding, thinking, and communicating. His school records indicated that his teachers repeatedly identified him as "mentally retarded." Hall's former attorneys testified that because of his mental disabilities and problems with communication, Hall could not even assist with his own defense. And evidence from clinicians concluded that Hall was "extremely impaired psychiatrically, neurologically and intellectually," that he showed signs of "serious brain impairment," and that he "is probably incapable of even the most … basic living skills which incorporate math and reading." One test, the Wechsler Adult Intelligence Scale—Revised, or "WAIS-R," administered by a graduate student, put Hall's IQ at 80. Another test, the Revised Beta Examination, scored Hall at 60 (the lowest possible score), in the range of mental retardation. (Earlier tests, a Beta Test and a Kent Test, put Hall's IQ at 76 and 79 respectively. But these tests are not considered as reliable as the Wechsler test. Indeed, Florida does not permit the use of the Kent or Beta tests to determine mental retardation at sentencing in capital cases.) Based on this last test and other evaluations, one doctor concluded that Hall was "mentally retarded" and that the mental retardation was "long-standing."

The trial court nevertheless again condemned Hall to death, and the Florida Supreme Court affirmed. He later sought postconviction relief. This was denied, and the Florida Supreme Court affirmed.

In 2001, Florida enacted a statute, § 921.137, that prohibited the execution of persons with mental retardation. The law defined mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." The law further defined "significantly subaverage general intellectual

functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the [relevant Florida] rules."

The next year, the Supreme Court ruled in *Atkins v. Virginia* that the "mentally retarded should be categorically excluded from execution." The Court explained that the "diminished capacities" of persons with mental retardation "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" undermined the traditional justifications for the death penalty and made it more likely that persons with mental retardation would be wrongfully convicted and executed.

In 2004, Hall filed a claim under Florida Rule of Criminal Procedure 3.203, which established a process for *Atkins* claims, arguing that his death sentence violated *Atkins*. A hearing was held on Hall's motion in 2009. Hall presented evidence similar to that in his previous case. In particular, Dr. Greg Pritchard testified that he administered the Wechsler Adult Intelligence Scale-III, or "WAIS-III," on which Hall scored 71. Dr. Pritchard also considered the results of a WAIS-IV test administered by Dr. Joseph Sesta in 2008, on which Hall scored 72, and a WAIS-III test administered by Dr. Bill Mosman in 2001, on which Hall scored 69. The trial court excluded Dr. Mosman's report, however, because Dr. Mosman died, and Hall's attorney was unable to provide the state with the raw data underlying the report. Dr. Harry Krop testified that Hall's IQ was 73 on the WAIS-R.

The trial court denied Hall's motion on the ground that Hall was unable to demonstrate "an I.Q. score of 70 or lower." The trial court set that particular threshold because the Florida Supreme Court interpreted § 921.127 two years earlier, in *Cherry v. State,* 959 So.2d 702 (Fla. 2007), to mean that only persons with an IQ of 70 or under qualified as mentally retarded. (The condemned prisoner in *Cherry* had an IQ of 72. The Florida Supreme Court denied relief.) The Florida Supreme Court, relying on its holding in *Cherry,* affirmed. This appeal followed.

CASE ANALYSIS

The Supreme Court ruled in *Atkins* that a state violates the Eighth Amendment's ban on cruel and unusual punishment when it executes a mentally retarded person. But the case did not define mental retardation. As a result, states have developed their own approaches to defining mental retardation. Florida's approach, under the state Supreme Court ruling in *Cherry,* defines mental retardation rigidly, as an IQ test score of 70 or below.

The parties in this case argue whether Florida's approach violates *Atkins*. More particularly, they argue whether executing a person, such as Hall, who has IQ test scores above 70 but nevertheless has severe and well-documented deficiencies in his intellectual functioning and adaptive behavior, violates the Supreme Court's prohibition on executing the mentally retarded.

Hall argues first that *Atkins* forbids the execution of persons meeting the clinical definition of mental retardation. According to Hall, that definition does not set a rigid cutoff; instead, it incorporates three prongs: (1) "significantly subaverage" intellectual functioning; (2) limitations in adaptive functioning; and (3) onset before age 18. Hall says that the Court in *Atkins* recognized this because it cited two clinical sources that contained definitions that incorporated these three prongs, and because it repeatedly described IQ, again citing these and other clinical sources, as only a rough measure of mental retardation. (Hall, and the Court, refer to the definitions of mental retardation promulgated by the American Association on Mental Retardation, or the AAMR, now the American Association on Intellectual and Developmental Disabilities, or the AAIDD, and the American Psychiatric Association, or APA.) Hall contends that Florida's rigid cutoff for mental retardation impermissibly redefines the clinical definition of mental retardation under *Atkins*. (Hall notes that the plain language of § 921.137 can be squared with *Atkins*. It is the Florida Supreme Court's rigid interpretation of § 921.137 that violates *Atkins*.)

Next, Hall argues that Florida's rigid approach does not comport with the commonly accepted clinical definition of mental retardation. In particular, Hall claims that Florida's rigid approach fails to take into account the standard error of measurement, or SEM. As Hall explains, "in Florida, an obtained IQ test score of 71—notwithstanding that it is clinically indistinguishable from a score of 70, in light of the inherent measurement error in the test—bars a defendant from presenting any evidence of limitations in adaptive functioning." This is so, even though that evidence may be compelling, and even though psychiatrists may have diagnosed the defendant as having mental retardation. Hall points (again) to the nearly identical definitions promulgated by the AAIDD and the APA, both of which account for measurement error within a range of plus or minus five points. Hall says that an obtained IQ score plus or minus one SEM yields a confidence interval equating to a 66 percent probability that a person's true IQ test score falls within that range. (If a person's score is 70, with a SEM of 2.5 points, there is about a two-thirds chance that the person's actual IQ is between 67.5 and 72.5.) He claims that the definitions promulgated by the AAIDD and the APA both account for the SEM and the resulting confidence interval. He says that they also look to guidelines on intellectual functioning and adaptive behavior, in addition to IQ scores, and require clinical judgment to determine mental retardation. Hall contends that both the AAIDD and the APA reject a specific cutoff score as the measure for mental retardation.

Hall says that Florida's rigid approach is inconsistent with these commonly accepted clinical definitions. Moreover, he contends that other death penalty states have rejected Florida's rigid approach, and that Florida is in a small minority of states that have adopted a rigid cutoff without consideration of the SEM. He claims that Florida's rigid approach will result in an unacceptable risk of executions of individuals who are mentally retarded.

Finally, Hall argues that there is no genuine dispute that under accepted clinical standards, he is mentally retarded. Hall says that all of his scores, save his score of 80, an outlier, are in the 95 percent confidence interval for a "true" score of 70, or two standard deviations below the mean IQ score. He contends that while those scores alone are insufficient to yield a diagnosis of mental retardation, they would prompt any competent clinician to investigate his adaptive behavior. And based upon that investigation—through all the evidence of his poor intellectual functioning and adaptive behavior submitted at earlier hearings—Hall says that he is mentally retarded.

The state argues first that *Atkins* left states substantial leeway in enforcing the ban on executing the mentally retarded. The state says that *Atkins* did not prescribe any particular diagnostic criteria or definition of mental retardation and, in particular, did not hold that states must apply the AAID or APA definitions. Indeed, the state claims that *Atkins* relied on a national consensus against executing the mentally retarded that included Florida's § 921.137 and other states with varied definitions of mental retardation. In other words, the state says that *Atkins* recognized a national consensus against executing the mentally retarded, but not a national consensus around a definition of mental retardation. Florida claims that the Court in *Atkins* relied on its own judgment about the mentally retarded and why they cannot be executed, not on a particular medical definition of mental retardation; instead, it left that to the states.

The state argues next that the Court should not eliminate the states' roles in enforcing *Atkins*. The state claims that the Court has traditionally deferred to the states in defining mental conditions for the purposes of criminal law. Moreover, the state says that deference is particularly appropriate here, where diagnostic criteria for mental retardation (including criteria for evaluating intellectual functioning, adaptive functioning, and even the age of onset) have changed so much over time and are constantly evolving. In particular, the state points to the changing ways that authorities have relied on IQ. Given these differences, the state says that a person could be labeled mentally retarded under one definition but not under another. The state claims that it would be particularly inappropriate for the Court to force the states to agree with any one particular authority under these circumstances. The state also suggests that the APA, the AAIDD, and similar groups seek to limit the application of the death penalty. According to the state, if the Court requires states to adhere to (evolving) clinical criteria developed by these groups, then these groups "would have unavoidable incentives to adopt even more expansive definitions of mental retardation" in order to serve their political purpose, to limit the application of the death penalty.

Third, the state argues that its approach is appropriate under *Atkins*. The state says that its definition generally conforms to the clinical definitions. It claims that its approach requires a finding on all three prongs (intellectual functioning, adaptive functioning, and age-of-onset), and that its IQ threshold is a long-settled way of determining mental retardation. It contends that consideration of the SEM is appropriate for some purposes (such as education, or determining eligibility for services), but not here, where Hall introduced numerous and varying test scores that fell above 70. The state says that a defendant can still introduce other mitigating evidence that satisfies some nonstatutory definitions of mental retardation.

The state contends that there is no national consensus on how to use the SEM, or how to consider clinical criteria. Still, it says that its approach is consistent with other states. It claims that Hall's approach would undermine its important interests in finality (because Hall's approach would necessarily lead to subsequent challenges based on constantly evolving clinical definitions) and an objective determination of mental retardation.

Finally, the state argues that Hall is not mentally retarded. The state says that Hall's crime—involving a multistep plan that was cold, calculated, and premeditated—shows that he was not mentally retarded when he committed the crime. It also says that Hall's medical evidence (including the results of his IQ tests) fails to show that his mental state was attributable to mental retardation. Instead, it says, Hall's evidence suggests that his mental state was attributable to his difficult childhood, abusive mother, and poverty.

SIGNIFICANCE

According to an amicus brief filed by nine other states in support of Florida, ten states use "an obtained IQ test score above 70 [as] a conclusive, bright-line cutoff (without using the SEM) in evaluating the intellectual function prong of mental retardation." Two other states have adopted bright-line cutoffs above 75. A number of other states either do not use a rigid cutoff, or allow application of the SEM in evaluating IQ scores. A number of other states have not firmly determined their approaches. (Thirty-two states in all still have the death penalty, according to deathpenaltyinfo.org. The amicus brief for Arizona and eight other states contains an appendix with a summary of state laws and rulings on determining mental retardation and another appendix with each state's burden of proof.)

As a result, *Hall* potentially directly affects ten, or maybe twelve, states—those with rigid cutoffs for determining mental retardation. If the Court rules for Hall, those states will have to adjust their determination criteria to take into account the SEM, and possibly other factors. (The Question Presented asks only whether a state must consider the SEM. Still, there is nothing preventing the Court from saying more about the definition of mental retardation. It seems unlikely that the Court will prescribe a particular comprehensive definition or approach, though. Instead, if it rules for Hall, it will likely continue to give the states substantial room to craft their own definitions, within the broad boundaries of its ruling.)

On the other hand, if the Court rules for Florida, those states may obviously retain their rigid definitions. In that case, there is a possibility, although it seems quite slim, that other states that currently consider the SEM or other factors may simplify their own definitions and follow Florida's approach.

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PREVIEW of United States Supreme Court Cases, pages 212–215.

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The Fraud on the Market Presumption in Securities Class Actions: Déjà Vu All Over Again

CASE AT A GLANCE

For the third time in recent years, the Court will reexamine the fraud on the market presumption as it is applied in securities fraud class actions, known as the *Basic* presumption. However, in this case corporate defendants are asking the Court to finally and definitely overturn this long-standing presumption.

Halliburton Co. and Lesar v. Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc.
Docket No. 13-317

Argument Date: March 5, 2014
From: The Fifth Circuit

by Linda S. Mullenix
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ISSUE

The Court will consider two issues: (1) should the Court overrule or substantially modify its holding in *Basic Inc. v. Levinson,* 485 U.S. 224 (1988), which recognized a presumption of classwide reliance based on a fraud on the market theory, and (2) may a defendant rebut the presumption and defeat class certification by producing evidence that the defendant's alleged misrepresentations did not distort its stock market price?

FACTS

This appeal represents the second coming of securities class litigation between Halliburton Co. (Halliburton) and the Erica P. John Fund, Inc. (Fund), because the Court previously visited the same facts and similar issues between these litigants in 2011. See *Erica P. Fund, Inc. v. Halliburton Co.,* 131 S.Ct. 2179 (2011) (*Halliburton I*). In that case Halliburton unsuccessfully mounted an attack against the presumption of classwide reliance provided by the fraud on the market presumption established in *Basic Inc. v. Levinson.* Just last term, corporate defendants again unsuccessfully attacked and failed to make inroads on the fraud on the market presumption. See *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S.Ct. 1184 (2013).

This year—based on hints in *Amgen* that at least four justices might consider overturning the *Basic* decision—Halliburton has returned with a full-bore attack on the presumption, asking the Court to finally and definitely overrule this precedent.

In the first round of litigation, the Fund sued Halliburton, alleging that investors lost money following the decline of Halliburton's stock price. The Fund alleged that Halliburton had misrepresented the company's potential liability for asbestos liabilities, revenue for fixed-price construction contracts, and potential benefits from a merger with Dresser Industries. The investors complained that the company's stock price dropped after publication of negative news about these alleged misrepresentations.

In 2002, the Fund brought a securities class action lawsuit under Federal Rule 23(b)(3) in the Northern District of Texas, and in 2007 the Fund sought to certify a class of all purchasers of Halliburton stock between 1999 and 2001. In a securities class action, the party seeking certification must show that common class issues predominate over individual issues. The Fund relied on the Court's *Basic* fraud on the market presumption of classwide reliance, which relieves individual investors of having to prove that they each detrimentally relied on the company's alleged misrepresentations in purchasing or retaining their stock. The presumption, then, satisfies the Rule 23(b)(3) reliance requirement.

The district court denied class certification, holding that the plaintiffs had failed to establish "loss causation," which was then a certification requirement under Fifth Circuit jurisprudence. The Fifth Circuit affirmed, concluding that the Fund was unable to point to any stock price increases resulting from positive misrepresentations, and that the Fund failed to prove market movement and loss causation.

On appeal in 2011, Halliburton argued that a plaintiff did not need to prove loss causation, but also argued that it effectively rebutted the presumption by showing the absence of any price impact—that the alleged misrepresentations did not affect the stock's market price. The Supreme Court reversed the Fifth Circuit and held that a plaintiff not need prove loss causation to invoke *Basic*'s presumption of classwide reliance. Although the Court acknowledged Halliburton's argument that it was entitled to rebut the presumption, the Court did not discuss how or when a defendant could rebut the presumption. The Court remanded the case so that the Fifth Circuit could address Halliburton's price-impact rebuttal argument.

The Fifth Circuit remanded the case to the district court, which certified the class. While on appeal to the Fifth Circuit for a second time, the Court decided *Amgen*. In *Amgen,* the Court held that plaintiffs need not establish that alleged misrepresentations were material in order to satisfy the *Basic* presumption. However, four justices (Justices Scalia, Kennedy, Thomas, and Alito), signaled their willingness to consider the continuing vitality of the *Basic* presumption itself in some future case.

The Fifth Circuit affirmed the district court's class certification. The appellate court characterized price impact as analogous to the materiality requirement, thereby concluding that the *Amgen* decision permitted similar application of the fraud on the market presumption. The court refused to consider Halliburton's offer of extensive evidence that the alleged misrepresentations had no impact. The court concluded that "if Halliburton were to successfully rebut the fraud-on-the-market presumption by proving no price impact, the claims of all individual plaintiffs would fail because they could not establish an essential element of the fraud action."

CASE ANALYSIS

Shareholder securities fraud class actions are a specialized type of fraud litigation. When a plaintiff individually pursues an ordinary common law fraud claim, the plaintiff must prove that he or she knew of an alleged fraudulent or misleading statement, and relied on that statement to his or her detriment. Pursuing fraud claims in the class action context, however, has been extremely difficult.

In order to certify a fraud class action for damages under Federal Rule of Civil Procedure 23(b)(3) for alleged violations of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, plaintiffs must demonstrate that common issues of law or fact predominate over individual issues. Therefore, because common law fraud claims entail an inherently individual reliance issue, almost all courts have refused to certify fraud class actions because such classes cannot satisfy the predominance requirement.

In 1988, the Supreme Court announced a doctrine to enable class certification in securities fraud class actions by substituting a rebuttable presumption that security purchasers rely on the integrity of the market price, which is presumed to incorporate all public, material misrepresentations. This so-called *Basic* presumption, or the "fraud on the market" presumption, enables a plaintiff in a securities fraud class action to submit proof of an efficient market of reliance in lieu of individual proof that would undermine the predominance requirement.

In order to invoke the fraud on the market presumption of reliance, a plaintiff must establish that (1) the defendant made public, material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed.

However, if a plaintiff satisfies these criteria, the Court in *Basic* also held that a defendant could then rebut the reliance presumption by showing that the misrepresentation in fact did not lead to a distortion in price. The *Basic* decision indicates that a defendant may rebut the presumption by refuting the elements of the presumption (such as market efficiency) or by making "[a]ny showing that severs the link between the alleged misrepresentation and either the price received or paid by the plaintiff, or his decision to trade at a fair market price."

If a defendant successfully rebuts the reliance presumption, then the causal connection between the misrepresentation and the plaintiff's reliance would be broken. When a defendant successfully rebuts the presumption, then plaintiffs must respond with sufficient evidence to reestablish the presumption. If the plaintiffs cannot, then they would have to establish reliance on a plaintiff-by-plaintiff basis. Thus, if plaintiffs cannot demonstrate that they are entitled to a presumption of reliance on the market price, or otherwise show that common issues predominate over individual issues, then a court may not certify a class action under Rule 23.

In its first appeal to the Court, Halliburton asked the Court to tighten class certification requirements where plaintiffs invoke the fraud on the market presumption, contending that a plaintiff must prove "loss causation" as a predicate to application of the *Basic* presumption.

In a unanimous opinion by Chief Justice Roberts, the Court rejected Halliburton's suggestion to tighten a plaintiff's pleading burden at class certification, which would have required plaintiffs to provide additional proof to invoke and rely on the fraud on the market presumption in lieu of actual reliance. The Court answered the simple question whether a plaintiff in a Rule 10b-5 securities class action must prove loss causation to obtain class certification with an unqualified "No."

In *Halliburton I,* the Court rejected prior appellate decisions that suggested that a plaintiff needed to prove loss causation in order for a court to apply the presumption of reliance to certify a Rule 23(b)(3) class. Plaintiffs do not need to demonstrate by a preponderance of the evidence "loss causation"—that alleged misrepresentations had an impact on a company's stock price. The Court indicated that a rule requiring the proof of loss causation as a precondition to class certification contravened *Basic*'s fundamental premise: that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his or her transaction.

The Court noted that loss causation addressed something different than whether an investor relied on a misrepresentation when buying or selling a stock. Thus, the element of reliance in a private Rule 10b-5 action refers to *transaction causation,* and not loss causation (which requires a showing of subsequent economic loss). The Court held that appellate decisions requiring proof of loss causation for class certification were not justified by the *Basic* decision or its logic. The Court indicated that it had never before mentioned proof of loss causation as a precondition for invoking *Basic*'s presumption of reliance. In addition, the term "loss causation" does not even appear in the *Basic* decision. However, the Court limited its opinion by not addressing any other question about the *Basic* decision, its presumption, or how or when the *Basic* presumption might be rebutted.

Two years later in *Amgen,* the Court analyzed what plaintiffs need to plead during securities class certification proceedings, this time addressing the materiality of the defendant's alleged misstatements. In a majority opinion by Justice Ginsburg, the Court held that plaintiffs do not carry a burden to prove the materiality of the alleged

fraudulent statements to take advantage of the fraud on the market presumption. In so holding, the Court resolved a circuit conflict concerning whether district courts must require plaintiffs to prove, and allow defendants to present evidence to rebut, the element of materiality before certifying a securities fraud class action.

The Court split 6-3, generating a series of separate opinions. The Court's four-member liberal wing, joined by Chief Justice Roberts and Justice Alito, united to save the fraud on the market presumption from further inroads. However, Justice Alito filed a separate concurring opinion calling into question the continued vitality of the *Basic* presumption; the concurrence set up a possible future wholesale attack on that precedent. Justices Scalia, Kennedy, and Thomas filed dissenting opinions. Thus, the combined *Halliburton I* and *Amgen* decisions saved the fraud on the market presumption and represented dual victories for securities fraud plaintiffs.

In her opinion, Justice Ginsburg unpacked the merits of a securities fraud claim from what a plaintiff must demonstrate at the time of class certification. Thus, the majority concluded that while the plaintiff would certainly have to prove the materiality of the alleged fraudulent statements at summary judgment or trial to prevail on the merits, such proof was not a prerequisite to class certification. Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered in favor of the class on the merits.

In a much quoted statement, Justice Ginsburg opined: "Essentially, Amgen, also the dissenters from today's decision, would have us put the cart before the horse. To gain certification under Rule 23(b)(3), Amgen and the dissenters urge, Connecticut Retirement must first establish that it will win the fray. But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'method' best suited to adjudication of the controversy 'fairly and efficiently.'"

The majority conceptualized the pivotal question as whether a plaintiff's proof of materiality was needed to ensure that common questions of law or fact would predominate over individual class member questions. The Court concluded that, for two reasons, the answer was no. First, the question of materiality is objective and can be proved through evidence common to the class. Second, a plaintiff's failure of proof on the element of materiality would end the case for all, and no claim would remain in which individual reliance issues would potentially predominate. "Because a failure of proof on the issue of materiality … does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification."

In reaching these conclusions, the majority's opinion reaffirmed general principles of class certification jurisprudence. Thus, citing its 2011 decision in *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, the Court restated that a court's class certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claims. The Court acknowledged that merits questions may be considered only to the extent that they are relevant to determining whether a plaintiff can satisfy the Rule 23 prerequisites for class certification. The Court rejected, however, Amgen's policy arguments concerning the in terrorem effects and settlement pressure of class certification decisions.

The majority suggested that Congress had addressed these problems legislatively in enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), while simultaneously repudiating calls to undo the *Basic* fraud on the market presumption. The majority also rejected Amgen's judicial efficiency argument based on the theory of avoidance of overseeing large class litigation where materiality cannot be proved in securities fraud actions. Instead, the majority noted that if Amgen's argument was embraced, this would require mini-trials on the issue of materiality at the class certification stage.

Finally, the majority concluded that the district and appellate courts did not err by disregarding Amgen's rebuttal evidence aimed to prove that the alleged misrepresentations were immaterial. The Court concluded that the potential immateriality of the alleged misrepresentations was no barrier to finding that common questions predominated. Therefore, even a definitive rebuttal on the issue of materiality would not undermine the predominance of common questions to certify a Rule 23(b)(3) class. Proof of materiality was a matter for trial and the district court correctly reserved consideration of Amgen's rebuttal evidence for summary judgment to trial.

Justice Alito filed a one-paragraph concurrence to suggest that (as Justice Scalia's dissent observed) the fraud on the market presumption may rest on a faulty economic premise. He concluded that "In light of this development, reconsideration of the *Basic* presumption may be appropriate."

Justice Thomas (joined by Justices Scalia and Kennedy) wrote the lengthy principal dissent, arguing that the majority's approach was doctrinally incorrect under *Basic*. The nub of Justice Thomas's dissent is that without demonstrating materiality at class certification, plaintiffs could not establish *Basic*'s fraud on the market presumption, and without the presumption, plaintiffs could not demonstrate that otherwise individual questions of reliance would predominate. Justice Thomas indicated that plaintiffs could not be excused of their class certification burden to show that reliance questions were common merely because they might subsequently lose on the merits concerning the element of materiality. Turning Justice Ginsburg's cart-before-the-horse metaphor on its head, Justice Thomas counterargued that it was the Court, and not Amgen, that would put the cart before the horse: by jumping chronologically to the § 10(b) merits of materiality. Rule 23 "as well as common sense" requires that the class certification issue be determined first, asserted Justice Thomas. Therefore, a plaintiff who cannot prove materiality does not simply have a claim that is dead on arrival; the plaintiff has a class that never arrived at the merits because it failed Rule 23(b)(3) from the outset.

Justice Scalia separately dissented, joining Justice Thomas's dissent in part. Justice Scalia argued that the *Basic* rule of fraud on the market governs not only questions of the defendant's substantive liability but also whether class certification is proper. All of the elements of the rule, including materiality, must be established if it is relied on to justify class certification. Justice Scalia noted that class certification often is the prelude to substantial settlements, and that a broad reading of the *Basic* presumption, embraced by the majority's approach, did an injustice to the *Basic* opinion. Justice Scalia contended that the *Basic* decision could not have intended that all market-purchase and market-sale class action suits would pass beyond certification, no matter what the alleged misrepresentation.

Concluding, Justice Scalia suggested that: "Today's holding does not merely accept that some consider the regrettable consequences of the four-Justice opinion in *Basic;* it expands those consequences from arguably regrettable to the unquestionably disastrous."

In this second appeal to the Supreme Court, Halliburton has seized this opportunity to mount a full-scale attack on the *Basic* presumption. Taking cues from the four dissenting justices in *Amgen,* Halliburton has revisited many of the same arguments in the first round of litigation, as well as similar arguments Amgen urged against the *Basic* presumption in 2013.

Thus, Halliburton argues that in the 25 years since announcement of the *Basic* presumption, its underlying economic theory has largely been discredited and rejected by economists and, therefore, should be overruled. Halliburton maintains that the presumption rests on faulty economic premises that empirical studies have proven unsound. Thus, according to Halliburton, a new economic consensus has emerged holding that *Basic*'s efficient market theory did not work in practice and that markets have proven to be extraordinarily inefficient and irrational.

Halliburton suggests that *Basic* subjects courts and litigants to a misleading notion of "binary market efficiency" ("it's thumbs up or thumbs down"): that if a market is shown to be efficient, courts may presume investors' reliance on all public material misrepresentations regarding the securities. Most economists, Halliburton notes, have rejected this premise because efficiency is far from a binary question. Hence, Halliburton contends that *Basic*'s simplistic understanding of market efficiency is at war with economic realities, was wrong when it was decided, and the passage of time has made things worse.

In addition, Halliburton notes that the *Basic* presumption undercuts prevailing class certification jurisprudence post-*Wal-Mart v. Dukes,* which insists that plaintiffs affirmatively show that common issues predominate in a proposed Rule 23(b)(3) action, not merely presume that they do. Thus, Halliburton suggests that if the Court decides not to overrule the *Basic* presumption, then at a minimum the Court should modify the presumption to require that plaintiffs demonstrate at class certification that the alleged corporate misrepresentations *actually* distorted the market price of the company's stock.

In seeking to overrule *Basic,* Halliburton claims that the decision merits minimal protection from the doctrine of stare decisis. According to Halliburton, *Basic* involves a judicially crafted procedural rule where stare decisis concerns are lowest. Moreover, members of the Court have now questioned *Basic* and its underlying economic basis, and lower courts have inconsistently applied the presumption. Further, according to Halliburton, the applying of *Basic* presumption has proved costly. Thus, a collection of factors makes reevaluation of the *Basic* decision appropriate.

Additionally, Halliburton advances various policy arguments favoring rejection of the *Basic* presumption as a matter of substantive securities doctrine. Thus, Halliburton asserts, the *Basic* presumption is unworkable; it is not a case from antiquity; there are no reliance issues at stake; and it is not well reasoned. Furthermore, overruling the presumption would make class certification in securities cases congruent with all other class actions, rather than conferring a special advantage on this category of cases. ("*Basic* opens an escape hatch for 10b-5 plaintiffs alone.") Individual investors would still retain a private right of action, and SEC enforcement does not require reliance at all. Thus, overruling the *Basic* presumption would not deter the two fundamental goals of securities fraud enforcement: compensation and deterrence.

Sounding themes from the briefing in *Halliburton I* and *Amgen,* Halliburton renews the policy argument that modern securities class litigation—with easy certification because of the *Basic* presumption—forces defendants to settle cases without regard to merit. Thus, securities settlements, in effect, have become routine tolls that large companies must pay. Nonetheless, securities settlements do not deter the culpable parties, and consume excessive judicial resources, and poorly compensate investors.

Moreover, Halliburton urges that if the Court does not overrule *Basic,* it should clarify that *Basic* permits defendants to rebut the presumption at class certification by showing the absence of market price distortion. Hence, Halliburton contends that the lower courts erred in ruling that such rebuttal was prohibited at the class certification stage; instead, Halliburton argues that this is the stage where the presumption and rebuttal matter the most. At the very least, then, defendants should be permitted to rebut the presumption by showing that the alleged misrepresentations did not distort the market price, thereby defeating class certification.

Finally, Halliburton argues that Congress has not considered or embraced the *Basic* presumption of reliance. Congress's silence only reflects a failure to express any opinion. Absent direction from Congress, the Court retains full discretion to overrule the *Basic* judicially fashioned presumption of reliance.

In response, the Fund counterargues that the *Basic* presumption is now well settled and the Court has repeatedly cited it favorably, including three years ago in the first unanimous *Halliburton* decision. Moreover, nearly every court to consider the question has adopted a rebuttable fraud on the market presumption. If *Basic* is to be overruled, then Congress is the appropriate forum, asserts the Fund; but Congress consistently has considered and declined to overrule the *Basic* presumption when the opportunity arose in the PSLRA and its amendments.

The Fund asserts that not only is overruling the *Basic* presumption Congress's prerogative, but the decision was correctly decided and should be upheld under well-established principles of stare decisis. In this view, *Basic* is a 25-year-old precedent that the Court has favorably cited three times in the last ten years; *Basic* is "a quintessential statutory interpretation case that this Court should not overrule." Significantly, Congress has twice enacted comprehensive reform of private securities actions—in the PSLRA and the Securities Litigation Uniform Standards Act of 1998—without disturbing the fraud on the market presumption, even though Congress was invited to overrule the presumption and rejected calls to do so. The Fund asserts that Halliburton's arguments for departing from stare decisis are meritless; the presumption is a substantive doctrine of federal securities fraud law and warrants the same deference as any other form of statutory construction.

The Fund contends that *Basic* was correctly decided and grounded in the historical securities laws, which embraced a widespread acceptance of the fraud on the market principle. The presumption is appropriate because securities fraud plaintiffs bear significant burdens in securing class certification, and because securities class actions play a significant role in deterring securities fraud and compensating defrauded investors. The Fund argues that government enforcement through SEC action is only a partial solution to securities fraud. If the Court overturns the *Basic* presumption, then the SEC might have to adopt more onerous disclosure or substantive requirements on corporations.

Moreover, the Fund maintains that the long-standing debate over the efficient capital market hypothesis is irrelevant to the Court's holding; *Basic* accounts for the fact that all markets are not efficient by requiring plaintiffs to submit proof to trigger the presumption and by permitting defendants to rebut it. The Fund contends that the *Basic* presumption does not rest on economic theory but rather the common sense probability that most publicly available information is reflected in a corporation's market price and therefore market professionals generally consider most publicly announced material statements about companies.

The Fund also asserts that there is no merit to the contention that *Basic* relied on a "binary" notion that markets are efficient or inefficient; there is nothing binary about *Basic,* which is case specific. The presumption applies only if the plaintiff can submit sufficient proof about the efficiency of the market for the specific security at issue.

The Fund further challenges Halliburton's fallback suggestion that the Court require plaintiffs at class certification to demonstrate that the defendant's fraud had a market price impact, to trigger the presumption. Such a requirement, the Fund argues, introduces a merits inquiry at class certification, and the Court previously rejected such merits inquiry in its pervious *Halliburton I* and *Amgen* decisions. Similar to the Court's analysis about materiality in *Amgen,* the Fifth Circuit correctly recognized that absent price impact, all the plaintiffs' claims fail together.

Thus, regarding proof of price impact, the Fund contends that a defendant has the opportunity to raise this argument on a summary judgment motion or at trial. But it would be improper to introduce this merits argument at class certification, either as part of the plaintiffs' burden or defendant's rebuttal. Such a rebuttal is a matter for trial and would conflict with Rule 23 and the Court's decision in *Amgen:* a successful rebuttal would not cause individual claims to predominate, but would defeat the claims of all class members.

The Fund further responds that the *Basic* presumption of reliance is administrable and has been consistently applied by the lower courts. In addition, *Basic* is consistent with recent Supreme Court Rule 23 jurisprudence, which, far from disapproving the fraud on the market presumption, has reaffirmed it. Halliburton's policy arguments, then, according to the Fund, are either exaggerated or misleading. Attorney fees in securities fraud class actions have declined, and state courts have not refused to follow *Basic*. The presumption is generally rebuttable, and defendants have successfully done so on summary judgment motions.

Finally, the Fund argues that the Court should reject Halliburton's arguments for modifying *Basic*. Halliburton's fallback position asks that *Basic* be modified to require proof of price impact at class certification. The Fund argues that this is contrary to *Halliburton I* and *Amgen* because this improperly introduces a merits issue not tethered to Rule 23 requirements. The fact that materiality is an element of a 10b-5 claim while price impact technically is not, is a distinction without a difference. The Fund notes that, like materiality, price impact is an objective inquiry that turns on common evidence. Adjudicating price impact at class certification would be an inefficient and premature inquiry on the merits, for which discovery often is required.

SIGNIFICANCE

This *Halliburton II* appeal is significant because it directly asks the Court to overturn the long-standing *Basic* presumption of fraud on the market, which has provided securities fraud plaintiffs with an easier path to class certification than plaintiffs in other types of class actions. If the Court agrees with Halliburton and overrules the *Basic* presumption, then there will be a new game in town for securities class litigation, one which is likely to be much more difficult for plaintiffs.

Almost all the competing arguments that the parties raise have been asserted and briefed to the Court before in *Halliburton I* and *Amgen;* hence this round should very much be an exercise in déjà vu, all over again. Of course, the most tantalizing aspect of this appeal is whether the four justices who hinted in *Amgen* that they believed *Basic* to be founded on sketchy economic ground are ready to overrule *Basic,* joined by some like-minded fifth or sixth justice.

What this may come down to is whether Halliburton's appeal has presented the Court with the appropriate factual and legal scenario to overturn *Basic*. In *Halliburton I* and *Amgen,* the Court characterized loss causation and materiality as elements of the 10b-5 claim, concluding that placing a burden of proof on the plaintiffs was an impermissible, premature intrusion into merits issues at class certification.

Thus, if the Court analogizes the issue of price impact to its prior discussions of loss causation and materiality—if the Court follows that same path—then this case may not be the death of the *Basic* presumption. Additionally, a different majority will have to rationalize away the Court's prior affirmations of the *Basic* presumption, overlooking congressional inaction as supporting the presumption. Further, the Court might have to entertain a digressive exegesis on the doctrine of stare decisis, as it applies (or not).

If the Court declines to overrule *Basic,* Halliburton's fallback request to modify *Basic* to require plaintiffs to prove market price impact at class certification, or to permit defendants to produce rebuttal price impact evidence, seems a hard row to hoe in light of *Halliburton I* and *Amgen*. But, if the Court decides to go there, we are likely to witness some complicated and intricate doctrinal tap dancing by the Court.

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PREVIEW of United States Supreme Court Cases, pages 216–221.

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Did the Lower Court Err in Determining That Officers Were Not Entitled to Qualified Immunity When They Fired Shots at a Fleeing Suspect, and, If So, Are the Officers Entitled to Qualified Immunity?

CASE AT A GLANCE

Officers of the West Memphis police force pursued a fleeing suspect in a high-speed car chase on an interstate highway and surface streets. During the chase, the suspect drove erratically and dangerously and rammed his car into police vehicles. Police fired shots at the suspect's vehicle in order to stop the chase, killing the suspect and his passenger. The driver's survivors sued the officers for civil rights violations. The officers moved to dismiss the case, arguing that they were entitled to qualified immunity. The lower courts denied their claim for immunity.

Plumhoff v. Rickard
Docket No. 12-1117

Argument Date: March 4, 2014
From: The Sixth Circuit

by Steven D. Schwinn
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INTRODUCTION

Law enforcement officers are entitled to qualified immunity from suits alleging constitutional violations unless a plaintiff can show that (1) the officers violated a statutory or constitutional right and (2) the right was "clearly established" at the time of the challenged conduct. The courts can consider these prongs in either order. This case asks whether the lower court erred in analyzing qualified immunity and, if so, whether the officers are entitled to qualified immunity.

ISSUES

Did the court of appeals fail to conduct a proper qualified immunity analysis?

Are the officers entitled to qualified immunity because it was not "clearly established" at the time of the incident that police officers violate the Fourth Amendment when they use deadly force to prevent a suspect who has led them on a dangerous high-speed car chase from resuming his flight?

FACTS

Around midnight on July 18, 2004, Officer Joseph Forthman of the West Memphis police force stopped a Honda Accord driven by Donald Rickard after noticing that the car had a broken headlight. Rickard had one passenger, Kelly Allen, who sat in the front passenger seat.

Officer Forthman asked Rickard for his license and registration; he also asked about a large indentation in the windshield "roughly the size of a head or a basketball." Allen told Officer Frothman that the indentation resulted from the car hitting a curb. Officer Forthman then asked Rickard if he had been drinking alcohol and twice ordered him out of the vehicle.

Rickard did not comply with Officer Forthman's instruction. Instead, he sped away on Highway I-40 toward the Arkansas-Tennessee border. Officer Forthman reported over his radio that a "runner" fled a traffic stop; he got back in his vehicle and proceeded to pursue Rickard. Officer Forthman was quickly joined by fellow West Memphis Officer Vance Plumhoff, who became the lead officer in the pursuit. Other West Memphis Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner, each in separate vehicles, also joined the pursuit.

The ensuing high-speed chase lasted nearly five minutes. Many of the details were captured by video cameras mounted on three of the police vehicles; many of the statements by officers came over the radio, or were recorded, or both.

During the chase, Rickard swerved in and out of traffic and rammed at least one other vehicle. Officer Plumhoff stated that "he just rammed me," "he is trying to ram another car," and "[w]e do have aggravated assault charges on him."

Rickard led the officers over the Mississippi River from Arkansas into Memphis, Tennessee, where he exited the highway onto Alabama Avenue. As he made a quick turn onto Danny Thomas Boulevard, his car hit a police vehicle and spun around in a parking lot. Rickard then collided head-on with Officer Plumhoff's vehicle. (It is not clear whether this was intentional.)

Some of the officers exited their vehicles and surrounded Rickard's car. Rickard backed up. Officer Evans hit the butt of his gun against the window of Rickard's vehicle. As other officers approached, Rickard spun his wheels and moved slightly forward into Officer Gardner's vehicle.

Officer Plumhoff approached Rickard's vehicle close to the passenger side and fired three shots at Rickard. Rickard reversed his vehicle in a 180-degree arc onto Jackson Avenue, forcing an officer to step aside to avoid being hit. Rickard began to drive away from the officers. Officer Gardner then fired ten shots into Rickard's vehicle, first from the passenger side and then from the rear as the vehicle moved further away. Officer Galtelli also fired two shots into the vehicle.

Rickard lost control of the vehicle and crashed into a building. Rickard died from multiple gunshot wounds; Allen died from the combined effect of a single gunshot wound to the head and the crash.

Rickard's survivors brought a civil rights lawsuit in federal district court against the six officers involved in the chase. They alleged, among other things, that the officers violated the Fourth Amendment. The officers moved for summary judgment or dismissal arguing that they were entitled to qualified immunity. The district court denied qualified immunity, and the United States Court of Appeals for the Sixth Circuit affirmed. This appeal followed.

CASE ANALYSIS

Qualified immunity shields government officials performing discretionary functions from suits for alleged constitutional violations, unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The doctrine is designed to give government officials some breathing room to do their jobs by limiting the threat of liability, and to ensure that capable individuals are not deterred from entering government service for fear of liability.

A plaintiff can defeat a claim of qualified immunity by pleading and ultimately proving that (1) the defendant-official violated a statutory or constitutional right and (2) the right was "clearly established" at the time of the challenged conduct. In determining whether a right was "clearly established," a court must first define the right at the appropriate level of specificity. (That is, the court must define the right at a particularized level, not a general one, because at a general enough level every right is "clearly established.") Once the court defines the right, the court must ask whether a reasonable official would have known that his or her behavior violates that right.

In arguing over the application of these rules, the parties rely principally on two cases. In the first, more recent one, *Scott v. Harris,* 550 U.S. 372 (2007), the Supreme Court held that a police officer did not violate the Fourth Amendment when he rammed a fleeing vehicle from behind in order to stop a chase. The officer's maneuver caused the suspect to lose control of the fleeing vehicle and crash, resulting in serious injuries to the suspect. But the Court held that the officer's action was objectively reasonable in light of the grave danger that the fleeing driver posed to both the police and bystanders. The Court ruled that the officer did not violate the Fourth Amendment, and that the officer was entitled to qualified immunity from suit.

In the second, earlier case, *Tennessee v. Garner,* 471 U.S. 1 (1985), the Court held that a state statute that authorized police to use deadly force to stop an apparently unarmed, nondangerous suspect who was fleeing on foot violated the Fourth Amendment. But the Court went on to say that "it is not constitutionally unreasonable" for an officer to use deadly force to prevent a suspect that poses a threat of serious physical harm, either to the officer or to others, from escaping.

The parties frame their arguments against this background.

The officers argue first that the Sixth Circuit erred in applying the second prong of the qualified immunity test. In particular, they claim that the Sixth Circuit concluded only "that the officers' conduct was reasonable as a matter of law"—a conclusion that either conflated the two prongs of the test or ignored the second prong entirely. In either event, they say, the lower court never discussed whether their use of force violated clearly established law at the time of the incident, in July 2004. Indeed, the officers contend that the Sixth Circuit only compared their conduct in 2004 to the facts of *Scott v. Harris,* a case that came down in 2007. They say that they could not have known about *Scott v. Harris* when they acted, and that therefore the court misused that case to determine whether the law was clearly established and that their actions were unreasonable at the time.

The officers argue next (on the second prong) that the law in 2004 did not clearly establish that their use of deadly force was objectively unreasonable in violation of the Fourth Amendment. They say that the Supreme Court ruled in December 2004, just five months after the incident here, that there was no clear answer to the question whether it is acceptable "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau v. Haugen,* 543 U.S. 194 (2004). The officers claim that the threat posed by Rickard was even greater than the threat posed by the fleeing felon in *Brosseau,* so, if anything, their use of deadly force was more justified. They also contend that neither the law in the Sixth Circuit (where the shootings occurred) nor the law in the Eighth Circuit (where the officers worked) clearly established that their actions were unconstitutional at the time. On the contrary, they claim, the law in those circuits in July 2004 gave the officers "every reason to believe their conduct was objectively reasonable."

Finally, the officers argue (on the first prong) that their use of deadly force was an objectively reasonable response to Rickard's behavior. They contend that the facts here are similar to the facts in *Scott v. Harris.* They say that their force was objectively reasonable and warranted by *Tennessee v. Garner* (stating that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force"). And they claim that their use of deadly force to terminate a high-speed chase served the public policy goal, recognized by the Supreme Court, in avoiding threats to innocent bystanders.

The federal government, weighing in on the side of the officers, makes substantially similar arguments. In particular, the

government puts this fine point on its critique of the Sixth Circuit's ruling: "The words 'clearly established' do not appear in its opinion, and the court did not undertake the basic inquiries required by this Court's decisions: defining the right at the appropriate level of specificity, canvassing pertinent authority, and ultimately determining whether a reasonable official would have understood clearly that her conduct violated the Constitution at the time it occurred." Like the officers, the government argues that the Sixth Circuit erred in its analysis. If the Court should reach the question whether the officers are entitled to qualified immunity, the government also says that they are, because the right was not clearly established at the time of the incident. (The government says that "[f]ramed at the appropriate level of specificity, the question here is whether in 2004 it was clearly established that the police may not use deadly force to prevent a misdemeanant and his passenger from resuming a dangerous, high-speed chase on public thoroughfares after the driver had recklessly operated the vehicle both during the chase and in a close-quarters encounter with police.") The government urges the Court not to rule on the first prong, the constitutional question, because it is unnecessary, "novel," and "highly factbound."

Rickard's survivors, called "Rickard" here, argue first that the Sixth Circuit lacked appellate jurisdiction over the case. In particular, Rickard says that the officers' appeal to the Sixth Circuit was grounded primarily in their dispute with the district court's factual conclusions. Rickard claims that this kind of ruling—"a determination that genuine issues of fact create disputes which preclude the defense of qualified immunity"—does not give rise to appellate jurisdiction.

Next, Rickard argues that additional facts, or "factual disputes," in the case show that the officers were not entitled to qualified immunity. In short, Rickard takes issue with the officers' characterization of nearly every significant event, from Rickard's car-rammings to the context of the officers' final shots at Rickard's car. Rickard says that the police videos and the officers' testimonies undermine the officers' versions of these events, and that he did not pose the kind of serious threat to the officers that they claim. As a result, Rickard says that their use of deadly force violated the Fourth Amendment as it was clearly established at the time.

Third, Rickard argues (on the first prong) that the Sixth Circuit properly held that the officers' use of force was not objectively reasonable. Rickard claims again that the facts are disputed, and that viewed correctly they show that Rickard did not pose a threat to the officers that warranted their use of deadly force. Rickard also contends that the Court should not create a blanket rule authorizing police officers to shoot a suspect in a vehicular chase in order to prevent the suspect's escape. Rickard says that such a rule would extend *Scott v. Harris,* which involved only car-ramming by the police, not shooting. Rickard also says that such a rule would "bootstrap" an otherwise nondangerous situation (presumably, the original misdemeanor stop) into a violent felony (the high-speed chase) for the purpose of determining a suspect's threat to the police. Rickard says that this situation was not as dangerous as the officers have claimed, and that their use of deadly force—"15 total shots at a vehicle containing an unarmed man and woman, the majority of them as the car went past and away from the police"—was excessive.

Finally, Rickard argues (on the second prong) that the officers violated clearly established Fourth Amendment law. Rickard claims that *Garner* established that it was "constitutionally unreasonable to shoot an unarmed, nondangerous fleeing suspect dead in order to prevent his escape." Rickard says that under *Garner* the officers' use of deadly force in this case was unreasonable. Rickard contends that it does not matter that *Garner* is not precisely on point: contrary to the officers' position, the Supreme Court has never required a case exactly on point to determine whether the law is clearly established.

On both prongs, Rickard emphasizes that the State of Tennessee indicted Officers Plumhoff, Gardner, and Galtelli for reckless homicide in the death of Allen. Rickard claims that the indictment underscores their excessive use of force.

SIGNIFICANCE

The questions presented give the Court several ways to resolve the case. The first question presented would allow the Court to determine only whether the Sixth Circuit erred in its qualified immunity analysis, to correct that error (or not), and to remand the case (or not) for further proceedings. In particular, this case gives the Court an opportunity to clarify the second prong (when a right is "clearly established" at the time of an officer's action) in the wake of the Sixth Circuit's somewhat confusing approach. (As the officers and the government argue, the Sixth Circuit seems to address only the first prong. If it addresses the second prong, its approach seems incomplete.) As the government explains, this approach, "defin[es] the right at the appropriate level of specificity, canvass[es] pertinent authority, and ultimately determin[es] whether a reasonable official would have understood clearly that her conduct violated the Constitution at the time it occurred." If the Court only answers the first Question Presented, this is as far as the Court needs to go. If so, the Court would likely remand the case for a proper qualified immunity analysis. (The Court could simply affirm the Sixth Circuit on this first issue, but that seems unlikely, given the Sixth Circuit's somewhat confusing and apparently incomplete analysis.)

If the Court reaches the second question presented, it could determine for itself whether the officers are entitled to qualified immunity. If the Court reaches this question, then it could decide that the officers are immune on the second prong alone (as the officers and the government urge) or on the second or first prong (thus ruling on the merits of the Fourth Amendment—something that the government urges against). The officers probably have the better of this case, given the state of the law in 2004 (on the second prong) and the state of the law now (on the first). But the Court could conclude that the officers are not entitled to qualified immunity, because Rickard can establish both prongs.

The potential wild card in the case is the facts. If the Court rules on the second question presented, qualified immunity (and not just on the first question presented, whether the Sixth Circuit erred), at least part of its analysis will almost certainly turn on the facts. It is unusual for the Court to review the facts of a case, but here the Court can only judge the reasonableness of the officers' actions by taking a look at the facts for itself. (For example, the Court's review of the videotapes in *Scott v. Harris* was key to its ruling there, creating what Justice Scalia (for the majority) called "a wrinkle" in the case.) We do not know how the justices will interpret the facts, but

we do know that the facts are likely to come into play if the Court gets to the second question presented. And we know that this case seems to be factually similar to *Scott,* although Rickard vigorously contests that. (*Scott* was a ruling on the Fourth Amendment itself, the first prong of the qualified immunity test, so the facts were central to the Court's ruling. But the facts are probably important on the second prong too.)

Finally, if the Court reaches the second question presented, the case may build on *Scott*. In particular, it may say whether the officer's reasonable action in *Scott* (ramming his car into the suspect's car to stop a chase) extends to firing shots to stop a chase. But while *Scott* seems highly relevant, remember that because it came after the officers' actions here, it will likely only play a central role if the Court rules on the first prong of the qualified immunity test, the underlying Fourth Amendment question.

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PREVIEW of United States Supreme Court Cases, pages 222–225.

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The Standard for Awarding Attorney Fees Under 35 U.S.C. § 285 to Prevailing Parties in Patent Litigation

CASE AT A GLANCE

The Supreme Court granted certiorari in two patent infringement cases that both concern shifting of attorney fees under the "exceptional case" standard of 35 U.S.C. § 285. The Federal Circuit has traditionally been resistant to fee shifting awards—especially in cases where an accused infringer is the prevailing party. In *Octane Fitness,* petitioner asks the Court to lower the standard for proving an exceptional case. In *Highmark,* petitioner asks for deference to lower court exceptional case findings.

Octane Fitness, LLC v. ICON Health & Fitness, Inc. **and** ***Highmark, Inc. v. Allcare Health Management Systems***
Docket Nos. 12-1184 and 12-1163

Argument Date: February 26, 2014
From: The Federal Circuit

by Dennis Crouch and Jafon Fearson
University of Missouri School of Law, Columbia, MO

INTRODUCTION

In the United States, each party to litigation ordinarily pays its own attorney fees regardless of the case outcome. In the patent litigation context, this changes as 35 U.S.C. § 285 provides an avenue for awarding "reasonable attorney fees to the prevailing party" in "exceptional cases" at the discretion of the lower court. However, discretion only goes so far, and the Federal Circuit's standard for classifying an "exceptional case" has been critiqued as too rigid, tough, and pro-patentee. It is those same complaints that led to reversal by the Supreme Court in a number of other patent cases such as *KSR Int'l. v. Teleflex Inc.,* 550 U.S. 398 (2007) (obviousness) and *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388 (2006) (injunctive relief).

In both *Octane Fitness* and *Highmark,* the Federal Circuit sided with the patentees who lost their infringement actions. In *Octane Fitness,* the Federal Circuit confirmed that the case was not "exceptional," while in *Highmark,* a divided Federal Circuit reversed an exceptional case finding based upon a de novo appellate review that gave no deference to the district court's finding that the lawsuit was objectively baseless.

Patent litigation is incredibly expensive, and most patent infringement actions rely on alternative litigation financing such as contingency fee. These two factors suggest that changing the likelihood of fee shifting is a form of tort reform that may greatly alter the risk calculus and the market for patent litigation.

Although separate, the Supreme Court has paired these cases for oral arguments.

ISSUES

In *Octane Fitness,* the question presented is: Does the Federal Circuit's promulgation of a rigid and exclusive two-part test for determining whether a case is "exceptional" under 35 U.S.C. § 285 improperly appropriate a district court's discretionary authority to award attorney fees to prevailing accused infringers in contravention of statutory intent and this Court's precedent, thereby raising the standard for accused infringers (but not patentees) to recoup fees and encouraging patent plaintiffs to bring spurious patent cases to cause competitive harm or coerce unwarranted settlements from defendants?

In *Highmark,* the question presented is: Is a district court's exceptional case finding under 35 U.S.C. § 285, based on its judgment that a suit is objectively baseless, entitled to deference?

FACTS

ICON originally sued Octane for infringing its patent covering a particular configuration of an elliptical exerciser. U.S. Patent No. 6,019,710. After two years of pretrial litigation, the district court awarded Octane summary judgment of noninfringement. However, the district court refused to then award attorney fees under § 285 based upon the Federal Circuit's *Brooks Furniture* standard. *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.,* 393 F.3d 1378 (Fed. Cir. 2005). On appeal, the Federal Circuit affirmed the denial of fees—holding that the court was not prepared "to revisit the settled standard for exceptionality."

Highmark centers on a computerized health management system covered by Allcare's U.S. Patent No. 5,301,105. The lawsuit arose when Highmark filed action seeking a declaratory judgment of noninfringement, invalidity, and unenforceability, and Allcare

counterclaimed with allegations that Highmark infringed claims 52, 53, and 102 of the '105 patent. On summary judgment, the district court agreed with Highmark that the challenged claims were not infringed and also awarded attorney fees based upon an exceptional case finding—stating that Allcare had engaged in "the sort of conduct that gives the term 'patent troll' its negative connotation." On appeal, the Federal Circuit confirmed the noninfringement holding but partially reversed the fee award since Allcare's infringement theory vis-à-vis claim 52 was "not objectively baseless" and none of Allcare's litigation actions rose to actionable litigation misconduct. Ultimately, the Federal Circuit remanded the case to the district court "for a calculation of attorneys' fees based on the frivolity of only the 102 claim allegations." The Federal Circuit gave no deference to the district court conclusion that all of Allcare's infringement allegations were objectively baseless. Rather, the Federal Circuit reviewed that issue de novo. Although the request for en banc review was denied, five of the eleven voting judges would have reheard the case. One dissent noted that the majority decision "establishes a review standard for exceptional case finding in patent cases that is squarely at odds with the highly deferential review adopted by every regional circuit and the Supreme Court in other areas of law."

CASE ANALYSIS

The primary focus of both appeals is the exceptional case determination with *Octane* addressing the substantive requirements necessary to prove an exceptional case and *Highmark* addressing the procedural standard of review and level of deference given to the lower court.

U.S. patent infringement litigation typically follows the traditional American Rule that each party is responsible for its own attorney and expert witness fees. The patent statute does provide for a reasonable fee shifting award, but only to the "prevailing party" and only in "exceptional cases." 35 U.S.C. § 285. The Federal Circuit has established a four-step process for evaluating claims under § 285 that involves determining (1) the prevailing party; (2) whether the case is exceptional; (3) if exceptional, whether a fee award is appropriate; and (4) the amount of the award, if any.

In its 2005 *Brooks Furniture* decision, the Federal Circuit laid down its structure for the exceptional case test. There, the court seemingly spelled out a limited set of actions sufficient to prove an exceptional case. In particular, the court noted that an exceptional case award may only be based upon either (1) material inappropriate conduct; or (2) objectively baseless litigation brought in subjective bad faith. According to the Federal Circuit:

> A case may be deemed exceptional when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed.R.Civ.P. 11, or like infractions … Absent misconduct in conduct of the litigation or in securing the patent, sanctions may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless.

The test for baseless litigation is derived from the Supreme Court *Noerr-Pennington* line of cases that protect parties who petition the government from being charged with anticompetitive behavior—even when seeking anticompetitive action from the government. That doctrine has been extended to shield private tort actions as well—absent sham litigation. See *Prof'l Real Estate Investors v. Columbia Pictures Indus.,* 508 U.S. 49 (1993) (only sham litigation if both objectively and subjectively baseless).

The language of § 285 has remained unchanged since its enactment as part of the major patent reforms of 1952. The predecessor statute, passed a few years earlier in 1946, was substantially similar but had two major differences. In particular, the 1946 act expressly gave the court "discretion" to award attorney fees to the prevailing party, while the 1952 act removed the "discretion" language and instead indicated that the fee may be awarded "in exceptional cases." The Senate Report associated with the 1946 act indicates that the statute is not intended to make fee awards an "ordinary thing in patent suits" but instead to reserve such awards for "gross injustice."

> It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.

S. Rep. No. 1503, 79th Cong., 2d Sess. (1946). When the 1952 act was passed, the House Committee Report briefly mentioned the "exceptional case" amendment to the statute—indicating that the phrase "'in exceptional cases' has been added as expressing the intention of the present statute as shown by its legislative history and as interpreted by the courts."

In its briefing, Octane argues that the *Brooks Furniture* test is overly constrictive on district court discretion and flawed. In particular, Octane argues that the First Amendment concerns that motivate *Noerr-Pennington* are not present in the fee-shifting context and that the result of the *Brooks Furniture* test is a disparate treatment that disfavors awarding fees to accused infringers who prevail at trial in violation of the principles laid down by the Supreme Court in *Fogerty v. Fantasy, Inc.,* 510 U.S. 517 (1994) (holding that plaintiffs and defendants must be treated alike under an analogous fee-shifting provision in copyright law). In the end, Octane argues that the test should revert back to an Equitable Discretion Test (EDT), which allows district courts to consider the totality of the circumstances when determining exceptional case fee awards.

In response, ICON argues Octane has mischaracterized *Brooks Furniture* and that the test is not so restrictive. In particular, ICON notes that, under the *Brooks Furniture* test, accused infringers who prevail in litigation can prove an exceptional case by a variety of mechanisms that go well beyond the strict baseless litigation standard. *Brooks Furniture* specifically calls out litigation misconduct, inequitable conduct by the patentee, as well as "vexatious or unjustified litigation" as justification for an exceptional case

finding. More broadly, *Brooks Furniture* identifies the possibility of exceptional case awards based upon any "material inappropriate conduct related to the matter in litigation." However, ICON agrees that the current test is more restrictive than pure equitable discretion. According to ICON, applying that test would effectively read the phrase "exceptional cases" out of the statute, eliminating a key limitation imposed by Congress.

In deciding patent cases, the Supreme Court frequently considers whether principles in other areas of intellectual property law provide guidance. Here, Octane suggests that the Court consider both trademark and copyright law. The Lanham Act's fee shifting statute for trademark infringement is textually identical to patent law's § 285 and the "exceptional case" limitation has been interpreted at the circuit court level as providing equitable discretion to district courts instead of being limited by any rigid formula. *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant,* 771 F.2d 521, 526 (D.C. Cir. 1985). The *Noxell* case is particularly important here because it was penned by Justice Ginsburg (then Judge Ginsberg) and joined by Justice Scalia (then Judge Scalia) who were colleagues on the D.C. Circuit Court of Appeals before being elevated to the Supreme Court. In *Noxell,* the appellate panel held that bad faith was not necessary for an exceptional case finding. Similarly, Octane argues that in *Fogerty,* the Supreme Court gave equitable discretion to district courts in awarding fees. ICON attempts to distinguish those cases by pointing to the "surprising lack of agreement" as to the meaning of "exceptional case" and by highlighting the less restrictive language of the copyright statute.

Both parties also claim legislative history support. Octane asserts that Congress intended a broad conferral of equitable discretion upon the district courts to grant fee awards to wrongfully accused defendants to prevent "gross injustice[s]," and that the *Brooks Furniture* test conflicts with decades of judicial interpretation of § 285, predating establishment of the Federal Circuit. ICON argues, however, that when Congress actually intends to give district courts discretion in a broad range, it does so expressly and does not confine the exercise of discretion to "exceptional cases." ICON further points to the fact that Congress affirmatively removed the statute's pre-1952 reference to discretion in favor of the more particular exceptional case test.

The United States filed an amicus brief strongly in support of Octane. The government relies on legislative history and similar areas of the law such as the Copyright Act and the Lanham Act in its argument that § 285 should be construed to allow a district court to authorize a fee award to a prevailing defendant when it determines—based on its analysis of the totality of circumstances present in each case—that such an award is necessary to prevent gross injustice to that defendant. The United States argues that the Federal Circuit's *Brooks Furniture* test has diminished § 285's effectiveness as a tool to discourage abusive patent litigation and mitigate injustice suffered by prevailing parties in particular cases.

At least one amici, the New York IP Law Association, takes a middle ground approach—agreeing with Octane that the bar is too high, but argues against a purely discretional and nonstructured totality of the circumstances test. A group of companies represented by 3M and General Electric, as amici, also suggest that any approach to an exceptional case test should focus on bad actions rather than on broad classes of actors, such as nonpracticing entities, and that any test should be balanced.

> To be sure, there are instances (some extremely well-publicized) of patent litigation abuse involving non-practicing patent owners who use the courts in an effort to collect large numbers of nuisance settlements. Yet this problem, in the experience of Amici Companies, is no more serious than that created by many infringing defendants who routinely fight off meritorious patent suits by pressing scores of frivolous defenses and counterclaims, and who otherwise rely upon dilatory tactics to force unjust settlements. Accordingly, the focus should be on curbing litigation misconduct wherever it occurs. An evenhanded standard, flexibly applied, allows just that.

In the exceptional case procedural dispute, petitioner Highmark argues that a district court's determination that a case was "objectively baseless" and thus amenable to an award of attorney fees should receive deferential appellate review rather than the de novo standard applied by the Federal Circuit. Highmark's principle argument is that the case is controlled by the prior Supreme Court decisions of *Pierce v. Underwood,* 487 U.S. 552 (1988), and *Cooter & Gell v. Hartmarx,* 496 U.S. 384 (1990). In *Pierce,* the Court considered the proper standard of review for fee awards under the Equal Access to Justice Act (EAJA). EAJA authorizes attorney fees when the United States' position is not "substantially justified," and Highmark argues that *Pierce*'s proposition that a position is not substantially justified if it has no "reasonable basis in both law and fact," is a standard effectively identical to the Federal Circuit's § 285 test, which deems a position objectively baseless if "no reasonable litigant could believe it would succeed." In *Cooter,* the Court considered the standard of review for decisions imposing Rule 11 sanctions. Prior to *Cooter,* the courts of appeals applied three different standards of review to different kinds of Rule 11 questions—clear-error review regarding the factual basis for a claim, de novo review of findings about whether a claim was "warranted by existing law," and abuse-of-discretion review of the amount of sanctions imposed. The Federal Circuit adopted this same trifurcated standard for § 285, and Highmark argues that *Cooter* squarely rejects this approach. Highmark further asserts that the Court held that "all aspects" of a district court's decision to impose Rule 11 sanctions—including its "legal conclusions"—should be reviewed under a unitary, abuse-of-discretion standard. Highmark argues that both *Pierce* and *Cooter* address fee and sanction standards directly analogous to the "objective baselessness" test, and that the Supreme Court in both cases held that appellate courts should review awards under such provisions for abuse of discretion.

Allcare responds that *Pierce* and *Cooter* actually work in its favor. Allcare asserts that *Pierce* noted that smaller dollar amounts counsels in favor of deferential review, while larger awards might suggest a more intensive review; and because patent cases commonly involve large potential damage awards, giving them de novo review does not raise the same concerns as raised in *Pierce* (that providing de novo review would result in the generation of additional appeals that would not otherwise be pursued). Allcare also argues that *Cooter* contradicts Highmark's position because one of the factors

in favor of deferential review was that the district court was "best situated" to consider the "local bar's litigation practices" as to when a Rule 11 sanction is warranted. Allcare argues that this is contrary to Congress's express determination that local variations in the approach to patent litigation are undesirable, by its very creation of the Federal Circuit.

Highmark also argues that the Federal Circuit's consideration in undertaking de novo review of objective-baselessness findings—namely, that some such findings may turn on legal issues—is flawed in light of *Pierce;* that *Pierce* called for deference even when the lower court determination was "based upon evaluation of the purely legal issue governing the litigation." Relying again on the Federal Circuit's role in promoting patent law uniformity, Allcare responds that the uniformity purpose can only be served if the Federal Circuit applies de novo review to questions involving the interpretation of the patent laws. The Federal Circuit decides many more patent cases than any individual district court and therefore, Allcare argues, it is much better suited to decide whether a litigant's ultimately unsuccessful position was nonetheless an objectively reasonable one.

As in *Octane,* the United States filed an amicus brief supporting the petitioner in *Highmark*. Here, the government argues that an appellate court should review a district court's exceptional case finding under 35 U.S.C. § 285 with deference, using an abuse-of-discretion standard. The United States offers three guideposts in support of its position: (1) Congress has long vested district courts with broad discretion to determine when fee awards are necessary to prevent gross injustice in appropriate patent cases—as evidenced by the 1946 version of the fee-shifting provision; (2) a sixty-year tradition of deferential review strongly supports an abuse-of-discretion standard; and (3) in both *Pierce* and *Cooter,* the Supreme Court concluded that deferential review was appropriate because baselessness determination involves a fact-intensive analysis that the trial court is best positioned to conduct. However, the government does offer that even under the abuse-of-discretion standard, appellate courts remain free to reverse decisions premised on a pure error of law.

SIGNIFICANCE

Because of the high cost of patent litigation, a reduced standard for fee shifting has the potential of having a large impact on the litigation landscape. And, accused infringers are looking to fee shifting as a mechanism for reducing patent enforcement by nonpracticing entities. However, it is unclear whether an equally applied lower standard would have that result because defendants would also face the risk of being assessed fees. Several years ago, Professor Jay Kesan wrote about fee shifting in patent cases and concluded that there is no deserving theoretical reason for believing the British rule (liberally awarding fees) better promotes efficient primary behavior and that only when the analysis is limited to very specific cases, can it sometimes be shown that the British or American rule is more efficient. Jay P. Kesan, Carrots and Sticks to Create a Better Patent System, 17 Berkeley Tech. L.J. 763 (2002). However, an unbalanced standard of practice—especially one directed against nonpracticing entities—is likely to have a greater impact. Further, to the extent wide deference is given to district court judges on this issue, we should expect a greater degree of forum shopping and venue battles as parties seek audience before judges more favorable to their particular cause.

In its briefing, ICON suggests that any policy-based shift in the rule should be left to Congress. In fact, several bills are pending in Congress that would shift fees even further than that contemplated by petitioners here. The leading proposal overwhelmingly passed in the House with bipartisan support, is supported by President Obama, and is now being considered in the Senate. See *Innovation Act,* H.R. 3309. The proposed legislation would rewrite § 285 to affirmatively require an award of reasonable fees to the prevailing party unless the court finds that "the position and conduct of the non-prevailing … parties were reasonably justified in law and fact" or that special circumstances would make an award unjust. Based upon its strong support, the bill has a substantial likelihood of passing in the Senate this term. If so, the Supreme Court decisions here would have little precedential value beyond the already pending lawsuits. However, a substantial contingent of patent litigators are hoping that Supreme Court action here will temper the fervor for legislative reform.

One spillover in the case may be in the area of willful patent infringement. Under the patent statute, a willful infringer can be assessed with a punitive award of treble damages. In parallel to the exceptional case rule, willfulness requires a finding of both objective and subjective recklessness (or willfulness). There is some likelihood that a shift on the standard of review for exceptional cases will lead to a shift on the willfulness side as well. In its amicus brief, Google cautioned against such a linkage. However, that issue will likely be reserved for future cases.

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PREVIEW of United States Supreme Court Cases, pages 226–230.

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In January, the Court heard a number of interesting cases. Below we highlight some of the more engaging comments between the justices and the advocates during *McCullen v. Coakley* (Docket No. 12-1168). *McCullen* put a controversial topic once again before the Court, abortion, but this time, the focus was on what happens outside of the clinics. The Court was asked to determine whether a Massachusetts law creating a fixed buffer zone outside of abortion clinics violated the First Amendment rights of petitioner-antiabortion activists.

Mr. Mark Rienzi (on behalf of petitioners): So the matter of very broad principle is that a law that makes it illegal to even engage in consensual conversation, quiet conversation, on a public sidewalk, an act that makes that a criminal act for which Mrs. McCullen can go to prison, I think, is not permissible under the First Amendment. If you compare it to, for example, the federal military funeral protest law, that law is specifically drawn to acts that disrupt the peace and good order of the funeral, and I think that is different.

Justice Elena Kagan: But are you saying that you could not do an act that instead just says, look, it's a little bit too hard to figure out what and what does not disrupt peace and order, so we're just going to say 25 feet around a funeral, or 25 feet around any facility, that that's never permissible?

Mr. Rienzi: So, generally speaking, I think any law like that runs into a big First Amendment problem of even eliminating peaceful, consensual conversation that doesn't disrupt anything. And this Court's past First Amendment decisions have said that precision of regulation is required. One difference, if it's a rule around any facility or a rule around all funerals, for example, is that—that there isn't nearly as much distortion of the marketplace of ideas as happens when you do what Massachusetts did here[.]

* * * *

Justice Stephen Breyer: That's why I just asked you that question. It just happens that the police testify with some evidence and examples that the 8-foot bubble doesn't work. And it also—they have some evidence and reasons for thinking that if you want to have a conversation, you have to convince the woman to walk 10 feet. I mean, the difference is about half—you know, if you were near me, Price is near Colorado. If we're over to where the first row is, we'd have Massachusetts, and—and they have some evidence that we can't enforce this Colorado thing very well; it doesn't help. Now, go ahead. I want your answer.

Mr. Rienzi: I agree, but if …

Justice Breyer: I'm not trying to put words …

Mr. Rienzi: … if you sent me 35 feet further back and asked me to make my argument from there …

Justice Breyer: I'd hear you.

Mr. Rienzi: You might hear me, but I would suggest you'd—you'd receive it quite differently. If I were sent back there, but the clinic—or the State were permitted to stand in front of you like a normal lawyer and make their argument in the normal way, I would suggest that would be a significant difference. And what we have here is …

Justice Breyer: I'm not denying the difference.

* * * *

Ms. Jennifer Grace Miller (on behalf of respondents): It—Your Honor, I would say it's a congestion case. Certainly, Ms. McCullen and others can have those conversations right in front of the abortion facility. It's just that those conversations are moved back a few feet. And in point of fact, Ms. McCullen …

Justice Kagan: Well, it's more than a few feet. You know, 35 feet is a ways. It's from this bench to the end of the court. And if you imagine the Chief Justice as sort of where the door would be, it's most of the width of this courtroom as well. It's pretty much this courtroom, kind of. That's a lot of space.

Ms. Miller: Just as a factual matter, I did want to point out that in Boston, for example, the door is recessed. It's a private entrance with a recessed door and the 35 feet is measured from the door. So it's actually only about 23 feet.

* * * *

Justice Breyer: Is there anything in this record that suggests that this is one of those cases where it's just too tough to say whether they're counseling somebody or whether they're screaming at somebody, whether they're pushing somebody or whether they're standing near them peacefully? Is there any evidence in the record I could turn to that would suggest that?

Justice Antonin Scalia: You should say yes. (Laughter.)

Ms. Miller: And I will. (Laughter.)

Justice Breyer: She can't say yes if it isn't there, because I'm going to ask her where because I want to read it.

Ms. Miller: I will of course, Your Honor. The best description of that is, of course, Commissioner Evans's description of the space functioning like a goalie's crease.

Justice Anthony Kennedy: Well, let me ask this question: Assume it to be true that an elderly lady who was quite successful and had meaningful communication with over 100 women going into the clinic, before this law, was unable to talk to even one after this law. Assume that's true. Does that have any bearing on our analysis? And does that have any bearing on Justice Breyer's question about whether or not a law can be written to protect that kind of activity but still to prevent obstruction and blocking?

Ms. Miller: I think, Your Honor, that no one is guaranteed any specific form of communication. So, there is no guarantee, as a doctrinal matter, to close, quiet conversations. The question is, are there adequate alternatives? And in this particular instance in this record, there are adequate alternatives.

* * * *

Justice Scalia: I object to you calling these people protestors, which you've been doing here during the whole presentation. That is not how they present themselves. They do not say they want to make protests. They say they want to talk quietly to the women who are going into these facilities. Now how does that make them protestors?

Ms. Miller: Your Honor, the problem, of course, that the statute was looking to address was not with protestors, per se. It was with people who had a desire to be as close to the facility doors and driveways as possible to communicate their message. But the result of that was congestion around these doors and driveways. So it wasn't a concern about the protest; it was a concern about people actually being able to use …

Justice Kagan: And I would think, Ms. Miller, that if you tried to do a statute that distinguished between protestors and counselors, that would be content-based much more than this statute is.

Ms. Miller: I would agree. ■

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PATENT LAW
Octane Fitness, LLC v. ICON Health & Fitness, Inc. and *Highmark, Inc. v. Allcare Health Management Systems*
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