

The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. This department includes an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

American Electric Power Co. v. Connecticut (10-174)

Appealed from the U.S. Court of Appeals for the Second Circuit (Sept. 21, 2009)

Oral argument: April 19, 2011

Several states brought suit against various power companies, arguing that the companies' carbon emissions create a public nuisance by contributing to global warming and damaging the environment. The district court dismissed the claim before trial, holding that disputes concerning global warming should be resolved by the legislature, not the courts. However, the Second Circuit Court of Appeals held that courts are allowed to hear such cases, and that resolution of such disputes is not restricted to the political arena.

Background

In July 2004, the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, and the city of New York (hereinafter referred to collectively as Connecticut) filed a complaint against American Electric Power Company, Southern Company, the Tennessee Valley Authority, Xcel Energy, and Cinergy (hereinafter referred to collectively as American Electric). Connecticut sought to curb the amount of carbon dioxide emitted by American Electric, arguing that the emissions were a public nuisance that harmed citizens by contributing to global warming, which, in turn, has led to serious environmental consequences.

The U.S. District Court for the Southern District of New York dismissed the complaint on the grounds that Connecticut's suit was "impossible to decide without an initial policy deter-

mination of a kind clearly for nonjudicial discretion." Connecticut appealed to the Second Circuit, where American Electric argued that the political question doctrine, a lack of standing, the absence of a veritable nuisance claim, and the doctrine of displacement all counseled against allowing the suit to proceed.

Political Question Doctrine

American Electric argued that the decision to regulate carbon dioxide emissions belonged to the legislative and executive branches, not to the judicial branch. American Electric also claimed that there was "a lack of judicially-discoverable and manageable standards for resolving this case."

The Second Circuit held that the political question doctrine did not apply because (1) the other branches of government did not have sole authority over this area, (2) federal courts have handled sophisticated nuisance claims in the past, (3) courts can resolve common law claims on global warming when the other political branches have not yet taken decisive action on the issue, and (4) there is little threat to the authority of the other political branches because they have yet to develop a comprehensive global warming policy.

Standing

American Electric also challenged Connecticut's standing to bring the suit, alleging that the states did not suffer a sufficient injury. The Second Circuit held that Connecticut could sue on behalf of its citizens in order to protect them. The Second Circuit also held that Connecticut met the traditional requirements of standing: injury, traceability, and redressability.

Federal Common Law of Nuisance

American Electric further challenged Connecticut's suit on the grounds that it did not state a valid public nuisance claim. The Second Circuit disagreed and rejected American Electric's arguments for limiting nuisance based on "constitutional necessity" and "the character of the alleged nuisance," finding that the courts could appropriately handle a nuisance case of this size and type.

Displacement

Finally, American Electric argued that the case should be dismissed under the doctrine of displacement because the Clean Air Act displaced the federal common law of nuisance in the area of carbon emissions. The Second Circuit held that, at the time of its decision, the U.S. Environmental Protection Agency had not regulated greenhouse gases in a way that displaced Connecticut's claim. American Electric appealed the Second Circuit's ruling to the Supreme Court, which granted certiorari on Dec. 6, 2010.

Implications

In this case, the Supreme Court will determine whether states and private citizens may bring common law nuisance claims to limit greenhouse gas emissions. American Electric argues that the legislature, not the judiciary, should make important policy decisions on contentious topics such as climate change. Connecticut counters that states and private citizens have the right to file lawsuits concerning global warming.

Undermining the Political Process

The CATO Institute argues that the legislature, not the court system, should resolve questions concerning climate change. The CATO Institute believes that Connecticut is forcing the court system to act because the legislature has refused to do so. In contrast, a group of law professors argues that allowing courts to hear nuisance claims will not harm the political process. The professors assert that judges will mere-

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ly decide the legal question of whether a common law nuisance is present.

Alternatively, the North Coast Rivers Alliance and other environmental groups argue that courts have successfully stepped in several times in the past to decide important policy issues that legislatures had refused to confront. Past examples include environmental claims concerning asbestos and oil spills and demonstrate that the judiciary is a viable avenue to use for solving major environmental problems.

Overwhelming the Judiciary

The U.S. Chamber of Commerce argues that affirming the Second Circuit's decision will open the floodgates to global warming litigation across the country, overwhelming an already strained federal judiciary. The Chamber of Commerce expresses further concern that these cases will be heard by a wide variety of courts around the country, resulting in a muddle of different results.

The North Coast Rivers Alliance argues that the judiciary is perfectly capable of handling this sort of litigation. The alliance also argues that, once all the major polluters have been targeted by lawsuits, the number of suits will dwindle dramatically, because there will be nobody else to sue.

Threats to the Environment

Two competing briefs from climate scientists debate the role of carbon emissions in global warming. One group of scientists, led by James G. Anderson, asserts that the injuries claimed by Connecticut are real, that it is a "scientific certainty" that American Electric's carbon emissions contribute to those injuries, and that Connecticut's suit will reduce global warming.

Another group of scientists, including Ross McKittrick, argues that the climate reports on which Connecticut relies contain "substantial and pivotal uncertainties in climate science." The group thus urges Supreme Court to dismiss this case on political question grounds so as to allow further debate on climate change in the legislative and executive branches.

Costs to Industry

The Business Roundtable argues the nature of climate change is not amenable to resolution via litigation because it will cause undue harm to the energy industry. The Business Roundtable expresses concern that forcing businesses to base their decisions on the rulings handed down in individual cases will lead to economic uncertainty and, consequently, decreased trade and commercial activity.

AllEarth Renewables and other renewable energy groups (hereinafter referred to collectively as AllEarth) counter that allowing this suit to proceed in the courts will encourage the use of renewable energy sources, such as solar power and wind power. AllEarth argues that current cost models for coal and other carbon-based energy sources fail to account for the costs of environmental damage.

In sum, this case will primarily affect the amount of litigation regarding carbon dioxide emissions, which in turn could lead to increased costs for the energy industry and could eventually affect the amount of carbon dioxide that companies are allowed to emit.

Legal Arguments

At issue in this case is whether Connecticut and other states may sue power companies in order to enjoin the companies' current levels of greenhouse gas emissions. The Second Circuit allowed Connecticut's suit to proceed, ruling that the suit (1) met the standing requirements, (2) was properly pled under the federal common law of nuisance, (3) was not displaced by federal regulation, and (4) did not raise a political question.

Constitutional and Prudential Standing

American Electric argues that the Supreme Court should dismiss the case because Connecticut lacks the core requirements for constitutional standing: injury, traceability, and redressability. First, American Electric argues that there is no causal connection between the harm alleged and the challenged conduct because the alleged harm was caused over centuries from billions of

different sources. Therefore, the conduct is not "fairly traceable" to the power companies' carbon emissions. Second, American Electric contends that the causal chain impermissibly depends on the actions of independent third parties that are not a party to this lawsuit. American Electric argues that Connecticut had admitted that climate change will continue with or without the power companies' specific contribution to the problem; thus the harm alleged by Connecticut would not be cured by a favorable court decision.

American Electric further argues that Connecticut does not have standing based on prudential grounds, arguing that the case is a prototypical "generalized grievance" that is best resolved by the other branches of government because the alleged harm of the power companies' emissions is shared by all persons and states and cannot be differentiated from other pollution. However, Connecticut argues that it has both constitutional and prudential standing to sue. Connecticut asserts that the emissions cause concrete and specific harm to the state's land and also increase health risks for its citizens. Connecticut argues that the harm is fairly traceable to the injury, as set out in *Massachusetts v. EPA*, in which the Court stated that the carbon emissions only had to "meaningfully contribute" to the harm. Connecticut also argues that an award of injunctive relief would redress its injuries because, under *Massachusetts v. EPA*, its suit does not need to reverse global warming; rather, a slowing or reduction of global warming would be sufficient to meet the redressability requirement. Connecticut also contends that, even though global warming affects numerous people and is caused by myriad sources, the harms suffered by the states and their citizens are concrete and therefore are not generalized grievances.

Federal Common Law

American Electric argues that there is no federal common law cause of action for public nuisance. American Electric contends that the Court's landmark decision in *Erie Railroad Co. v. Tompkins* severely limited the areas where

federal courts can create a cause of action. American Electric argues that the Supreme Court has fashioned federal common law only when the necessity of such action can be inferred from the Constitution, which cannot be done for public nuisance claims.

Connecticut responds by noting that the pre-*Erie* Supreme Court established a federal common law right for interstate public nuisance suits. Connecticut elaborates that, even though *Erie* removed the general federal common law, the federal common law of public nuisance continues to exist and has been upheld in subsequent decisions.

Displacement

Under the doctrine of displacement, common law as made by judges is preempted by a relevant statute on the same topic. American Electric argues that, even if the federal common law of public nuisance existed, it has been displaced by the Clean Air Act and by the EPA's regulatory actions. American Electric contends that, along with a comprehensive statute dealing with this issue, there is also the regulatory structure that allows respondents and all other interested parties access to the decision-making process through petitions.

Connecticut argues that the Clean Air Act does not displace this common law cause of action because it merely granted regulatory power to the EPA, and the EPA has not acted upon its grant of authority. Connecticut points out that the Clean Air Act does not by itself prohibit any form of pollution. Connecticut notes that the EPA has recently announced plans to regulate this type of pollution by May 2012 and concedes that, if the EPA follows through on that agreement, it would in fact displace the federal common law.

Political Question

American Electric contends that this case ultimately presents a political question that the legislative branch of government should resolve. American Electric asserts that this case deals with questions that require the court to make policy decisions that would not be governed by any standard other than how much pollution the decision-maker believes to be too much pollu-

tion. American Electric also contends that these types of cases have the potential to become some of the largest and most complex cases in history.

Connecticut responds by asserting that the political question defense only really applies in two categories of cases: foreign affairs and constitutional questions. Connecticut continues that the Supreme Court has never held that a common law tort case was barred under the political question doctrine. In addition, Connecticut argues that nuisance is a long-established part of common law and is a matter that was not thought to be improper for courts to determine.

Conclusion

The U.S. Supreme Court will decide whether states may bring common law public nuisance suits seeking to enjoin certain energy companies' current levels of carbon emissions. This case will primarily affect the role of federal courts in the debate on global warming. If the states do in fact have the right to sue, many states may choose to use this power to slow or diminish global warming. If American Electric wins, attempts to limit carbon emissions must be made through the legislative and executive branches. Full text is available at topics.law.cornell.edu/supct/cert/10-174. **TFL**

Prepared by Alexander Malahoff and Eli Kirschner. Edited by Joanna Chen.

Microsoft Corp. v. i4i Limited Partnership and Infrastructures for Information Inc. (10-290)

Appealed from the U.S. Court of Appeals for the Federal Circuit (March 10, 2010)

Oral argument: April 18, 2011

In 2007, i4i Limited Partnership and Infrastructures for Information Inc. sued Microsoft®, alleging that Microsoft Word's XML capabilities infringed on i4i's patent. Microsoft counterclaimed, contending that i4i's patent was invalid. At trial, the jury was instructed that Microsoft had to prove the patent's invalidity by clear and convincing evidence, even though the evidence Microsoft presented had never

been reviewed by the U.S. Patent and Trademark Office (PTO). Microsoft argues that this high standard is contrary to congressional intent, at least in cases in which the PTO never reviewed the "prior art" on which the alleged invalid patent was based. On the other hand, i4i contends that the Federal Circuit's case law, combined with Congress's enduring failure to legislatively overrule it, reveals that Congress intended a higher standard to apply to the presumption of validity.

Background

The respondent, i4i, is a software consulting company that creates, markets, and sells computer software. On June 2, 1994, it applied for a patent covering its invention—an improved method for manipulating the architecture and content of an electronic document. This technology, commonly referred to as a markup language, places tags around text as a way to tell a computer how to structure an electronic document, including how to display and format text and whether to classify data as a certain type. One specific markup language, XML, allows users to develop their own custom tags. All of the information about the document's structure, including the tags, is known as the metacode. The respondent developed the innovative step of storing the metacodes separately from the document and thereby improved pre-existing technology by allowing users to focus solely on either the document's content or its structure. The PTO issued a patent for this method on July 28, 1998, as U.S. Patent No. 5,787,449 ('449 patent).

Beginning in 2003, Microsoft Corporation, the petitioner, began releasing versions of Microsoft Word capable of editing XML. In 2007, i4i sued Microsoft, alleging that Microsoft Word's XML processing and editing capabilities infringed the i4i's '449 patent. Microsoft counterclaimed, alleging that i4i had sold a software program, SEMI S⁴, more than one year before applying for a patent. Therefore, Microsoft argued that the invention was unpatentable because of the on-sale bar of 35 U.S.C. § 102(b), which

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requires that a patent application be filed within one year of the sale of the invention. Consequently, Microsoft contended that the PTO issued the '449 patent in error, rendering it invalid and unenforceable.

Because the PTO had never reviewed the SEMI S⁴ software before issuing the '449 patent, Microsoft sought a jury instruction that its burden of proof for invalidity be only a preponderance of the evidence—not the typical clear and convincing standard. The U.S. District Court for the Eastern District of Texas denied Microsoft's request, and the jury found that the '449 patent was valid and that Microsoft had willfully infringed upon it. The district court ultimately granted a permanent injunction against Microsoft and awarded \$40 million in damages.

Microsoft appealed to the U.S. Court of Appeals for the Federal Circuit, arguing that the jury instruction requiring Microsoft to prove invalidity by clear and convincing evidence was inappropriate when the PTO had never examined the evidence presented. The Federal Circuit affirmed the district court's judgment, finding that the jury instructions were consistent with circuit precedent. On Nov. 29, 2010, the Supreme Court granted certiorari.

Implications

Microsoft alleges that the district court erred by instructing the jury that Microsoft had to prove invalidity of a patent by clear and convincing evidence, rather than simply by a preponderance of the evidence. The Supreme Court's decision in this case could recast the traditional evidentiary burden for challengers of patent validity and affect parties' decisions to settle their cases or proceed with litigation.

Quality at the Patent and Trademark Office

The Public Patent Foundation faults the current standard of clear and convincing evidence for providing too much deference to issued patents in light of the arguably poor quality of U.S. patents. For example, the foundation states that, in 2009, courts invalidated nearly half of all patents

reviewed for validity. The organization also stresses a recent study of U.S. patent applications that involved an inventor who also sought a patent in the European Patent Office; the study found that the European Patent Office issued a patent only 72.5 percent of the time when a U.S. patent had already been issued.

The Bar Association of the District of Columbia does not dispute the poor quality of U.S. patents; however, it argues that lowering the evidentiary standard would only make things worse. The association recognizes that a lower standard might provide an incentive for applicants to submit more references to prior art when applying for patents and contends that the increased volume is likely to flood the PTO's examiners with many unnecessary references. Accordingly, the D.C. Bar Association posits that the increase in the volume of references, combined with the fact that examiners already work under severe time pressures, will result in even more cursory reviews of patent applications, thereby worsening the quality of patents.

Does the Current Standard Impede Innovation?

Other amici take a position that is similar to those discussed above and argue that the incomplete review by patent examiners, coupled with the clear and convincing standard, chills innovation. The Business Software Alliance, for example, contends that invalid patents—with their corresponding threat of litigation—deter new competitors from entering the marketplace, force those that do enter to sign unnecessary licenses, and create general uncertainty within the marketplace, which raises costs.

The Electronic Frontier Foundation argues that the clear and convincing standard harms small software innovators and the development of open source software. In these particular areas, the short useful life of software, coupled with haphazard documentation, make the clear and convincing standard especially burdensome. As Apple and Intel argue, this restriction on innovation results in a strong

public interest to eliminate invalid patents, and the clear and convincing standard impedes development of new software.

A number of venture capital firms, however, argue that the clear and convincing standard actually protects innovation. These firms maintain that lowering the evidentiary standard will increase uncertainty surrounding the validity of all patents. Because the success of an innovative, start-up company often depends on patent protection, this increased uncertainty raises the level of risk, deterring some venture capitalists from investing.

Will a New Standard Even Make a Difference?

Paul F. Morgan, on the patent blog "Patently-O," argues that, even if the Court does change the standard, the decision will have little practical effect on how entities engage in business and deal with litigation, because it will affect the outcome in very few cases. Morgan states that only 3 percent of patent suits go to trial and only a few of these cases will be decided on validity grounds. Furthermore, the jury—not the judge—usually determines validity. Accordingly, Morgan posits that merely changing a vague burden of proof in the jury's instructions will have little practical effect.

Legal Arguments

The U.S. Supreme Court will address whether 35 U.S.C. § 282 imposes a burden on challengers to prove by clear and convincing evidence that a patent is invalid, and whether such a heightened standard of proof is a judicially created rule that implicates principles of agency deference.

What Standard of Proof Does § 282 Require?

The relevant parts of § 282 state that patents "shall be presumed valid" and that the "burden of establishing invalidity ... shall rest on the party asserting such invalidity." According to Microsoft, the statutory language only assigns to the challenger the burden of proving only invalidity; thus, there is no basis for a court to presume that

the standard of proof should be higher than the default preponderance of the evidence standard. Microsoft argues that, under *Grogan v. Garner*, this default standard is superseded only when important individual interests or rights are at stake. Because this case does not involve drastic action against individuals, Microsoft asserts that the only appropriate standard is preponderance of the evidence.

On the other hand, i4i states that the Supreme Court has adopted a clear and convincing standard for evidence used in civil cases that do not invoke liberty interests, often in situations that involve the promotion of stable property rights or respect for judicial precedent. Thus, i4i argues that individual interests do not have to be at issue for a court to adopt a more stringent standard.

In addition, i4i argues that § 282 codified the common law presumption that those who challenge the validity of a patent must satisfy a heightened standard of proof. Specifically, i4i notes that many of the Supreme Court's decisions that applied a heightened standard for invalidity claims involved a prior-use claim that the Patent Office never considered, which matches the situation in this case.

Microsoft rejects i4i's interpretation of the legislative history behind § 282. The legislative history, Microsoft contends, does not reflect Congress' intent to codify any particular standard of proof. According to Microsoft, if Congress had intended to do so, it is likely that it would have indicated such intent in earlier drafts of the statute. Furthermore, Microsoft notes that, prior to enactment of § 282, the Federal Circuit refused to recognize a uniform application of the standard for invalidity claims.

Finally, i4i asserts that Congress has implicitly endorsed the Federal Circuit's clear and convincing standard by failing to make such changes when it was amending other parts of § 282. Moreover, according to i4i, the Supreme Court should presume that Congress was aware of Federal Circuit precedent regarding this standard, because official records do not suggest otherwise.

Microsoft attempts to refute i4i's

contention by noting that the Supreme Court has stated in the past that Congress may choose not to make an affirmative move to correct every lower court's interpretation of its statutes, even Congress believes the interpretation is erroneous. Therefore, in Microsoft's view, courts should not automatically construe congressional inaction as tacit approval, nor should they assume that Congress was even aware that the Federal Circuit read a heightened standard into the statute at issue in this case.

Does the Standard of Proof Implement Principles of Agency Deference?

Microsoft also argues that courts would not be able to justify the imposition of a clear and convincing standard based on principles of administrative law. Microsoft contends that, in suits involving issues of patent validity, federal courts have recognized that the only provision governing judicial deference is 35 U.S.C. § 282—in other words, the deferential standard of review included in the Administrative Procedure Act (APA) does not apply to patent infringement cases.

Specifically, Microsoft asserts that the Supreme Court has held that the APA was designed to allow a review of an agency's decision based exclusively on the record the agency presents to the reviewing court. In this case, however, a patent validity challenge by the alleged infringer is a defense to a claim of patent infringement, not a method of seeking review of agency action. Therefore, according to Microsoft, the APA standard of review is not appropriate for patent infringement cases.

In the alternative, Microsoft believes that, even if the APA's standards of review were applicable, the Supreme Court should resolve such validity issues without deference to the lower courts' opinions. According to Microsoft, patent infringement suits cannot be litigated based only on the record before the PTO, because § 282 encourages the introduction of new evidence concerning the patent's invalidity. The inclusion of new evidence, Microsoft contends, necessarily warrants a non-deferential review of the lower court's findings. However, i4i, disagrees with

Microsoft's interpretation of administrative law principles. According to i4i, courts routinely defer to governmental agencies' decisions that are outside the scope of APA actions, and such deference reflects a respect for Congress' determination that agencies should fill any gaps in their regulations. Therefore, judicial deference in this situation is grounded not in the APA, but in the presumption that agencies can determine validity questions in their area of expertise.

Furthermore, i4i contends that the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe* established that de novo review is appropriate only when the court has determined that the agency's fact-finding procedures were inadequate, which the Supreme Court has never found. Overall, i4i believes that judicial deference to the PTO's decision is highly appropriate and consistent with the principles of administrative law established by the Supreme Court.

Conclusion

In this case, the Supreme Court will determine whether 35 U.S.C. § 282 requires the challenger of a patent's validity in patent infringement cases to satisfy the clear and convincing standard, and whether such a heightened standard of proof is justified under principles of administrative law. If the Supreme Court reverses the Federal Circuit, Microsoft would only have to prove that i4i's patent was invalid based on a preponderance of the evidence. However, if the Court agrees with i4i and imposes the clear and convincing standard on Microsoft, then the jury's finding that Microsoft was unable to satisfy this stringent standard would stand. Full text is available at topics.law.cornell.edu/supct/cert/10-290. **TFL**

Prepared by Teresa Lewi and Benjamin Rhode. Edited by Joanna Chen.

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Erica P. John Fund v. Halliburton (09-1403)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Feb. 12, 2010)

Oral argument: April 25, 2011

Halliburton is accused of making misstatements about its financial position, which allegedly caused Halliburton's stock price to drop when the information was revealed. The Erica P. John Fund asserts that these misstatements defrauded Halliburton's investors and seeks class certification to recover investors' losses. The Fifth Circuit held that, in order to be certified as a class, investors must prove that the fraud actually caused the drop in stock value. Halliburton asserts that this is necessary because, unless the fraud actually caused the loss, no presumption of reliance on the misstatement can arise, and therefore the plaintiffs have failed to make the case for class certification. The Erica P. John Fund argues that the Fifth Circuit's holding contradicts the Federal Rules of Civil Procedure and Supreme Court precedent, and that requiring proof of loss causation undermines the values and goals of the reliance presumption. Full text is available at topics.law.cornell.edu/supct/cert/09-1403. **TFL**

Prepared by L. Sheldon Clark and Omair Khan. Edited by Kate Hajjar.

McNeill v. United States (10-5258)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (March 8, 2010)

Oral argument: April 25, 2011

In 2009, Clifton Terelle McNeill was convicted of possession of cocaine with intent to distribute it and of possession of a firearm in furtherance of a drug trafficking crime and was sentenced for his crimes. The district court determined that McNeill qualified for a sentencing enhancement under the Armed Career Criminal Act (ACCA) because of his prior convictions, which included six convictions for the sale and possession of cocaine. The ACCA applies to "serious drug offenses," defined as crimes

carrying a maximum imprisonment term of at least 10 years. McNeill argues that the ACCA did not apply in his case because, although his drug offenses did carry a maximum term of at least 10 years when the crimes were committed, North Carolina had lowered its drug sentences by the time of his sentencing for the current crimes. Conversely, the United States insists that, because North Carolina decided not to make its drug sentencing change retroactive, the ACCA should apply to McNeill. Full text is available at topics.law.cornell.edu/supct/cert/10-5258. **TFL**

Prepared by Priscilla Fasoro and Justin Haddock. Edited by Catherine Sub.

Nevada Commission on Ethics v. Carrigan (10-568)

Appealed from the Supreme Court of Nevada (July 29, 2010)

Oral argument: April 27, 2011

The Nevada Commission on Ethics censured Michael Carrigan, a city council member, for voting to issue a permit to a company that employed his friend and campaign manager. The Commission on Ethics alleges that Carrigan violated a catchall recusal provision requiring officials to disqualify themselves when faced with a personal interest in a matter. Carrigan argues that the provision violates his First Amendment rights of expression and association and must be subject to strict scrutiny. The commission contends that any violation of the First Amendment is incidental, and therefore the Supreme Court should apply a standard of review that is lower than strict scrutiny. The Supreme Court of Nevada applied strict scrutiny and struck down the provision as unconstitutional. The U.S. Supreme Court's decision could affect the level of scrutiny at which recusal provisions are reviewed nationwide and the freedom of states to establish voting restrictions on independent legislators. Full text is available at topics.law.cornell.edu/supct/cert/10-568. **TFL**

Prepared by Kelly Halford and Eric Schulman. Edited by Sarah Chon.

Sorrell v. IMS Health Inc. (10-779)

Appealed from the U.S. Court of Appeals for the Second Circuit (Nov. 23, 2010)

Oral argument: April 26, 2011

In 2007, the state of Vermont passed Act 80, which prohibits prescription drug companies from obtaining patients' personal information for marketing purposes without the prescribing physician's consent. The pharmaceutical companies sued Vermont, seeking an injunction prohibiting the enforcement of Act 80, because it was an unconstitutional restriction on their right to commercial speech. Vermont argues that Act 80 does not regulate speech protected by the First Amendment, and that the law is related to Vermont's interests of protecting medical privacy, controlling health care costs, and protecting public health. On the other hand, the pharmaceutical companies argue that Act 80 is unconstitutional, because it discriminates against the speech of pharmaceutical manufacturers and is not related to Vermont's state interests. The Supreme Court's decision will affect patients' and physicians' privacy, the marketing of prescription drugs, and the status of other laws protecting consumers' privacy. Full text is available at topics.law.cornell.edu/supct/cert/10-779. **TFL**

Prepared by Natanya DeWeese and James Rumpf. Edited by Eric Johnson.

Tapia v. United States (10-5400)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (April 16, 2010)

Oral argument: April 18, 2011

Alejandra Tapia was convicted of smuggling illegal aliens and sentenced to 51 months in prison. At sentencing, the district court factored in her history of substance abuse in its decision to give her a sentence beyond the minimum term so that she could enter and complete an in-custody drug rehabilitation program. Tapia appealed her sentence to the Ninth Circuit, which affirmed the district court's deci-

sion. Tapia now appeals to the U.S. Supreme Court, contending that the plain meaning and legislative history of the Sentencing Reform Act confirm that rehabilitation is an inappropriate consideration in prison sentencing. The United States agrees with Tapia and urges vacating the lower court decision. Writing as amicus curiae by invitation of the Supreme Court, Professor Stephanos Bibas asserts that district courts may properly consider the rehabilitative potential of in-prison targeted treatment programs when determining a prison sentence. Full text is available at topics.law.cornell.edu/supct/cert/10-5400. **TFL**

Prepared by Jacqueline Bendert and Rachel Sparks Bradley. Edited by Kate Hajjar.

United States v. Jicarilla Apache Nation (10-382)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Feb. 1, 2010)

Oral argument: April 20, 2011

In 2002, the Jicarilla Apache Nation filed a breach of trust action against the United States, alleging mismanagement of funds held in trust for the tribe. In 2008, the Jicarilla Apache Nation moved to compel the production of a few hundred documents exchanged between the government and its attorneys, but the government refused to disclose nearly 160 documents on the grounds of attorney-client privilege. The Court of Federal Claims subsequently granted Jicarilla's motion to compel production of the documents, and the Federal Circuit affirmed. Now, the United States argues that disclosure

of the documents was unwarranted, because no statute or regulation specifically requires the disclosure. The Jicarilla Apache Nation, however, contends that the government must be treated like an ordinary private trustee and forced to disclose information exchanged with its attorneys. Full text is available at topics.law.cornell.edu/supct/cert/10-382. **TFL**

Prepared by Colin O'Regan and Edan Shertzer. Edited by Joanna Chen.

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¹⁰⁰*Id.* § 501(r)(5).

¹⁰¹*Id.* § 501(r)(6).

¹⁰²Fine and Jedry, *supra* note 5, at 6.

¹⁰³King et al., *supra* note 27, at 11–13.

¹⁰⁴ACA, *supra* note 29, § 501(r)(2)(B).

¹⁰⁵Fine and Jedry, *supra* note 5, at 7.

¹⁰⁶ACA, *supra* note 29, § 501(r)(2)(A).

¹⁰⁷Stewart and Azman, *supra* note 94, at 12.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰Fine and Jedry, *supra* note 5, at 7.

¹¹¹Stewart and Azman, *supra* note 94, at 15.

¹¹²*Id.*

¹¹³IRS, Rev. Rul., *supra* note 20.

¹¹⁴Stewart and Azman, *supra* note 94, at 15.

¹¹⁵*Id.* at 16.

¹¹⁶*Id.* at 17.

¹¹⁷*Id.*

¹¹⁸*Id.* at 16.

¹¹⁹IRS Exempt Organizations (TE/GE), *Hospital Compliance Project Final Report*, *supra* note 24, at 169, 171.

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²³Breard, *supra* note 16, at 194.

²⁴Medellín, *supra* note 17, at 494.

²⁵Vienna Convention of the Law on Treaties, 1155 U.N.T.S. 331 (May 23, 1969).

²⁶See *Convention Between the Government of the United States and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains, U.S.-Ireland*, Jul. 28, 1997. A list of links to all U.S. tax treaties is provided by the IRS and is available at www.irs.gov/businesses/international/article/0,,id=96739,00.html. The OECD's list of member countries is available at www.oecd.org/countrieslist/0,3025,en_33873108_33844430_1_1_1_1,00.html.

²⁷See Congress of the United States, Congressional Budget Office, *Corporate Tax Rates: International Comparisons*, Nov. 2005 (Ireland has one of the world's lowest corporate tax

rates at 12.5 percent on nontrading income.).

²⁸Vienna Convention on the Law of Treaties, *supra* note 24.

²⁹Organisation for Economic Co-Operation and Development, Centre for Tax Policy and Administration, *Proposed Revision of Chapters I-III of the Transfer Pricing Guidelines* (Jan. 9, 2010), available at www.oecd.org/dataoecd/1/57/43655703/pdf.

³⁰See OECD, *supra*, note 12; See Wittendorff, *supra* note 7, at 650.

³¹Veritas, *supra* note 1, at 327.

³²Veritas, *supra* note 1.

³³Wittendorff, *supra*, note 7 at 655–656; Dept. of Treas., Reg. § 1.482-5(b)(2)(i).

³⁴*Id.*, § 1.482-4(f)(2)(i).