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BG GROUP, PLC V. REPUBLIC OF ARGENTINA (12-138)

Appealed from the District of Columbia Circuit Court of Appeals

Oral argument: Dec. 2, 2013

Issues

1. Does an arbitrator or a court decide whether a precondition to arbitration has been satisfied?
2. To what extent can federal courts review such decisions?

Question as Framed for the Court by the Parties

1. In a multistaged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?
2. Can a federal court with jurisdiction over an application to vacate an arbitral award independently decide whether a valid and binding agreement to arbitrate has been created under the terms of a bilateral investment treaty?

Facts

On Dec. 11, 1990, the United Kingdom and Argentina signed the bilateral investment treaty (BIT) at issue. Its purpose was to promote foreign investment in the Argentine market to reduce the country's inflation and public debt.

Article 8(2) of the BIT states that disputes between an investor and Argentina that fall under the treaty must first be submitted to a competent tribunal in the state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request if (1) a period of 18 months has passed since the dispute was presented to the tribunal and no decision has been made; or (2) the final decision was made, but the parties still disagree. Article 8(3) specifies that if a dispute goes to arbitration and the parties

cannot agree on arbitration procedures, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) will govern.

Petitioner BG Group held substantial shares of MetroGAS, a private Argentinian gas transportation and distribution company. MetroGAS granted the U.S. company 35-year, exclusive licenses to distribute gas in and around Buenos Aires. These licenses provided that tariffs would be calculated in U.S. dollars. The tariffs could be adjusted every six months for inflation based on the U.S. Product Price Index (PPI).

Between 2001 and 2002, the Argentine economy collapsed. In response, the government enacted Emergency Law 25,561 to prohibit inflation adjustments based on PPI and converted dollar-based tariffs to peso-based tariffs at a rate of one U.S. dollar to one peso. Then, Argentina passed Decree 214/02, Article 12 (Article 12), which stayed for 180 days compliance with injunctions and trial judgments resulting from lawsuits relating to the emergency law.

Eight months after Article 12 expired, BG filed a notice of arbitration under Article 8(3) and submitted the dispute to arbitration in the United States under the UNCITRAL Rules. BG Group claimed that the emergency laws negatively affected its investment in MetroGAS, for which it sought damages.

At arbitration, Argentina argued that the arbitral tribunal did not have jurisdiction over the parties because the dispute had not gone before an Argentine tribunal for at least 18 months, as required by Article 8(2). BG Group argued this was unnecessary because of the time it would have taken the Argentine courts to resolve the dispute.

The arbitral tribunal determined that it had jurisdiction over the dispute and issued an award for BG Group. The tribunal

reasoned that Argentine courts would not have made a decision within 18 months because of the emergency decrees that restricted access to the courts.

The District of Columbia District Court upheld the arbitration award, stating that the tribunal could decide its own jurisdiction. The District of Columbia Circuit Court of Appeals overturned that decision and found that the tribunal did not have jurisdiction because the parties did not meet the preconditions for Article 8(2).

BG Group filed a petition for a writ of certiorari with the Supreme Court, which was granted on June 10, 2013.

Discussion

BG Group argues that the arbitrator, not the court, should make arbitrability decisions. It asserts that arbitration's purpose is to provide a neutral forum with experienced arbitrators as decision-makers. If courts second-guess these decisions, BG Group argues, arbitration's purpose will be defeated. On the other hand, Argentina argues that arbitration's purpose is to give the parties what they agreed to, and if arbitrators can bind countries to arbitration without consent and judicial review, the international commercial market will suffer. The Supreme Court's resolution of this case will determine whether arbitrators can make threshold decisions on arbitrability and the extent to which courts can review these decisions.

Purpose of International Arbitration

BG Group and supporting *amici* argue that international arbitration's purpose is to provide businesses engaged in international transactions with a neutral forum for dispute resolution. BG Group asserts that businesses pursuing international transactions choose to bring their disputes to arbitration because they fear courts may be biased toward businesses based in the

country where the transactions occurred.

Argentina counters that arbitration's purpose is to enforce the parties' intent in making the contract. It argues that if the parties here intended that the arbitrators decide the agreement's validity, they would have specified this threshold issue in the agreement. Furthermore, Argentina contends that the international arbitration community relies on the assumption that courts will have power to review arbitrator decisions.

United States in the Arbitration Community

BG Group argues that the Federal Arbitration Act (FAA) shows that the United States is committed to a policy of arbitration. The American Arbitration Association (AAA) adds that the United States is one of the preferred seats for international arbitration because of (1) the respect U.S. courts have for FAA-based arbitration and (2) U.S. participation in the New York Convention. In its amicus brief supporting BG Group, the Council for International Business (CIB) notes that if the courts in one country refuse to enforce arbitration agreements and decisions made by arbitrators, other countries will show similar disregard, and the framework for fair and neutral international arbitration will unravel.

Argentina argues that for international commercial treaties such as bilateral investment treaties, the states involved rely on judicial review to monitor the fairness of arbitral decisions. Argentina claims that courts and arbitrators alike must be cautious not to bind sovereign states to proceedings to which they do not consent. Specifically, Argentina claims that allowing arbitral tribunals to do so implicates comity concerns between nations.

Analysis

According to BG Group, the issue in this case is whether it had to satisfy the litigation precondition contained in Article 8(2) of the BIT before beginning arbitration proceedings. It argues that this question is one of procedural arbitrability that should be resolved by the arbitrators, not the courts.

According to Argentina, the issue is not one of procedural, but of substantive arbitrability. That is, the issue is whether there was a valid arbitration agreement between the parties. Argentina believes that courts,

not arbitrators, must decide this question.

The Federal Arbitration Act and Supreme Court Precedent

BG Group argues that the issue is resolved by *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), in which the Court held that courts decide questions of *substantive* arbitrability—such as whether a party is bound at all by a particular arbitration clause—whereas arbitrators decide questions of *procedural* arbitrability—such as whether prerequisites like time limits, notices, and estoppel to arbitrate have been met. The issue in *Howsam* was whether a claim submitted for arbitration was barred under the time limit rules of the National Association of Securities Dealers. The Court held that arbitrators should decide this procedural question, relying on its previous holding in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

BG Group contends that *Howsam* and *John Wiley* stand for the proposition that a dispute concerning compliance with arbitration preconditions must be decided by the arbitrators. It asserts that this case falls clearly under these precedents and compels the conclusion that whether the litigation precondition in Article 8(2) was satisfied is a question of procedural arbitrability.

Argentina argues that Article 8(2) constitutes an offer to arbitrate, subject to various conditions. To form an agreement, the investor must accept the offer along with its conditions, one of which is submitting the dispute to the local courts for at least 18 months before initiating arbitration. Because BG Group failed to satisfy this condition, Argentina argues that BG Group's invitation to begin arbitration was a counteroffer, not an acceptance of the offer contained in the treaty. To have a binding agreement between the parties, Argentina must have accepted the counteroffer.

Moreover, under the FAA, when there is a question of the existence, validity, or scope of an arbitration agreement, the default presumption is that courts decide those questions, not arbitrators. Argentina argues that this is not surprising given the fact that if parties never entered into a contract to arbitrate, then the arbitral tribunal has no power over the parties or any power to determine its own jurisdiction.

Argentina cites the UNCITRAL Model Law, which it argues represents an international consensus on the appropriate role for national courts in international commercial arbitration.

The Bilateral Investment Treaty

BG Group argues that the BIT does not establish any presumption that the parties intended to allow the courts, rather than the arbitrators, to have the final word with respect to disputes about the litigation precondition. Rather, BG argues, the treaty only permits the Argentine courts to issue a nonbinding decision on the merits of the dispute and does not contemplate they would decide issues of arbitral jurisdiction. Indeed, BG Group contends that under the treaty's terms, only the arbitral tribunal has the authority to issue a final decision, even with respect to its own jurisdiction.

In response, Argentina contends that the lower court properly interpreted the treaty under the Vienna Convention on the Law of Treaties, which requires a treaty's terms to be interpreted according to their ordinary meaning. According to Argentina, the BIT requires on its face that the parties submit their dispute to 18 months of litigation in Argentina before commencing arbitration. Argentina points out that BG Group never presented an alternative basis for the tribunal's jurisdiction.

Conclusion

The Court will determine whether, as BG Group contends, the issue concerns the satisfaction of a precondition to arbitration, or, as Argentina argues, whether the parties ever entered into a valid arbitration agreement. Its decision implicates the United States' role in international commercial arbitration, how U.S. courts interpret arbitral awards and bilateral investment treaties between foreign sovereigns, and how the United States is perceived as a seat for international arbitration. ☉

Written by Sean Mooney and Brett Mull. Edited by Angela Lu. The authors would like to thank former Supreme Court Reporter of Decisions Frank Wagner for his assistance in editing this preview.

MICHIGAN V. BAY MILLS INDIAN COMMUNITY (12-515)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: Dec. 2, 2013

Issues

1. Can a federal court exercise jurisdiction over a state's suit alleging violations of the Indian Gaming Regulatory Act (IGRA) when the gaming activity is not located on Indian lands?
2. Does tribal sovereign immunity bar a state from suing a tribe in federal court for violations of the IGRA?

Questions as Framed for the Court by the Parties

The IGRA, 25 U.S.C. § 2701 et seq., authorizes an Indian tribe to conduct Class III gaming under limited circumstances and only on Indian lands, § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located off of Indian lands.

The petition presents two recurring questions of jurisprudential significance that have divided the circuits:

1. Does a federal court have jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands?
2. Does tribal sovereign immunity bar a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands?

Facts

The IGRA legalizes casino-style, or Class III, gaming on Indian lands if certain requirements are met. To conduct Class III gaming, an Indian tribe must adopt a gaming ordinance, which must be approved by the chairman of the National Indian Gaming Commission, an independent federal agency that regulates and oversees gaming activities on Indian lands. Additionally, the tribe must consult with the state and enter into a Tribal-State compact that governs the terms of the gambling.

Bay Mills, a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula, operates one casino on its reservation and another in Vanderbilt, Mich., on the Lower Peninsula. In 1997, Congress passed the Michigan Indian Land Claims Settlement Act to allocate funds to Bay Mills and other Michigan tribes to satisfy

judgments resulting from lost territory and broken federal treaties. The settlement act directed Bay Mills to use a portion of the settlement funds to establish a land trust, with the earnings to be used for improvements to tribal land or the acquisition of land. Any land acquired with these funds would be held as Indian lands. In 2010, Bay Mills used these earnings to purchase property in Vanderbilt, located more than 100 miles from the tribe's reservation. It opened a small casino on the property on Nov. 3, 2010.

The State of Michigan filed suit in federal court against Bay Mills seeking to enjoin the gambling activity at the Vanderbilt casino, which it contends is not being operated on Indian lands and, therefore, is in violation of the IGRA. The Little Traverse Bay Bands of Odawa Indians, also a federally recognized Indian tribe, filed suit alleging that the Vanderbilt casino was causing its casino, located approximately 45 miles away, to lose revenue. Shortly thereafter, the National Indian Gaming Commission issued an informal opinion stating that the Vanderbilt Casino is not located on Indian lands within the meaning of the IGRA.

The U.S. District Court for the Western District of Michigan enjoined the Vanderbilt casino's gambling activities, but the Sixth Circuit reversed on two distinct holdings. First, the court held that Michigan and Little Traverse could not establish federal jurisdiction through federal statute because suits may only be brought under the IGRA if the gaming is conducted on Indian lands. However, the court held that Michigan could establish jurisdiction in federal court based on federal question jurisdiction because Michigan's claims implicate significant federal issues in state and Indian relations. Second, the court held that Bay Mills was immune from suit even though the activities did not occur on tribal land, because Congress had not authorized suit and Bay Mills did not waive its immunity. Michigan alone petitioned for certiorari to address the issues of federal jurisdiction and tribal sovereign immunity, and certiorari was granted.

Discussion

Bay Mills argues that this case does not fall within the IGRA, and therefore the suit is barred by tribal immunity, which exists because Congress has not explicitly abrogated immunity and the tribe has

not waived it. Michigan argues that tribal immunity does not bar states from pursuing prospective relief, such as injunctions, in federal court to stop gaming when tribal casinos are not located on Indian lands.

Negative Effects of the Proliferation of Gambling and Casinos

Michigan contends that the blocking of this action would cause the proliferation of casinos that are off Indian lands. The state asserts that casinos have negative economic and social impacts, such as enabling organized crime and increasing rates of crime, alcoholism, and unemployment.

Bay Mills responds that Michigan itself proliferates organized gambling and points to four race tracks operating in the state as well as Detroit's increasing dependency on gaming revenues from its casinos. The tribe suggests that states have often hidden behind rationales like the prevention of organized crime, but that historically states' true interest in opposing Indian gaming has been to stifle the competition it poses to a state's own gaming enterprises.

Available Methods of Gambling Enforcement

Michigan argues that if it cannot enjoin in federal court gaming taking place off Indian lands, it must resort to sending in law enforcement to seize equipment and arrest tribal employees, which would create the type of inter-sovereign friction the IGRA seeks to avoid.

Conversely, Bay Mills contends that such extreme action is unnecessary because under the gaming compact between Bay Mills and Michigan, the proper resolution is arbitration. The United States, writing in support of Bay Mills, adds that other avenues of relief are available. For example, Bay Mills could waive immunity so that the federal court could determine the status of the land or Michigan could pursue injunctions against individual tribal officials or Michigan state law claims against individuals directly conducting the gaming.

Analysis

First, the Court could determine whether it has jurisdiction to enjoin an activity that violates the IGRA and takes place outside of Indian lands. If the Court properly has jurisdiction, it will determine whether tribal sovereign immunity bars the action brought by the state. Under IGRA, 25

U.S.C. § 2710(d)(7)(A)(ii), a federal court can enjoin any gaming activity identified as Class III gaming under IGRA and is located on Indian lands. Michigan argues that the same section provides a clear grant of federal jurisdiction over the lawsuit because although the casino is not located on the Bay Mills reservation, the tribe licensed and facilitated operation of the casino on its reservation, satisfying the “on Indian lands” requirement. Bay Mills argues that the court should reject Michigan’s suit wholly on the ground that Bay Mills is immune from suit and that it is the prerogative of Congress to change the doctrine of tribal sovereign immunity.

Does the Court Have Jurisdiction Over This Suit?

Michigan argues that the IGRA provides the federal courts with jurisdiction over this case. It contends that by definition a reservation is Indian land under 25 U.S.C. § 2703(4), and thus because the authorization, licensing, and operation of the casino occurred on the reservation, that requirement is satisfied and federal court jurisdiction is appropriate. The state argues that Congress could not have meant to limit federal court authority to enjoining only gaming itself, and therefore authorizing, licensing, and operating a Class III gaming facility are encompassed in the definition of Class III gaming activities under § 2710.

Bay Mills contends that it maintains sovereign immunity, and therefore the question of jurisdiction is not the deciding factor in this case. It asserts that Michigan skips over the inquiry into whether § 2710 can be considered an abrogation of sovereign immunity for any claim. Bay Mills argues that Michigan cannot move forward under § 2710 because Class III gaming activities refers to only the gaming itself and not licensing and operation. Therefore, the tribe argues that because the gaming facility is not located on Indian land there is no federal court jurisdiction under § 2710. It contends that for an abrogation of tribal sovereign immunity to occur, “Congress must unequivocally express that purpose.”

Does Tribal Sovereign Immunity Bar This Suit?

Bay Mills contends there are only two exceptions to the overarching rule of immunity and neither exception applies here. The tribe states that in *Kiowa v. Mfg. Techs.*,

523 U.S. 751, 754 (1998), the Supreme Court held that a tribe can waive sovereign immunity or Congress can abrogate a tribe’s immunity from suit and that barring these two exceptions, immunity remains intact. Bay Mills asserts that without any clear indication to the contrary, it is able to maintain its immunity from suits outside § 2710’s narrow scope. Additionally, it argues that reading 18 U.S.C. § 1166, which states “for purposes of federal law all state law pertaining to licensing, regulation or prohibition of gambling ... shall apply in Indian country ...” as a sweeping extension of state civil jurisdiction would disrupt IGRA’s allocation of jurisdiction among tribal, federal, and state governments.

Michigan argues that Bay Mills does not have sovereign immunity from a suit seeking to enjoin it from operating an illegal gaming facility on lands subject to the state’s jurisdiction. It contends that IGRA was enacted with the clear expectation that states would be able to enforce state law in federal court against tribes that engaged in unlawful off-reservation gaming. Michigan asserts that by enacting 18 U.S.C. § 1166, it is implausible that Congress’s intention was to allow states to invoke that statute to enforce anti-gambling law in Indian country but not on state lands. Michigan argues that it does not make sense to read the phrase “Indian lands” as a limitation on suits in federal courts when the gaming is occurring outside of Indian lands.

Conclusion

In this case, the Supreme Court can decide whether or not federal jurisdiction exists where a state seeks an injunction against an Indian-run casino located off Indian land. Additionally, the Court may decide whether tribal sovereign immunity exists or instead is abrogated by the IGRA, or, alternatively, that no tribal immunity exists for illegal commercial activity that takes place off reservation. The Court’s decision will impact the legal relationship between states and Indian tribes in the area of commercial gaming and may affect state/tribal relations generally. ☉

Written by Katherine Hinderlie and Rose Petoskey. Edited by Allison Nolan. The authors would like to thank former Supreme Court Reporter of Decisions Frank Wagner for his assistance in editing this preview.

LEXMARK INTERNATIONAL, INC. V. STATIC CONTROL COMPONENTS, INC. (12-873)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: Dec. 3, 2013

Petitioner Lexmark International, Inc., a major producer of laser printers, developed a microchip for its toner cartridges to restrict third-party businesses from replacing Lexmark cartridges. Respondent Static Control Components, Inc., replicated that microchip, thereby allowing third parties to refill and resell used Lexmark cartridges. Lexmark responded by telling businesses that the use of Static’s replicated microchips would infringe upon Lexmark’s patent. In a 2004 lawsuit, Static brought false advertisement claims against Lexmark under the Lanham Act. The district court dismissed those charges, concluding that Static lacked standing. The Sixth Circuit reversed that dismissal, reasoning that Static had a cognizable business interest that was harmed by Lexmark’s remarks; therefore, Static had standing and qualified for protection under the Lanham Act. The Supreme Court’s ruling in this case will resolve a circuit split over the proper framework for determining prudential standing in false advertising claims under the Lanham Act and, accordingly, determine who can assert false advertising claims under it. Full text is available at www.law.cornell.edu/supct/cert/12-873. ☉

Written by Daniel Rosales and Jordan Manalastas. Edited by Chanwoo Park.

NORTHWEST, INC. V. GINSBERG (12-462)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral argument: Dec. 3, 2013

S. Binyomin Ginsberg sued Northwest Airlines, now Delta Airlines, after Northwest terminated his WorldPerks frequent flyer membership. Ginsberg asserted four state contract causes of action. Northwest argues that Ginsberg’s claims are preempted under the Airline Deregulation Act (ADA) of 1978, which preempts states from enacting or enforcing laws related to the price, route, or service of airline transportation. The District Court for the

Southern District of California granted Northwest's motion to dismiss the complaint. The Court of Appeals for the Ninth Circuit reversed, holding—in conflict with other circuit courts—that Ginsberg's claim for breach of an implied covenant of good faith and fair dealing was not preempted. The Ninth Circuit reasoned that nothing in the ADA suggested that Congress intended to displace state common law contract claims that were only peripherally related to deregulation. The Supreme Court granted *certiorari* to resolve the circuit split over whether state contract claims are preempted by the Airline Deregulation Act. The Court will also determine whether the act preempts claims arising out of frequent flyer programs. The Court's decision will impact the balance of state and federal regulatory interests under the ADA and the scope of other federal preemption regimes. Full text is available at www.law.cornell.edu/supct/cert/12-462. ☉

Written by Sandra Fung and Jacob Brandler. Edited by Chanwoo Park.

TOWNSHIP OF MOUNT HOLLY V. MOUNT HOLLY GARDEN CITIZENS IN ACTION, INC. (11-1507)

Appealed from the U.S. Court of Appeals for the Third Circuit

Oral argument: Dec. 4, 2013

This case asked whether disparate impact claims are cognizable under Section 804(a) of the Fair Housing Act (FHA). That section makes it unlawful “to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” The Township of Mount Holly argues that the plain language of the statute does not permit disparate treatment claims, whereas residents of Mount Holly Gardens argued the opposite. Further, the township asserts that permitting disparate-impact claims raises constitutional concerns—including Equal Protection Clause and Tenth Amendment violations. Residents of Mount Holly Gardens counter that no such violations result from acknowledging disparate-impact liability under the statute. This

case presented the Supreme Court with the opportunity to definitively rule on whether the FHA allows for disparate-impact claims. On Nov. 13, 2013, the parties settled, and on Nov. 15, 2013, the Supreme Court dismissed the case. Full text is available at www.law.cornell.edu/supct/cert/11-1507. ☉

Written by So Yeon Chang and Madeline Weiss. Edited by Angela Lu.

UNITED STATES V. APEL (12-1038)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral argument: Dec. 4, 2013

John Apel was convicted of violating 18 U.S.C. § 1382, which prohibits the re-entry of persons barred from a military installation. The Ninth Circuit overturned his conviction, interpreting § 1382 as requiring the military's exclusive control over the area, which did not exist here because the area was subject to a public easement. The United States disputes the Ninth Circuit's interpretation of § 1382 and argues that the military need not have exclusive possession or control of an area for a military installation commander to exclude a civilian trespassing. According to the government, it is sufficient that the easement be under the jurisdiction of the military. The United States also argues that § 1382 is a content-neutral restriction that does not violate the First Amendment. Apel responds that § 1382 requires that the military have exclusive control and possession of an area and that the area be used for a military purpose to be considered a military installation under the statute. Apel also argues that his conduct is protected under the First Amendment. The Supreme Court's decision will help determine the scope of the military's power in relation to easements on their property. It may also affect the scope of First Amendment protections afforded soldiers and others who would protest the government on or near military installations. www.law.cornell.edu/supct/cert/12-1038. ☉

Written by Kalson Chan and Alex Kerrigan. Edited by Stephen Wirth.

AIR WISCONSIN AIRLINES V. HOEPER (12-315)

Appealed from the Supreme Court of Colorado

Oral argument: Dec. 9, 2013

Former co-workers reported pilot William Hoeper to the Transportation Security Administration (TSA), claiming they were concerned that Hoeper, who was about to fly home as a passenger, was mentally agitated and might be armed. Hoeper sued Air Wisconsin for defamation, alleging that the co-workers' statements to the TSA were misleading and the result of animosity against him. The Court will decide whether immunity under the Aviation and Transportation Security Act (ATSA), which would cover statements made by airlines to the TSA, can be denied without a court first determining that the disclosure was false. While Hoeper argues that his co-workers' statements were clearly materially false, Air Wisconsin argues that the lower court needed to make a determination that the statements were false before denying immunity to Air Wisconsin. The Supreme Court's ruling in this case will have a direct impact on the scope of protection for airlines that report suspicious activities to the TSA and may also have a broader impact on First Amendment jurisprudence. www.law.cornell.edu/supct/cert/12-315. ☉

Written by Holly Tao and Chihiro Tomioka. Edited by Allison Nolan.

EPA V. EME HOMER CITY GENERATION (12-1182); CONSOLIDATED WITH AMERICAN LUNG ASSOCIATION V. EME HOMER CITY GENERATION (12-1183)

Appealed from the U.S. Court of Appeals for the D.C. Circuit

Oral argument: Dec. 10, 2013

In 1963, in response to growing concerns of pollution, Congress passed the Clean Air Act (CAA), which requires the Environmental Protection Agency (EPA) to set certain air quality standards for harmful pollutants and includes a Good Neighbor provision requiring states to adopt plans that prohibit pollution that would contribute significantly to other states' nonattainment of these standards. However, the CAA does not define significant contribu-

tion. In 2011, the EPA finalized a rule known as the Transport Rule. Mirroring the language of the Good Neighbor provision, the Transport Rule defines emission-reduction obligations for several upwind states that contribute significantly to downwind states' nonattainment of the EPA's air quality standards. In determining what constitutes a significant contribution, the EPA balanced achievable emission reductions against the cost of achieving those reductions. However, in *EME Homer City Generations v. EPA*, the D.C. Circuit struck down the Transport Rule and rejected the EPA's analysis for determining what constitutes a significant contribution in this context. These two cases present the Supreme Court with questions about the EPA's interpretation of its statutory grant of authority under the CAA as well as questions about the jurisdiction of the D.C. Circuit to hear the challenges presented. The consolidated case also raises concerns about federal intervention in state affairs and public health concerns posed by the EPA's interpretation of the CAA. Should the Supreme Court decide this case on the merits, its decision will significantly affect the EPA's grant of authority to regulate interstate pollution. www.law.cornell.edu/supct/cert/12-1182. ☉

*Written by Jordan Kobb and Craig Steen.
Edited by Jeremy Amar-Dolan.*

LOZANO V. ALVAREZ (NO. 12-820)

Appealed from the U.S. Court of Appeals for the Second Circuit

Oral argument: Dec. 11, 2013

In July 2009, Diana Lucia Montoya Alvarez and her daughter fled the United Kingdom for the United States without the knowledge or consent of Manuel Jose Lozano, the child's father. In August 2010, Lozano discovered that the child was in New York and filed a petition in U.S. federal district court under the Hague Convention on the Civil Aspects of International Child Abduction for the return of his daughter to England for a custody determination. The U.S. Supreme Court must decide if equitable tolling applies to the one-year period where the petitioner has searched for the child but only found her after the deadline had passed. The Court's ruling will impli-

cate the rights of the abducted child and the left-behind parent. www.law.cornell.edu/supct/cert/12-820. ☉

Written by Melanie Senosiain and Paul Rodriguez. Edited by Dillon Horne.

MAYORKAS V. CUELLAR DE OSORIO (12-930)

Appealed from the U.S. Court of Appeals for the Ninth Circuit

Oral argument: Dec. 10, 2013

The Immigration and Nationality Act (INA) allows aliens to immigrate to the United States through a family-sponsored process where a U.S. citizen or lawful permanent resident may petition for certain family members, known as primary beneficiaries, to obtain visas to immigrate. If a qualifying relationship exists between the family members, then the primary beneficiary can legally immigrate once the priority date becomes current. Furthermore, the primary beneficiary's child—an unmarried person under the age of 21—receives the same priority date as the parent. However, if, while waiting for a visa, the child reaches the age of 21, that child ages out and no longer receives the same priority date as the parent. Petitioner Mayorkas argues that the Child Status Protection Act (CSPA) does not give aged-out children the same priority date as their parents. Respondent Cuellar de Osorio counters that the act seeks to keep families together, and therefore a child should retain the parent's priority date. The Supreme Court will decide whether the CSPA grants an original visa priority date to an alien who formerly qualified as a child beneficiary but now has aged out of this benefit. This case will have a significant impact on families and individuals seeking to immigrate to the United States through the INA's family-sponsored immigration framework. www.law.cornell.edu/supct/cert/12-930. ☉

*Written by Paul Kang and Oscar Lopez.
Edited by Jeremy Amar-Dolan.*

RAY HALUCH GRAVEL CO. V. CENTRAL PENSION FUND (12-992)

Appealed from the U.S. Court of Appeals for the First Circuit

Oral argument: Dec. 9, 2013

On June 17, 2011, a federal district court issued a decision on a dispute between Ray Haluch Gravel Company (Haluch) and the Central Pension Fund (CPF). Although this order addressed the central issue of whether or not Haluch owed certain contributions to CPF, it did not address attorney's fees and costs. The district court issued a second order on June 25, 2011, on attorney's fees and costs. CPF filed an appeal on both orders, but the 30-day statute of limitations for notice of appeal had expired on the first order. The First Circuit accepted the appeal, stating that the first order was not a final judgment under 28 U.S.C. § 1291 because the contractual attorney's fees decided in the second order were an issue on the merits, rendering the second order the final judgment. Haluch argues that under *Budinich v. Becton Dickinson & Company*, attorney's fees should always be considered collateral to the merits, and a separate judgment on the merits should be considered final. CPF argues that *Budinich* applies only to statutory fees, which are considered costs, whereas contractual fees are considered damages and therefore part of the merits, rendering any judgment that does not resolve an issue concerning the merits—i.e., damages in the form of contractual fees—a non-final judgment. The Court's decision will clarify what constitutes a final judgment and guide litigants seeking to make timely appeals. www.law.cornell.edu/supct/cert/12-992. ☉

Written by Gabriella Bensur and Jennifer Brokamp. Edited by Dillon Horne.

WHITE V. WOODALL (12-794)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral argument: Dec. 11, 2013

Robert Keith Woodall pled guilty to the murder, rape, and kidnapping of a 16-year-old victim. At the penalty phase, Woodall put on 14 witnesses but did not himself

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and Immunities Clause. When the committee later considered a draft amendment that would have banned racial discrimination by the states, Bingham proposed adding “nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property without just compensation.” After this language was also rejected, Magliocca states that Bingham “finally convinced his colleagues” to adopt the text now in the second sentence of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

We are not told what arguments Bingham used to convince the rest of the committee to adopt the final text, nor are we told why other committee members rejected Bingham’s earlier proposals. This may be due to the paucity of the evidence, as Magliocca undoubtedly would have included this information had it been available. Based on his earlier proposals, Bingham may well have originated the references to “privileges or immunities,” “life, liberty, or property,” and “equal protection” in the Fourteenth Amendment.

What this work does not clarify is the source of the Due Process Clause, which has played such an important part in our constitutional jurisprudence. From what Magliocca has provided, we not know whether Bingham or another member of the Joint Committee introduced that phrase, or what its author or other members of the Joint Committee thought it meant. Bingham himself seems not to have attached much importance to it. In an 1871 speech,

Bingham asserted that the first section of the Fourteenth Amendment extended the Bill of Rights to the states. True to form, however, he attributed that effect to the Privileges or Immunities Clause, not the Due Process Clause.

Although *American Founding Son* provides valuable information on the origins of the Fourteenth Amendment, it is of limited utility as “a handy reference work about the Fourteenth Amendment.” In addition to underestimating the importance of the Due Process Clause, Bingham consistently asserted that the Fourteenth Amendment did not give the federal government the power to regulate voting in the states, an argument the Supreme Court rejected in *Baker v. Carr* (1962) and subsequent cases. Even if John Bingham was the primary drafter of the “the most important sentence in the Constitution”—the second sentence of the Fourteenth Amendment—and thus a “founding son” of the post-Civil War Constitution, the Supreme Court has already gone far beyond his ideas.

That said, Magliocca has done valuable work in bringing to public attention the story of an interesting and important statesman of the mid-19th century. As an enemy of slavery and advocate for constitutional freedom, John Bingham has been too long neglected. ☉

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ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, bonus reviews are included in the online version of the magazine. The following reviews are available at www.fedbar.org/magazine. ☉

MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT

BY RICHARD SANDER AND STUART TAYLOR JR.

Reviewed by Michael Ariens

THE DIVORCE PAPERS

BY SUSAN RIEGER

Reviewed by JoAnn Baca

THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS

BY MICHAEL AVERY AND DANIELLE McLAUGHLIN

Reviewed by Heidi Boghosian

MURDER AT THE SUPREME COURT: LETHAL CRIMES AND LANDMARK CASES

BY MARTIN CLANCY AND TIM O'BRIEN

Reviewed by Paula Mitchell

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testify. The trial court rejected his request for a no-adverse-inference jury instruction regarding his decision not to testify and recommended the death penalty, which the trial court accepted. After exhausting state court avenues, Woodall filed for and received *habeas corpus* relief from a federal district court. The Sixth Circuit affirmed, concluding that the trial court violated Woodall's Fifth Amendment privi-

lege against self-incrimination by rejecting his request for a no-adverse-inference jury instruction. In this case, the Supreme Court will have the opportunity to consider whether the rejection of a request for a no-adverse-inference at the penalty phase of a trial, even where the defendant has pled guilty to all charged crimes, violates the Fifth Amendment right against self-incrimination. This case will impact the rights of

criminal defendants charged with capital crimes and will clarify prior Supreme Court precedent. www.law.cornell.edu/supct/cert/12-794. ☉

Written by Jennifer Breen and L. Alyssa Chen. Edited by Stephen Wirth.