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GIBSON DUNN Supreme Court Round-Up

The Supreme Court Round-Up recaps the current Term's opinions, previews the cases scheduled for the upcoming 2010 Term, and tracks the actions of the highly influential Office of the Solicitor General. Each entry contains a description of the case as well as a substantive analysis of the Court's actions that is organized according to the Court's argument schedule.

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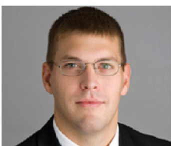

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October Term 2009

Decided Cases

1. ***Samantar v. Yousuf*, No. 08-1555 (4th Cir., 552 F.3d 371; cert. granted Sept. 30, 2009; SG as amicus, supporting affirmance; argued on Mar. 3, 2010). (1) Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state. (2) Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state.**

   Decided June 1, 2010 (560 U.S. ___). Fourth Circuit/Affirmed and remanded. Justice Stevens for a 9-0 Court (Alito, J., concurring; Thomas, J., concurring in part and concurring in the judgment; Scalia, J., concurring in the judgment). Natives of Somalia who allege that they (or members of their families) were the victims of torture and extrajudicial killings sued Somalia's former Prime Minister, seeking damages from the former official based on his alleged authorization of those acts. The Court held that the Foreign Sovereign Immunities Act does not provide individual officials with immunity from suit based on actions taken in their official capacity.

2. ***Carr v. United States*, No. 08-1301 (7th Cir., 551 F.3d 578; cert. granted Sept. 30, 2009; argued on Feb. 24, 2010). The President signed the Sex Offender Registration and Notification Act ("SORNA") into law on July 27, 2006. *See* Pub. L. 109-248 §§ 101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. *See* 42 U.S.C. § 16913(a). The law imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register[,] * * * travels in interstate or foreign commerce[,] * * * and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The Questions Presented are the following: (1)**

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Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment. (2) Whether the *Ex Post Facto* Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment.

Decided June 1, 2010 (560 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Sotomayor for a 6-3 Court (Scalia, J., concurring in part and concurring in the judgment; Alito, J., dissenting, joined by Thomas and Ginsburg, JJ.). The Court held that 18 U.S.C. § 2250(a)—which makes it a crime for a person who knowingly fails to register or update a registration under the Sex Offender Registration and Notification Act ("SORNA") to travel in interstate commerce—does not apply to sex offenders whose interstate travel occurred prior to SORNA's effective date. Federal law "require[s] States, as a condition for the receipt of certain law enforcement funds, to maintain federally compliant systems for sex-offender registration and community notification." One of SORNA's provisions, 18 U.S.C. § 2250(a), created a federal criminal offense covering, *inter alia*, any person who (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." The Court concluded that § 2250(a) reaches only interstate commerce that occurs *after* a person becomes subject to SORNA's registration requirements. Because no person could have been subject to SORNA's requirements before SORNA was enacted, the Court held that § 2250(a) does not extend to travel that predated the effective date of SORNA. Accordingly, the Court had no occasion to address whether SORNA would have violated the Constitution's *Ex Post Facto* Clause if it had extended to preenactment travel.

3. ***Berghuis v. Thompkins*, No. 08-1470 (6th Cir., 547 F.3d 572, cert. granted Sept. 30, 2009; SG as amicus, supporting Petitioner on the first Question Presented; argued on Mar. 1, 2010). (1) Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them. (2) Whether the Sixth Circuit failed to afford the state court the deference to which it was entitled under 28 U.S.C. § 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkin's guilt allowed the state court to reasonably reject the claim.**

   Decided June 1, 2010 (560 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Kennedy for a 5-4 Court (Sotomayor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.). The Court held that a criminal defendant's silence during an interrogation did not invoke his *Miranda* right to remain silent because such right must be invoked unambiguously. If, on the other hand, the defendant had stated that he wanted to remain silent or that he did not want to talk, he would have invoked his right. The Court further held that the defendant waived his right to remain silent by knowingly and voluntarily making a statement to the police after receiving a *Miranda* warning. Finally, the Court explained that the police did not need to obtain a waiver of the defendant's *Miranda* rights prior to the interrogation.

4. ***Levin v. Commerce Energy, Inc.*, No. 09-223 (6th Cir., 554 F.3d 1094; cert. granted Nov. 2, 2009; argued on Mar. 22, 2010). (1) Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation? (2) Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?**

   Decided June 1, 2010 (560 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Kennedy, J., concurring; Thomas, J., concurring in the judgment, joined by Scalia, J.; Alito, J., concurring in the judgment). The Court held, under the comity doctrine, that a claim of allegedly discriminatory state taxation that is framed as a request to increase a commercial competitor's tax burden must proceed originally in state court. The Tax Injunction Act ("TIA") prohibits lower federal courts from restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In addition, the comity doctrine applicable in state taxation cases is broader than the TIA. Specifically, the comity doctrine "restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." The Court concluded that "[c]omity considerations . . . preclude the exercise of lower federal-court adjudicatory authority over this controversy, given that an adequate state-court forum is available to hear and decide [the] constitutional claims." A variety of factors supported this conclusion. For example, Ohio's courts are better suited than federal courts to correct any violation in this case "because they are more familiar with state legislative preferences and because the TIA does not constrain their remedial options."

5. ***Alabama v. North Carolina*, No. 132 Orig. (On Oct. 13, 2009, the Court set the exceptions to the Special Master's report for oral argument in due course; argued on Jan. 11, 2010). This case involves an interstate dispute in which four States are suing the State of North Carolina over enforcement of a regional pact on disposal of radioactive wastes.**

   Decided June 1, 2010 (560 U.S. ___). On Exceptions to the Preliminary and Second Reports of the Special Master/Exceptions to Special Master's Reports overruled, and Master's recommendations adopted; North Carolina's motions to dismiss Count I and for summary judgment on Count II granted; Plaintiffs' motions for judgment on Counts I and II denied; and North Carolina's motions to dismiss the Commission's claims on sovereign immunity grounds and for summary judgment on Counts III–V denied without prejudice. Justice Scalia delivered the opinion of the Court, in which Stevens, Ginsburg, and Alito, JJ., joined, in which Roberts, C.J., joined in all but Parts II–D and III–B, in which Kennedy and Sotomayor, JJ., joined in all but Part II–E, in which Thomas, J., joined in all but Part III–B, and in which Breyer, J., joined in all but Parts II–C, II–D, and II–E (Kennedy, J., concurring in part and concurring in the judgment, joined by Sotomayor, J.; Roberts, C.J., concurring in part and dissenting in part, joined by Thomas, J.; Breyer, J., concurring in part and dissenting in part, joined by Roberts, C.J.). In the 1980s, Congress

granted its consent to the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact"), which was entered into by eight States. The Commission that administers the Compact sanctioned North Carolina and demanded that it repay approximately $80 million that the Commission had provided to the State in connection with licensing costs and building a facility. The Court assigned this original-jurisdiction case to a Special Master, who filed two reports. Justice Scalia's opinion overruled a host of exceptions to the Special Master's reports. Among other things, the Court concluded that the terms of the Compact do not authorize the Commission to impose monetary sanctions against North Carolina.

6. ***Hardt v. Reliance Standard Life Insurance Co.*, No. 09-448 (4th Cir., 336 F. App'x 332; cert. granted Jan. 15, 2010; SG as amicus, supporting Petitioner; argued on Apr. 26, 2010). Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1). The Questions Presented are the following: (1) Whether ERISA § 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party. (2) Whether a party is entitled to attorney's fees pursuant to § 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially ordered remand requiring a redetermination of entitlement to benefits, and subsequently receives the benefits sought on remand.**

   Decided May 24, 2010 (560 U.S. ___). Fourth Circuit/Reversed and remanded. Justice Thomas for a unanimous Court as to Parts I and II and an 8-1 Court as to Part III (Stevens, J., concurring in part and concurring in the judgment). The Court held that a fee claimant need not be a "prevailing party" to be eligible for an attorney's fee award under 29 U.S.C. § 1132(g)(1), the fee-shifting provision that applies in most lawsuits brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). That fee-shifting provision provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The words "prevailing party" do not appear anywhere in the text of that provision. Moreover, the contrast between 29 U.S.C. § 1132(g)(1), allowing courts to grant fees to "either party," and 29 U.S.C. § 1132(g)(2), restricting fee awards in a small subset of ERISA litigation to plaintiffs who obtain "a judgment in favor of the plan," further confirms that Congress did not intend to limit attorney's fee awards in most ERISA litigation to "prevailing parties." Still, § 1132(g)(2) does not indicate that Congress meant to abandon the "American Rule," which provides that each litigant pays his own attorney's fees, win or lose. As a result, even where Congress has left the decision to the court's discretion, a party must achieve "some success, even if not major success" on the merits to be eligible for an attorney's fee award. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686 (1983). What constitutes "some success on the merits" is difficult to quantify, but it must be more than "trivial success" or a "purely procedural victor[y]." In the case at hand, the plaintiff was entitled to her fees because although the district court remanded the case to the ERISA plan administrator for a more thorough review, it also cautioned that absent new evidence, it would enter judgment in plaintiff's favor if the case returned to court.

7. ***United States v. Marcus*, No. 08-1341 (2d Cir., 538 F.3d 97; cert. granted Oct. 13, 2009; argued on Feb. 24, 2010). When determining, under plain-error**

review, whether a criminal defendant may obtain relief on a forfeited claim that his conviction was based on conduct that preceded the enactment of the relevant statute, did the Second Circuit err in holding that reversal is mandatory "whenever there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct"?

Decided May 24, 2010 (560 U.S. ___). Second Circuit/Reversed and remanded. Justice Breyer for a 7-1 Court (Stevens, J., dissenting) (Sotomayor, J., took no part in the consideration or decision of the case). The Court held that the Second Circuit's plain-error standard for review of a claim not raised at trial conflicted with the Court's interpretation of the plain-error standard under Federal Rule of Criminal Procedure 52(b). The Respondent was convicted of forced labor and sex crimes between January 1999 and October 2001, and, for the first time on appeal, claimed that, because the statutes he violated did not become law until October 2000, the indictment and evidence permitted at trial allowed a jury to convict him exclusively based on pre-enactment conduct, in violation of the *Ex Post Facto* Clause. The Second Circuit vacated the conviction, recognizing a "plain error" and holding that retrial was necessary if there was "any possibility, no matter how unlikely," that the jury convicted on the basis of actions taken before enactment of the statute that made those actions criminal. The Court found that the Second Circuit's standard conflicted with the third and fourth criteria for noticing a plain error that are set forth in the Court's cases interpreting Rule 52(b)—the error must "affect[] the appellant's substantial rights" and it also must "seriously affect the fairness, integrity or public reputation of judicial proceedings." The former criterion requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome—not that there is "any possibility" that the jury could have convicted based exclusively on pre-enactment conduct. Nor could the error at issue be labeled "structural," because a jury instruction might have minimized or eliminated the risk that the Respondent would be convicted solely based on pre-enactment conduct. Finally, the Second Circuit's "any possibility" standard conflicted with the latter criterion. The Court posited that a retrial would be required under the Second Circuit's approach even where the evidence supporting a conviction consisted of a few days of pre-enactment conduct along with several years of post-enactment conduct. Such a situation, the Court noted, would be unlikely to cast serious doubt on the fairness, integrity, or public reputation of the judicial system.

8. ***United States v. O'Brien*, No. 08-1569 (1st Cir., 542 F.3d 921; cert. granted Sept. 30, 2009; argued on Feb. 23, 2010). 18 U.S.C. § 924(c)(1) provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.,* using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The Question Presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machine gun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by a preponderance of the evidence.**

   Decided May 24, 2010 (560 U.S. ___). First Circuit/Affirmed. Justice Kennedy for a 9-0 Court (Stevens, J., concurring; Thomas, J., concurring in the judgment). The Court held, under 18 U.S.C. § 924(c)(1) (which prohibits, among other things, using or carrying a firearm during a crime of violence) that the fact that the firearm was a machine gun

(triggering a 30-year minimum prison sentence under subsection (B)(ii) rather than the default 5-year minimum) is an element of the offense, and so must be proved to the jury beyond a reasonable doubt instead of proved to the sentencing judge by a preponderance of the evidence. The Court had reached the same conclusion regarding the pre-1998 version of the same statute in *Castillo v. United States*, 530 U.S. 120 (2000). In deciding that the machine gun provision was an element of the offense instead of a sentencing factor, the Court relied upon the same five-factor test as it had in *Castillo*: (1) the language and structure of the statute, (2) tradition, (3) the risk of unfairness, (4) the severity of the sentence, and (5) legislative history. Although the 1998 amendments to § 924 made some structural changes that affected the analysis of the first factor, all five factors continued to support treating the machine gun provision as an element of the offense.

9. ***Lewis v. City of Chicago*, No. 08-974 (7th Cir., 528 F.3d 488; CVSG May 18, 2009; cert. supported Aug. 21, 2009; cert. granted Sept. 30, 2009; SG as amicus, supporting Petitioners; argued on Feb. 22, 2010). Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the *announcement* of the practice, or may a plaintiff file a charge within 300 days after the employer's *use* of the discriminatory practice?**

   Decided May 24, 2010 (560 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Scalia for a unanimous Court. The Court held that a plaintiff who does not file a timely charge challenging the adoption of an employment practice under Title VII may assert a disparate impact claim challenging the employer's later use of that practice, so long as the plaintiff alleges each of the elements of a disparate impact claim. Plaintiffs, a class of African-American firefighter applicants, alleged that the City's use of test results in hiring decisions had a disparate impact on African-Americans in violation of Title VII. The City argued that the only actionable discrimination occurred when it used examination results to create a hiring eligibility list, which limited hiring to applicants who achieved a certain score on the exam. The City asserted that Plaintiffs did not have a cognizable disparate impact claim because they failed to file a timely charge challenging the decision to create that list and the exclusion of Plaintiffs was an automatic consequence of the test scores. The Seventh Circuit agreed. Reversing the Seventh Circuit, the Court defined the issue as whether the alleged employment practice could be the basis for a disparate impact claim. Here, the Court found that the City's practice of excluding passing applicants who scored below the cutoff score when making hiring decisions constituted an employment practice under 42 U.S.C. § 2000e-2(k) and thus served as an independent basis for a disparate impact claim, distinct from the City's original decision to administer the exam and create the eligibility list. Plaintiffs filed timely charges challenging these hiring decisions. Thus, the Court concluded that Plaintiffs had stated a cognizable disparate impact claim under Title VII. The Court also noted in *dictum* that, unlike under disparate treatment claims, disparate impact plaintiffs need not demonstrate deliberate discrimination within the limitations period. Rather, they must only show use of an employment practice that causes disparate impact.

10. ***American Needle, Inc. v. National Football League*, No. 08-661 (7th Cir., 538 F.3d 736; CVSG Feb. 23, 2009; cert. opposed May 28, 2009; cert. granted June 29, 2009; SG as amicus, supporting Petitioner; argued on Jan. 13, 2010). (1) Are the NFL and its member teams a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league? (2) Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years, subject to a rule of reason claim under Section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of team products?**

    Decided May 24, 2010 (560 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Stevens for a unanimous Court. The Court held that the National Football League's ("NFL") licensing activities constitute concerted action under § 1 of the Sherman Act and that the legality of that concerted action must be judged under the Rule of Reason. The NFL comprises thirty-two separately owned professional football teams. In 1963, the teams formed National Football League Properties ("NFLP") to develop, license, and market their intellectual property. Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, including American Needle. In 2000, the teams voted to authorize NFLP to grant exclusive licenses. NFLP thereafter granted Reebok International Ltd. an exclusive ten-year license to manufacture and sell trademarked headwear and declined to renew American Needle's nonexclusive license. The Court first considered whether the NFL's arrangement embodied "concerted action" so as to constitute a "contract, combination . . . or conspiracy" under § 1. It explained that whether the arrangement is a single legal entity or multiple legal entities is not dispositive of the concerted action analysis, reasoning that substance, and not form, should determine whether an entity is capable of conspiring under § 1. The Court further explained that the inquiry is whether the agreement joins together independent centers of decisionmaking. Applying this reasoning to the case, the Court characterized the NFL as a group of independently owned and managed businesses that compete against one another not only on the playing field, but also for fans, gate receipts, and for intellectual property. NFL teams' decisions to license their separately owned trademarks collectively and to only one vendor deprive the marketplace of independent centers of decisionmaking. The Court found the question whether NFLP's decisions constitute concerted activity covered by § 1 to be a closer one, but concluded that NFLP's decision to market property collectively owned by separate teams was within § 1, reasoning that competitors cannot get around antitrust liability by acting through a joint venture. Recognizing that football teams need to cooperate to promote the success and profitability of the league, the Court concluded that the restraint at issue had to be judged by the Rule of Reason.

11. ***Robertson v. United States ex rel. Watson*, No. 08-6261 (D.C. Court of Appeals, 940 A.2d 1050; CVSG Mar. 23, 2009; cert. opposed Nov. 6, 2009; cert. granted Dec. 14, 2009; SG as amicus, supporting Respondent; argued on**

Mar. 31, 2010). Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.

Decided May 24, 2010 (560 U.S. ___). Writ of certiorari dismissed as improvidently granted.

12. ***Abbott v. Abbott*, No. 08-645 (5th Cir., 542 F.3d 1081; cert. granted June 29, 2009; SG as amicus, supporting Petitioner; argued on Jan. 12, 2010). Whether a *ne exeat* clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on International Child Abduction.**

    Decided May 17, 2010 (560 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Kennedy for a 6-3 Court (Stevens, J., dissenting, joined by Thomas and Breyer, JJ.). The Court held that a parent's *ne exeat* right is a "right of custody" under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). Under Chilean law, Respondent mother was awarded daily care and control of her son, while Petitioner father was granted visitation rights and a *ne exeat* right to consent before Respondent could take the child out of the country. Respondent brought their son from Chile to Texas without Petitioner's consent, and Petitioner filed suit, seeking an order requiring his son's return to Chile pursuant to the Convention. The Court relied on Chilean law to determine the extent of Petitioner's rights, while looking to the Convention to decide whether his *ne exeat* right is a "right of custody." Rights of custody, as defined under the Convention, include "rights relating to the care of the person of the child and . . . the right to determine the child's place of residence." The Court found that Petitioner's *ne exeat* right gave him joint rights relating to the care of the child and the determination of the child's place of residence and therefore fit within the Convention's definition of "rights of custody." The Court employed a textual approach to the Convention's terms, which it believed would help to ensure international consistency of interpretation. Any suggestion that a *ne exeat* right could be categorized as a "right of access" rather than a "right of custody" under the Convention was rejected as "atextual." The Court acknowledged that Executive Branch views on the interpretation of treaties should be given significant weight, and the State Department's position that *ne exeat* rights are rights of custody supported the Court's conclusion. Because Congress directed that "uniform international interpretation" is part of the Convention framework, the Court also considered the views of other contracting states, which indicate broad acceptance of the rule that *ne exeat* rights are rights of custody. The objects and purposes of the Convention further bolster the conclusion that it makes a return remedy available for violations of *ne exeat* rights; the Convention is based on the principle that the child's best interests are served when custody decisions are made in the country of his habitual residence, and allowing an abducting parent to avoid a return remedy would legitimize the very international abductions that the Convention was designed to prevent. The Court noted in closing that there are certain situations in which a return remedy would not be appropriate, and it directed that the potential applicability of any such exceptions be considered on remand.

13. ***United States v. Comstock*, No. 08-1224 (4th Cir., 551 F.3d 274; cert. granted June 22, 2009; argued on Jan. 12, 2010). Whether Congress had the**

constitutional authority to enact 18 U.S.C. § 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

Decided May 17, 2010 (560 U.S. ___). Fourth Circuit/Reversed and remanded. Justice Breyer for a 7-2 Court (Kennedy, J., concurring in judgment; Alito, J., concurring in the judgment; Thomas, J., dissenting, joined by Scalia, J. as to all but Part III-A-1-b). The Court held that the Necessary and Proper Clause grants authority to Congress to enact 18 U.S.C. § 4248, which authorizes a district court to order the civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released. The Court based its conclusion on five considerations. First, the Necessary and Proper Clause grants Congress broad authority to pass laws in furtherance of its constitutionally enumerated powers. Thus, although the Constitution nowhere speaks directly about the creation of federal crimes beyond certain specific crimes, Congress has broad authority to create federal crimes, to punish violators, to provide for those imprisoned, and to secure those who are not imprisoned but who may be affected by the federal imprisonment of others. Second, Congress has long delivered mental health care to federal prisoners and provided for their civil commitment, as evidenced most notably by 18 U.S.C. § 4246, which already subjects many of the individuals subject to § 4248 to civil commitment. Third, there are sound reasons for the enactment of § 4248, including the need to protect communities from the danger that mentally ill, sexually dangerous federal prisoners pose. Thus, the means chosen in § 4248 are rationally related to the implementation of a constitutionally enumerated power. Fourth, § 4248 does not violate the Tenth Amendment by invading areas typically left to state control, because that Amendment does not give the states powers that are delegated to the United States. Moreover, § 4248 in fact accommodates state interests by, *inter alia*, giving the State the right to assert its authority and ultimately gain custody over the individual. Finally, § 4248 is a "narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system"; it has been applied only to a small fraction of federal prisoners, and it is limited to individuals already in federal custody. It does not, therefore, grant the federal government a "general police power." The Court concluded by making clear that it did not decide whether § 4248 denies equal protection or due process of law, or violates any other constitutional rights.

14. ***Graham v. Florida*, No. 08-7412 (First District Court of Appeal of Florida, 982 So. 2d 43; cert. granted May 4, 2009; argued on Nov. 9, 2009). Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a nonhomicide.**

    Decided May 17, 2010 (560 U.S. ___). District Court of Appeal of Florida, First District/Reversed and remanded. Justice Kennedy for a 6-3 Court (Stevens, J., concurring, joined by Ginsburg and Sotomayor, JJ.; Roberts, C.J., concurring in the judgment; Thomas, J., dissenting, joined by Scalia, J. and joined by Alito, J. as to Parts I and III; Alito J., dissenting). The Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause categorically forbids sentencing any juvenile nonhomicide offender to life in prison without the possibility of parole. Although not dispositive of the inquiry, "objective indicia of society's standards [of decency], as expressed in legislative

enactments and state practice," demonstrate a national consensus against such sentences. Although thirty-seven states, the District of Columbia, and the federal government all permit life without parole for juvenile nonhomicide offenders, available evidence of actual sentencing practices indicates that only twelve of those jurisdictions currently incarcerate any individuals sentenced to life without parole as juveniles for nonhomicide offenses. And even in those jurisdictions, such sentences are exceedingly rare. Moreover, the United States stands alone among nations in permitting life without parole for nonhomicide juvenile offenders. Next, in the Court's own judgment, life sentences for juveniles in nonhomicide cases do not comport with the morality embedded in the Eighth Amendment. That moral judgment is based on three considerations. First, juvenile nonhomicide offenders' culpability is twice reduced: Once because their youth means that they are not yet fully-formed moral agents, inclined toward impulsive actions, and once because they have committed crimes less severe and less irreparable than murder. Second, life without parole is a punishment nearly as severe as a death sentence because both result in an irrevocable loss of an individual's freedom. That is especially the case for juveniles who can expect to live many years in confinement. Finally, life without parole sentences for juvenile nonhomicide offenders inadequately serve the penological ends of retribution, deterrence, and incapacitation, and fail to advance the goal of rehabilitation at all. Accordingly, the Eighth Amendment guarantees juvenile nonhomicide offenders the right to a meaningful opportunity, at some point, to secure their release from prison based on demonstrated maturity and rehabilitation.

15. ***Sullivan v. Florida*, No. 08-7621 (First District Court of Appeal of Florida, 987 So. 2d 83 (Table); cert. granted May 4, 2009; argued on Nov. 9, 2009). (1) Does imposition of a life-without-parole sentence on a thirteen-year-old for a nonhomicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children? (2) Given the extreme rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a nonhomicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?**

    Decided May 17, 2010 (560 U.S. ___). Writ of certiorari dismissed as improvidently granted.

16. ***Renico v. Lett*, No. 09-338 (6th Cir., unpublished opinion below; cert. granted Nov. 30, 2009; argued on Mar. 29, 2010). Whether the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 by denying relief on double jeopardy grounds in the circumstance where the state trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.**

    Decided May 3, 2010 (559 U.S. ___). Sixth Circuit/Reversed and remanded. Chief Justice Roberts for a 6-3 Court (Stevens, J., dissenting, joined by Sotomayor, J. and joined as to Parts I and II by Breyer, J.). The Court held that the defendant was not entitled to a writ of habeas corpus, because the Michigan Supreme Court's application of *United States v. Perez*, 9 Wheat. 579 (1824), was not unreasonable. *Perez* held that the Double

Jeopardy Clause does not apply when the trial court exercises its sound discretion and concludes that the jury was deadlocked and that there is "manifest necessity" for a mistrial. The Michigan Supreme Court applied *Perez* and determined that the trial court did not err when it declared a mistrial at Lett's first trial. The Sixth Circuit reviewed the trial court proceedings, came to a different conclusion than the Michigan Supreme Court, and affirmed the federal district court's reversal of the Michigan Supreme Court's decision. The Court explained that under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d), a state court's decision may be reversed by a federal court only when the state court engages in an unreasonable application of clearly established federal law. The Court noted that under *Williams v. Taylor*, 529 U.S. 362 (2000), an unreasonable application of federal law is different than an incorrect application of federal law. The Court acknowledged that both the Sixth Circuit's and Michigan Supreme Court's interpretations of the trial record were reasonable. But, because the Michigan Supreme Court's decision was not objectively unreasonable, the Court determined that the Sixth Circuit erred in substituting its own judgment for that of the Michigan Supreme Court.

17. ***Hui v. Castaneda*, No. 08-1529[1] (9th Cir., 546 F.3d 682; cert. granted and cases consolidated Sept. 30, 2009; SG as amicus, supporting Petitioners; argued on Mar. 2, 2010). Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising out of the medical care and related functions provided by United States Public Health Service personnel, thus barring *Bivens* actions?**

Decided May 3, 2010 (559 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that 42 U.S.C. § 233(a)'s plain language precludes an action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), against U.S. Public Health Service ("PHS") personnel for constitutional violations committed in the course of their official duties, and limits recovery for such conduct to Federal Tort Claims Act ("FTCA") suits against the United States. The Court found it inconsequential that § 233(a) preceded *Bivens* because § 233(a)'s language making the FTCA remedy "exclusive of any other civil action" was broad enough to cover both known and unknown causes of action. The Court distinguished *Carlson v. Green*, 446 U.S. 14 (1980), which the Ninth Circuit cited for the proposition that a *Bivens* action is unavailable only when an alternative remedy is both expressly declared to be a substitute and can be viewed as equally effective, because *Carlson* considered only whether a *Bivens* action was available under the Eighth Amendment's Cruel and Unusual Punishments Clause and did not consider whether the defendant was immune from suit. The Court also rejected three arguments that the text of § 233(a) does not preclude a *Bivens* action. First, the Court disagreed that § 233(a) incorporated a *Bivens* exception through its cross-reference to § 1346(b) and that section's cross-reference to the FTCA, which includes the Westfall Act's exception for constitutional claims, § 2679(b)(2)(A). Because § 233(a) refers only to "[t]he remedy . . . provided by sections 1346(b) and 2672," only those portions of the FTCA that establish its remedy are incorporated by

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[1] This case was previously captioned *Migliaccio v. Castaneda*. In addition, it had been consolidated with *Henneford v. Castaneda* (No. 08-1547), a case which has now been dismissed pursuant to Rule 46.

§ 233(a)'s reference to § 1346, which portions do not include § 2679(b). Second, the Court rejected the contention that the Westfall Act's *Bivens* exception, § 2679(b)(2)(A), directly preserves a *Bivens* action against PHS personnel. Third, the Court disagreed that other features of § 233 show that subsection (a) does not make the remedy under the FTCA exclusive of all other actions against PHS personnel.

18. ***Salazar v. Buono*, No. 08-472 (9th Cir., 527 F.3d 758; 371 F.3d 543; cert. granted Feb. 23, 2009; argued on Oct. 7, 2009). (1) Whether an individual has Article III standing to bring an Establishment Clause suit challenging the display of a religious symbol on government land where the individual has no objection to the public display of the symbol, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols. (2) Whether, after a court held that display of a religious symbol violated the Establishment Clause, an Act of Congress directing the Department of the Interior to transfer land including the religious symbol to the Veterans of Foreign Wars in exchange for a parcel of equal value should be given effect.**

    Decided Apr. 28, 2010 (559 U.S. __) Ninth Circuit/Reversed and remanded. Justice Kennedy announced the judgment of the Court and delivered an opinion joined by Roberts, C.J., in full, and Alito, J., in part. (Roberts, C.J., concurring; Alito, J., concurring in part and concurring in the judgment; Scalia, J., concurring in the judgment, joined by Thomas, J.; Stevens, J., dissenting, joined by Ginsburg and Sotomayor, JJ.; Breyer, J., dissenting). Justice Kennedy began his opinion by considering whether Buono had standing to challenge the Defense Appropriations Act (the "Act"), which would transfer the land the cross was located on to private control. Justice Kennedy concluded that Buono's standing as to the initial injunction—which barred the government from displaying the cross *on federal land*—was embodied in a final judgment and hence was no longer assailable. Turning to Buono's standing to challenge the Act, Justice Kennedy found that the dispositive inquiry was the nature of the injury that prompted the plaintiff to seek to invoke the Court's jurisdiction. As Buono was invoking the district court's jurisdiction to prevent the government from "frustrating" or "evading" the underlying injunction, his interests "were sufficiently personal and concrete to support his standing." Justice Kennedy concluded that the Government's contention that Buono sought to expand the injunction went to the merits, not standing. Moving to the merits, Justice Kennedy concluded that the district court clearly erred in that it did not consider the significance of the Act itself; it only examined the motives that led to the cross being placed, not those that led to the transfer. Justice Kennedy observed that even if the Act was an attempt to prevent removal of the cross, it did not mean an injunction against enforcement of the Act was appropriate. Justice Kennedy noted that the district court failed to consider that the cross was placed for secular purposes (honoring veterans) and had been accepted in that role for nearly seven decades. The fact that the cross was designated a national historical landmark only underscored the error of the district court's failure to consider all relevant facts in construing Congress's intent in passing the Act. Turning to the actual transfer, Justice Kennedy noted that the district court had it "backwards" when it claimed the Act was designed to evade the injunction, as the Act was really a congressional attempt to accommodate a desire to comply with the original injunction while still honoring the veterans for whom the cross was erected in the first place. Justice Kennedy then canvassed the Court's precedent holding that when legislative action has undermined the basis for an injunction a court must consider

whether the "original finding of wrongdoing continues to justify the court's intervention." Viewed in this light, the district court's decision was error, as no inquiry was made into how the land transfer would have effected any perceived governmental support for religion—*i.e.,* the basis for the 2002 injunction—or into less drastic remedies. Given these errors, Justice Kennedy reversed, but determined that remand was necessary given the fact-intensive nature of the applicable inquiries. Justice Alito would have reversed and directed that the injunction be vacated—and, on the merits, he concluded that no reasonable observer could view the Act as endorsing religion. Justice Scalia, joined by Justice Thomas, concluded that Buono lacked Article III standing. Justice Scalia began by noting that on its face the original injunction enjoined only the display of the cross on government land. The relief Buono requested—preventing the government from "permitting" the cross's display—could only apply to government land, and the government can only bar a private display by making that display illegal. Justice Scalia stated that it was clear that a plaintiff cannot ask for an injunction to be expanded unless he has standing for that expansion *independent* from his standing to seek the initial injunction. Applying this test to the case at bar, Justice Scalia found that as Buono has made clear he has no objection to religious symbols on private property, he has no standing to contest the expansion of the injunction.

19. ***Merck & Co. v. Reynolds*, No. 08-905 (3d Cir., 543 F.3d 150; cert. granted May 26, 2009; SG as amicus, supporting Respondents; argued on Nov. 30, 2009). Did the Third Circuit err in holding that under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation?**

    Decided Apr. 27, 2010 (559 U.S. ___). Third Circuit/Affirmed. Justice Breyer for a 9-0 Court (Stevens, J., concurring in part and concurring in the judgment; Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.). The Court held that private securities fraud claims under § 10(b) of the Securities Exchange Act of 1934 accrue, for the purposes of the two-year limitations period in 28 U.S.C. § 1658(b)(1), "when the plaintiff did in fact discover, or . . . when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation'—whichever comes first." (The five-year statute of repose for such claims, *see* 28 U.S.C. § 1658(b)(2), was unaffected by the holding.) The Court further held that the facts showing scienter (an element of § 10(b) claims) are among "the facts constituting the violation." The Court adopted this "discovery rule," despite its absence from the statute's text, because the Court assumed that Congress had acted in awareness of "relevant judicial precedent." When Congress enacted the two-year limitations period as part of the Sarbanes-Oxley Act in 2002, it repeated the critical language the Supreme Court had used in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in deciding the limitations period for § 10(b)'s implied private cause of action: the period began "after the discovery of the facts constituting the violation." Every Court of Appeals to address that language had held that "'discovery of the facts constituting the violation' occurs not only once a plaintiff actually discovers the facts, but also when a hypothetical reasonably diligent plaintiff would have discovered them." The Court held that "[g]iven the history and precedent surrounding the use of the word 'discovery,'" the "discovery rule" was implied in § 1658(b)(1).

20. ***Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, No. 08-1198 (2d Cir., 548 F.3d 85; cert. granted June 15, 2009; argued on Dec. 9, 2009). This case**

involves an ocean shipping dispute in which the parties stipulated that because their arbitration agreements were silent on the question of class arbitration, there had been no agreement on that issue. The parties' views differed, however, as to what legal implications flowed from their lack of agreement on the issue of class arbitration. The Question Presented is whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

Decided Apr. 27, 2010 (559 U.S. ____). Second Circuit/Reversed and remanded. Justice Alito for a 5-3 Court (Ginsburg, J., dissenting, joined by Stevens and Breyer, JJ.; Sotomayor, J. took no part in the consideration or decision of this case). The Court held that the arbitration panel improperly imposed class arbitration on the parties, whose arbitration agreement was silent on the issue, because doing so was inconsistent with the Federal Arbitration Act ("FAA"). After a Department of Justice criminal investigation revealed that the Petitioners, Stolt-Nielsen and other shipping companies, were engaged in an illegal price-fixing conspiracy, AnimalFeeds brought a putative class action against the Petitioners, followed by a demand for class arbitration. The parties stipulated that the arbitration clause in their contract was "silent" with respect to class arbitration and submitted the dispute to an arbitration panel, which concluded that the clause allowed for arbitration. The district court vacated the panel's award, holding that the arbitrators failed to conduct the required choice-of-law analysis and should have applied federal maritime law. The Second Circuit reversed. The Court found that the arbitration panel exceeded its powers by imposing its own conception of sound policy rather than applying a rule derived from the FAA, maritime law, or New York law. Additionally, the Court noted that the panel incorrectly understood *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244 (2002), as establishing a rule to be applied in deciding whether class arbitration is permitted. The plurality opinion in *Bazzle* concluded only that the arbitrator (and not a court) should decide whether the contract is indeed "silent" on the issue of class arbitration. Turning to the question of whether class arbitration could be imposed in this case, the Court explained that the primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. Thus, the Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." Furthermore, the Court reasoned that the arbitrator may not infer an agreement to authorize class arbitration simply from an agreement to submit disputes to an arbitrator, due to the significant differences between bilateral and class arbitrations.

21. ***Conkright v. Frommert*, No. 08-810 (2d Cir., 535 F.3d 111; cert. granted June 29, 2009; SG as amicus, supporting Respondents; argued on Jan. 20, 2010). (1) Whether the Second Circuit erred in holding that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits. (2) Whether the Second Circuit erred in holding that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.**

Decided Apr. 21, 2010 (559 U.S. ___). Second Circuit/Reversed and remanded. Chief Justice Roberts for a 5-3 Court (Breyer, J., dissenting, joined by Stevens and Ginsburg, JJ.). The Court held that a pension plan administrator's interpretation of the plan is entitled to deference, despite the fact that the administrator's earlier interpretation was held unreasonable under the Employee Retirement Income Security Act of 1974 ("ERISA"). At issue is the plan administrator's interpretation of Xerox Corporation's pension plan as it relates to how to account for former employees' plan distributions when determining their current benefits. Initially, the plan administrator had interpreted the plan to call for a "phantom account" method, which was later found unreasonable under ERISA by the Second Circuit. On remand, the plan administrator submitted an affidavit to the district court proposing a new approach to interpreting the plan. The issue before the Supreme Court was whether that new approach was entitled to deference from the courts. In holding that the plan administrator's new interpretation was entitled to deference, the Court relied on its earlier decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in which it applied trust law to hold that if the benefit plan gives the administrator discretionary authority to construe the terms of the plan, that construction is entitled to deference. The Court rejected the exception to that rule carved out by the Second Circuit, whereby the plan administrator is not entitled to such deference if an earlier interpretation violated ERISA. The Court reasoned that although trust law does not resolve the issue presented, the guiding principles of ERISA do. Specifically, the Court explained that ERISA represents a balancing between fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans, concluding that *Firestone* deference protects these interests by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator. The Court added that *Firestone* deference serves the interests of uniformity, ensuring that the plan is interpreted the same way in different jurisdictions. The Court was unwilling to strip the plan administrator of *Firestone* deference based on "a single honest mistake."

22. ***Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200 (6th Cir., 538 F.3d 469; cert. granted June 29, 2009; SG as amicus, supporting Petitioner; argued on Jan. 13, 2010). Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692.**

Decided Apr. 21, 2010 (559 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Sotomayor for a 7-2 Court (Breyer, J., concurring; Scalia, J., concurring in part and concurring in the judgment; Kennedy, J., dissenting, joined by Alito, J.). The Court held that the Fair Debt Collection Practices Act's ("FDCPA") "bona fide error" defense, 15 U.S.C. § 1692k(c), does not apply to violations that result from a debt collector's mistaken interpretation of the Act's legal requirements. Petitioner Jerman contended that Respondents had violated the FDCPA by stating that her debt would be presumed valid unless she disputed it in writing. Both the district court and the Sixth Circuit found that the FDCPA's bona fide error defense extended to mistakes of law, therefore excusing Respondents' violation. The Court has long recognized the maxim that ignorance of the law is no excuse, and thus where Congress has intended to provide a mistake of law defense, it has used language more explicitly geared to that purpose than that of the FDCPA. To avail himself of the bona fide error defense, the FDCPA requires that a debt collector maintain procedures designed to avoid mistakes, which suggests that the defense was intended to apply to clerical or factual mistakes, not legal errors. The context and history of the Act further bolster the Court's conclusion that the bona fide error provision was not meant to shield violations of the Act resulting from legal errors. The Court

rejected Respondents' assertion that its reading of the statute would "have unworkable practical consequences for debt collecting lawyers." The FDCPA specifically guards against the risk of abusive lawsuits, lawyers can avail themselves of the bona fide error defense in cases of factual error, and the risk of misinterpretation of the Act's legal requirements can be avoided altogether by obtaining an FTC advisory opinion under § 1692k(e) of the Act. Any constraints that the FDCPA places on a lawyer's ability to advocate zealously on behalf of his client are no more restrictive than other existing limitations on attorneys' professional conduct.

23. ***Perdue v. Kenny A.*, No. 08-970 (11th Cir., 532 F.3d 1209; cert. granted Apr. 6, 2009, limited to Question 1; SG as amicus, supporting Petitioners; argued on Oct. 14, 2009). Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?**

    Decided Apr. 21, 2010 (559 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Breyer, J., concurring in part and dissenting in part, joined by Stevens, Ginsburg, and Sotomayor, JJ.). The Court unanimously held that the calculation of an attorney's fee based on the "lodestar," *i.e.*, the number of hours attorneys and their employees worked multiplied by the prevailing market rate, may be increased due to superior performance, but only in extraordinary circumstances. The district court had granted a 75 percent fee enhancement under 42 U.S.C. § 1988, a fee-shifting statute designed to enforce federal rights. The Court explained that there is a "strong presumption" that the lodestar calculation is reasonable, but that it can be "overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." With respect to an attorney's performance or the results obtained, the Court held that such factors can justify an enhancement only in "rare and exceptional circumstances," such as where "the hourly rate does not adequately measure the attorney's true market value," "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted," or "the attorney's performance involves exceptional delay in the payment of fees." The Court also emphasized that the fee applicant seeking an enhancement bears the burden of producing "specific evidence" that supports the award, and that it is inappropriate to grant performance enhancements based on the increasing use of alternative fee arrangements. Applying these principles to the facts before it, the Court held, by a 5-4 vote, that the district court "did not provide proper justification for the large enhancement that it awarded." The district court granted a 75 percent enhancement based on several factors, including unwarranted delay and the cost to counsel of extraordinary outlays for expenses. But it did so on an "impressionistic basis," without calculating the amounts attributable to those factors or linking them to proof in the record. Moreover, insofar as the trial judge relied on the counsel's superior performance, it "did not employ a methodology that permitted meaningful appellate review." The Court concluded that trial judges must "provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement."

24. ***United States v. Stevens*, No. 08-769 (3d Cir., 533 F.3d 218; cert. granted Apr. 20, 2009; argued on Oct. 6, 2009). Whether 18 U.S.C. § 48—which prohibits the knowing creation, sale, or possession of "a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain" unless the depiction "has serious religious, political,**

scientific, educational, journalistic, historical, or artistic value"—is facially invalid under the First Amendment's Free Speech Clause.

Decided Apr. 20, 2010 (559 U.S. ___). Third Circuit/Affirmed. Chief Justice Roberts for an 8-1 Court (Alito, J., dissenting). The Court held that 18 U.S.C. § 48, which criminalizes the commercial creation, sale, or possession of certain depictions of animal cruelty, is substantially overbroad and therefore invalid under the First Amendment. In reaching its decision, the Court first concluded that depictions of animal cruelty are not categorically unprotected by the First Amendment. Rejecting the Government's proffered test that would consider "a categorical balancing of the value of the speech against its societal costs," the Court noted that the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." Rather, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—and depictions of animal cruelty should not be added to the list. Assessing the Respondent's facial challenge under existing First Amendment jurisprudence, the Court found that § 48 swept too broadly. First, its definition of a "depiction of animal cruelty" fails to require that the depicted conduct be cruel. Although the terms "maimed, mutilated, [and] tortured" convey cruelty, "wounded" or "killed" do not. Second, although § 48 requires that the depicted conduct be illegal, many state and federal laws that apply to the treatment of animals are not designed to guard against animal cruelty. For example, laws restrict the humane killing of endangered species. In addition, § 48 requires only that the depicted conduct be illegal in the state in which the creation, sale, or possession takes place, regardless of whether the wounding or killing takes place in that state. Thus, a depiction of lawful conduct violates the statute if it makes its way into a state where the same conduct is illegal, and views about animal cruelty, as well as regulations having no connection to cruelty, vary widely from place to place. The Court also found that § 48's exceptions clause, which exempts "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," could not be read to limit the statute's application to only the most "extreme acts of animal cruelty." For example, most hunting videos are not obviously instructional in nature and would seemingly fall outside of the exceptions clause. The Court was not persuaded by the Government's assurance that it would apply § 48 to reach only "extreme" cruelty. Moreover, the Court concluded that "to read § 48 as the Government desires requires rewriting, not just reinterpretation." Finally, the Court declined to decide whether a statute limited to "crush" videos and other depictions of extreme animal cruelty would be constitutional.

Gibson Dunn – Counsel for *Amici Curiae* in Support of Petitioner

25. ***Padilla v. Kentucky*, No. 08-651 (Ky., 253 S.W.3d 482; cert. granted Feb. 23, 2009; SG as amicus, supporting affirmance; argued on Oct. 13, 2009). (1) Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an aggravated felony under the Immigration and Naturalization Act, is a "collateral consequence" of a criminal conviction that relieves counsel from any affirmative duty to investigate and advise. (2) Assuming immigration consequences are "collateral," whether counsel's grossly erroneous advice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.**

Decided Mar. 31, 2010 (559 U.S. ___). Supreme Court of Kentucky/Reversed and remanded. Justice Stevens for a 7-2 Court (Alito, J., concurring in the judgment, joined

by Roberts, C.J.; Scalia, J., dissenting, joined by Thomas, J.). The Court held that the Sixth Amendment requires defense counsel to inform a criminal defendant "whether his [guilty] plea carries a risk of deportation." Although many lower courts have held that counsel must inform criminal defendants of only "direct"—but not "collateral"—consequences of a guilty plea, the Court did not consider that distinction in this case. Because of the "unique nature of deportation" and "its close connection to the criminal process," "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), Petitioner sufficiently stated a claim that his counsel's advice "fell below an objective standard of reasonableness": the relevant immigration statute was "succinct, clear, and explicit," and counsel's advice that a guilty plea would not result in deportation was incorrect. (Where the law is less clear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.") The Court remanded the case to the Kentucky courts to determine, under *Strickland*'s second prong, whether Petitioner had been prejudiced by the incorrect advice.

26. ***Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, No. 08-1008 (2d Cir., 549 F.3d 137; cert. granted May 4, 2009; argued on Nov. 2, 2009). Plaintiffs brought a putative class action against an insurance company in federal court in New York. A New York statute provides that a class action may not be maintained to recover statutory penalties unless the statute providing the penalties specifically authorizes class proceedings. The insurer-defendant argued that the New York statute applies to diversity proceedings in federal courts and that the statute precludes maintenance of the case as a class action. The Question Presented is the following: Does a state statute limiting the availability of class actions in state courts restrict a federal court's power to certify a class under Federal Rule of Civil Procedure 23 in an action where jurisdiction is based on diversity of citizenship?**

    Decided Mar. 31, 2010 (559 U.S. ___). Second Circuit/Reversed and remanded. Justice Scalia for a 5-4 Court. Justice Scalia delivered the opinion of the Court with respect to Parts I and II-A, in which Roberts, C.J., and Stevens, Thomas, and Sotomayor, JJ., joined, an opinion with respect to Parts II-B and II-D, in which Roberts, C.J., and Thomas and Sotomayor, JJ., joined, and an opinion with respect to Part II-C, in which Roberts, C.J., and, Thomas, J., joined. (Stevens, J. concurring in part and concurring in judgment; Ginsburg, J., dissenting, joined by Kennedy, Breyer, and Alito, JJ.). The Court held that N.Y. Civ. Prac. Law Ann. § 901(b), which prohibits class actions in suits seeking penalties or statutory minimum damages, conflicts with, and is superseded by, Federal Rule of Civil Procedure 23, which provides the general criteria for class action suits in federal court. In this diversity action, the plaintiff sought relief on behalf of a class of parties that were allegedly owed statutory interest accruing on late payments from Allstate. Although Rule 23 would authorize the class action if its requirements were satisfied, § 901(b) explicitly forbid the suit because it asserted a violation of a statute that imposed statutory interest. Applying a two part-test to determine whether Rule 23 applied in this case, the Court examined: (1) whether the federal and state rules could be reconciled such that they did not both control the issue and, if not, (2) whether the federal rule would violate the Rules Enabling Act, 28 U.S.C. § 2072, by abridging, enlarging, or modifying any substantive right. The Second Circuit found no conflict between § 901(b) and Rule 23, as it believed they covered different issues, with § 901(b) addressing whether the particular claim is eligible for class treatment to begin with and Rule 23 addressing the

criteria for determining whether a given class can and should be certified. The Court, however, disagreed. In Part II-A of Justice Scalia's opinion, five Justices concluded that the two rules could not be reconciled and rejected the dissent's contention that there was no such conflict because the purpose of § 901(b) was to limit statutory damages. Turning to the second part of the test, Justice Scalia's reasoning departed from that of Justice Stevens, whose narrower approach ultimately controls. On behalf of a plurality, Justice Scalia applied a categorical approach under which any federal rule that "really regulates procedure" "is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights." Thus, according to the plurality, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the federal rule. Because Rule 23 is procedural, insofar as it regulates "the manner and the means by which the litigants' rights are enforced," the plurality opinion held that it applied here. On the other hand, Justice Stevens concluded that the determination of whether a federal rule applies in a diversity action requires a case-by-case assessment of the state rule with which the federal provision conflicts. Such an inquiry turns on "whether the state law actually is part of a State's framework of substantive rights or remedies." Applying this standard, Justice Stevens determined that § 901(b) was not the type of procedural rule that is sufficiently interwoven with substantive rights so as to negate the application of Rule 23. Justice Stevens also noted that "it is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy." While Justice Stevens acknowledged legislative history that potentially indicated the rule was adopted as a limitation of statutory damages, he concluded § 901(b) should be interpreted under its plain text as a procedural rule concerning when to certify class actions brought under any source of law.

27. ***Berghuis v. Smith*, No. 08-1402 (6th Cir., 543 F.3d 326; cert. granted Sept. 30, 2009; argued on Jan. 20, 2010). In *Duren v. Missouri*, the Court established a three-prong standard for determining whether a defendant was able to demonstrate a *prima facie* violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community. The circuits have split over the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of *Duren*. In this case, the Michigan Supreme Court concluded that the small disparities at issue here for African Americans did not give rise to a constitutional violation. The Question Presented is the following: Whether the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which the Court has never applied and which four circuits have rejected.**

    Decided Mar. 30, 2010 (559 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court (Thomas, J., concurring.) The Court held that the Sixth Circuit erred in ruling that the Michigan Supreme Court's decision holding that Respondent failed to establish a *prima facie* violation of the fair-cross-section requirement of the Sixth Amendment "involv[ed] an unreasonable application o[f] clearly established

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Respondent was convicted by an all-white jury of second-degree murder and sentenced to life imprisonment. Under the juror allocation system in place at his trial, the county assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the county-wide Circuit Court, which heard felony cases like Respondent's. That system, Respondent argued, "siphoned off" most of the minority jurors, leaving the Circuit Court with a jury pool that did not represent the entire community. Respondent filed a federal habeas corpus petition, urging that under *Duren v. Missouri*, 439 U.S. 357, 364 (1979), African Americans were not fairly represented in his jury venire, and that "systematic exclusion" in the jury-selection process accounted for that underrepresentation. The Sixth Circuit agreed, but the Court reversed, holding that "*Duren* hardly establishes—no less 'clearly' so—that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community." In reaching its decision, the Court declined to "take sides" in the debate over which statistical method (*e.g.*, "absolute disparity," "comparative disparity," or "standard deviation") used to measure underrepresentation should be employed in fair-cross-section cases. The Court held that Respondent failed to prove that the district-court-first assignment order had any significant effects on the representation of African Americans on Circuit Court venires. "Although the record established that some county officials *believed* that the assignment order created racial disparities . . . the belief was not substantiated by [Respondent's] evidence." Finally, the Court rejected Respondent's claim that a host of additional factors, including the County's practice of excusing people who merely alleged hardship or failed to show up for jury service, constituted "systematic causes of underrepresentation." Nothing in its precedent, the Court held, supported the notion that a *prima facie* case can be established by "pointing to a host of factors . . . that *might* contribute to a group's underrepresentation." Accordingly, the Michigan Supreme Court's decision was consistent with *Duren* and did not involve an "unreasonable application o[f] clearly established Federal law."

28. ***Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, No. 08-304 (4th Cir., 528 F.3d 292; cert. granted June 22, 2009; SG as amicus, supporting Respondent; argued on Nov. 30, 2009). Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).**

    Decided Mar. 30, 2010 (559 U.S. ___). Fourth Circuit/Reversed and remanded. Justice Stevens for a 7-2 Court (Scalia, J., concurring in part and concurring in the judgment; Sotomayor, J., dissenting, joined by Breyer, J.). The Court held that the reference to "administrative" reports, audits, and investigations in the public-disclosure bar to *qui tam* actions under the False Claims Act encompasses disclosures made in state and local sources as well as federal sources. The United States Department of Agriculture entered into contracts with two counties in North Carolina, authorizing them to perform cleanup and repair work in areas that had experienced severe flooding. Respondent Karen Wilson was an employee of Graham County Soil and Conservation District. Wilson suspected fraud, and she reported her concerns to local officials and to the Department of Agriculture. As a result of her concerns, investigations were conducted and reports were made by county and state agencies. Wilson later filed a *qui tam* action alleging that local and federal officials submitted false claims for payment. The False Claims Act contains three categories of jurisdiction-stripping disclosures, namely, public disclosures (1) in a

criminal, civil, or administrative hearing; (2) in a congressional, administrative, or GAO report, hearing, audit, or investigation; or (3) from the news media. *See* 31 U.S.C. § 3730(e)(4)(A). The issue was whether the term "administrative" in the second category was limited solely to federal administrative bodies. The Court reasoned that there was no language in the statutory text itself limiting "administrative" to federal agencies. Rejecting the "sandwich theory" argument (based on the maxim *noscitur a sociis*) that because "administrative" is sandwiched between two federal bodies, it, too, must be federal in nature, the Court read the statute more broadly to construe all three categories together. Reasoning that the first and third categories are clearly not limited to the federal context, the Court concluded that the term "administrative" in the second category was not limited to the federal context. The Court also explained that it is the fact of public disclosure, not federal government creation or receipt, that is the touchstone of the public-disclosure bar. Finally, the Court found nothing in the legislative history to support the reading that "administrative" must be construed as only federal in nature.

Gibson Dunn – Counsel for Independent Directors Council in Support of Respondent

29. ***Jones v. Harris Associates L.P.*, No. 08-586 (7th Cir., 527 F.3d 627; cert. granted Mar. 9, 2009; SG as amicus, supporting Petitioners; argued on Nov. 2, 2009). Whether the Seventh Circuit contravened the Investment Company Act ("Act") in holding that a shareholder's claim that a fund's investment adviser charged an excessive fee is not cognizable under Section 36(b) of the Act, 15 U.S.C. § 80a-35(b), unless the shareholder can show that the adviser misled the fund directors who approved the fee.**

    Decided Mar. 30, 2010 (559 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Alito for a unanimous Court (Thomas, J., concurring). The Court held that to face liability under § 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b), an investment advisor must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining. Section 36(b) governs the amount of compensation a mutual fund investment advisor is permitted to receive. In *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), the Second Circuit concluded that the relevant test under § 36(b) is whether the "fee schedule represents a charge within the range of what would have been negotiated at arm's-length in light of all of the surrounding circumstances." The Seventh Circuit declined to adopt the *Gartenberg* standard, relying on trust law to determine that an investment adviser's compensation would be relevant only if the compensation were so unusual as to give rise to an inference that deceit occurred or that the persons responsible for the compensation decision abdicated their responsibilities. The Supreme Court rejected the Seventh Circuit's approach, explaining that the *Gartenberg* standard was consistent with the Court's decision in *Pepper v. Litton*, 308 U.S. 295 (1939). In *Pepper*, the Supreme Court considered the concept of fiduciary duty in an analogous context and explained that "[t]he essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain." The Court noted that under § 36(b), the party alleging a breach has the burden of proving that there was a breach of fiduciary duty in awarding the investment advisor's compensation. The Court also stated in *dictum* that courts are not well suited to make precise calculations regarding the appropriate fees that are representative of arm's length bargaining.

30. ***United Student Aid Funds, Inc. v. Espinosa*, No. 08-1134 (9th Cir., 545 F.3d 1113; 553 F.3d 1193; cert. granted June 15, 2009; SG as amicus, supporting Petitioner; argued on Dec. 1, 2009). (1) Student loans are statutorily non-**

dischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void? (2) Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?

Decided Mar. 23, 2010 (559 U.S. ___). Ninth Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that the bankruptcy court's failure to find "undue hardship" under 11 U.S.C. § 523(a)(8) before discharging student-loan debt was not a jurisdictional error and did not violate Petitioner's due process right to notice and a hearing. Pursuant to § 523(a)(8), student-loan debt is not dischargeable in bankruptcy unless repayment would cause the debtor "undue hardship." Moreover, Bankruptcy Rules permit discharge of a student loan on a showing of "undue hardship" only through an adversary proceeding commenced by filing a complaint and serving it and a summons on the creditor. After Debtor failed to prove undue hardship in an adversary proceeding and instead merely declared a discharge of student-loan debt in his Chapter 13 Plan and mailed it to Creditor's post office box, the bankruptcy court confirmed the award. Petitioner sought to set aside the judgment under Federal Rule of Civil Procedure 60(b)(4), which authorizes a court to set aside a judgment if "the judgment is void." Because a void judgment is a nullity—*i.e.*, one "so affected by fundamental infirmity that the infirmity may be raised even after the judgment becomes final"—Rule 60(b)(4) operates only where a judgment is premised on certain types of jurisdictional errors or on violations of a party's due process right to notice and a hearing. In holding that the bankruptcy court's failure to find "undue hardship" was not a jurisdictional error, the Court noted that § 523(a)(8) was not drafted as a jurisdictional limitation. Rather, the requirement that the "undue hardship" finding be made arises from procedural rules. In addition, the bankruptcy court's actions did not result in a due process violation because Petitioner had actual notice of the proposed discharge and had a full opportunity to be heard.

31. ***Bloate v. United States*, No. 08-728 (8th Cir., 534 F.3d 893; cert. granted Apr. 20, 2009; argued on Oct. 6, 2009). Whether the time granted to prepare pretrial motions is excludable under 18 U.S.C. § 3161(h)(1), which excludes certain time periods from the Speedy Trial Act's 70-day period for trying a criminal defendant after she has been indicted or appeared in court.**

Decided Mar. 8, 2010 (559 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Thomas for a 7-2 Court (Ginsburg, J., concurring; Alito, J., dissenting, joined by Breyer, J.). The Court held that the time granted to prepare pretrial motions in a criminal case is not automatically excluded from the Speedy Trial Act's requirement that a defendant's trial begin within 70 days of his indictment or initial appearance. At issue was the Act's automatic exclusion from its 70-day clock of delays "resulting from any pretrial motion, from the filing of the motion through the . . . prompt disposition of" such motion. Because delays caused by granting additional time to prepare pretrial motions "result[] from . . . proceedings involving pretrial motions," such delays are governed by the

automatic-exclusion provision. That provision, however, automatically excludes only the delays that occur between the filing of the motion through its resolution. Because preparation delays obviously happen *before* a motion is filed, the automatic-exclusion provision governs—but does not exclude—such delays. Nevertheless, such delays are excludable under a provision of the Act that forgives delays "resulting from a continuance granted by any judge" as long as the district judge makes certain findings on the record. If the district judge fails to make the requisite findings and the time limit runs, courts will usually be able to dismiss the case without prejudice, allowing the Government time to refile charges against or reindict the defendant. These factors prevent defendants from gaming the Act to secure an acquittal.

32. ***Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 08-1119; *United States v. Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (8th Cir., 541 F.3d 785; cert. granted and cases consolidated June 8, 2009; argued on Dec. 1, 2009). Section 101(12A) of Title 11 of the United States Code defines the term "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110," with five enumerated exceptions. Section 528 of Title 11 requires any "debt relief agency" to include certain disclaimers in any public advertising that promotes specified bankruptcy-related services. The Questions Presented are as follows: (1) Whether an attorney who provides bankruptcy assistance to an assisted person in return for valuable consideration, and who does not fall within one of the five exceptions, is a "debt relief agency" for purposes of 11 U.S.C. §§ 526–528. (2) Whether 11 U.S.C. § 528 violates the First Amendment.**

Decided Mar. 8, 2010 (559 U.S. ___). Eighth Circuit/Affirmed in part, reversed in part, and remanded. Justice Sotomayor for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment; Thomas, J., concurring in part and concurring in the judgment). The Court held that attorneys are "debt relief agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"); that the statute's provisions governing advice to clients are not impermissibly vague; and that the BAPCPA's advertising disclosure requirements, as applied to *Milavetz*, do not violate the First Amendment. The BAPCPA provides that a "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person"—a definition that, on its face, covers services commonly provided by attorneys. Because the Court concluded that the Act's use of the term "debt relief agencies" includes attorneys, it went on to consider the scope and validity of the BAPCPA's provisions governing debt relief agencies' advice to clients. Section 526(a)(4) of the Act prohibits debt relief agencies from advising a debtor to "incur more debt in contemplation of" filing for bankruptcy. The Court adopted a narrow reading of this provision, which would only reach the "type of misconduct designed to manipulate the protections of the bankruptcy system"—that is, advising that an individual "load up" on debt prior to filing for bankruptcy. Given the context in which the BAPCPA was drafted and the absence of plausible alternative interpretations, the Court found a narrow reading most natural. Under such a reading, the scope of conduct prohibited by Section 526(a)(4) is adequately defined, and the Court thus rejected Milavetz's vagueness claim. The Court then considered the validity of Section 528's advertising disclosure requirements as applied to *Milavetz*. The Court found that because Section 528 is aimed only at misleading commercial speech and imposes a disclosure

requirement, rather than an affirmative limitation on speech, Section 528 is subject to the standard of scrutiny described in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Section 528's requirements that attorneys identify themselves "as a debt relief agency and include certain information about . . . bankruptcy-assistance and related services are 'reasonably related to the [Government's] interest in preventing deception of consumers'" and therefore satisfy the *Zauderer* standard.

33. ***Johnson v. United States*, No. 08-6925 (11th Cir., 528 F.3d 1318; cert. granted Feb. 23, 2009, limited to Questions 1 and 2; argued on Oct. 6, 2009). (1) Whether, when a State's highest court holds that a given state-law offense does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA"), which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." (2) Whether the Court should resolve circuit splits on (i) whether a prior state conviction for simple battery is in all cases a "violent felony" under the ACCA and (ii) whether the physical force required under the ACCA's definition of "violent felony" must be violent in nature (*i.e.*, intended or likely to cause bodily injury).**

    Decided Mar. 2, 2010 (559 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Scalia for a 7-2 Court (Alito, J., dissenting, joined by Thomas, J.). The Court held that the felony offense of battery under Florida law did not constitute a violent felony for purposes of the ACCA, 18 U.S.C. § 924(e). Johnson pleaded guilty to knowingly possessing ammunition after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). The government sought an enhanced penalty under the ACCA, because Johnson had five prior felony convictions. Johnson argued that his 2003 battery conviction was not a violent felony under the ACCA because it did not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." Under Florida law, a defendant can be convicted of battery if he or she "actually or intentionally touches" another person, and the Florida Supreme Court had held that the statute is satisfied by any intentional physical contact, no matter how slight. The Court reasoned that the touching that would violate the Florida battery statute does not constitute the use of "physical force" within the meaning of the definition of a violent felony. It rejected the government's assertion that battery constitutes a violent felony because the common law definition of battery was the intentional application of unlawful force against another.

34. ***Mac's Shell Service v. Shell Oil Products Co.*, No. 08-240; *Shell Oil Products Co. v. Mac's Shell Service*, No. 08-372 (1st Cir., 524 F.3d 33; CVSG Dec. 1, 2008; cert. supported May 15, 2009; cert. granted and cases consolidated June 15, 2009; SG as amicus, supporting Petitioners in No. 08-372 and supporting Respondents in No. 08-240; argued on Jan. 19, 2010). Under what circumstances may a service station operator bring suit against an oil refiner or distributor for "constructive termination" under the Petroleum Marketing Practices Act?**

    Decided Mar. 2, 2010 (559 U.S. ___). First Circuit/Affirmed in part, reversed in part, and remanded. Justice Alito for a unanimous Court. The Court held that (1) a franchisee cannot recover for constructive termination under the Petroleum Marketing Practices Act

("PMPA") if the franchisor's allegedly wrongful conduct did not compel the franchisee to abandon its franchise and (2) a franchisee who signs a renewed franchise agreement cannot maintain a claim for unlawful nonrenewal under the PMPA. The PMPA establishes minimum federal standards governing the termination and nonrenewal of petroleum franchises. Plaintiffs, Shell franchisees, argued that the elimination of a rent subsidy in their new franchise agreements constructively terminated their franchises in violation of the PMPA. The Court held that the "ordinary meaning" of the PMPA's text prohibits only franchisor conduct that has the effect of ending a franchise. Thus, because no plaintiffs actually abandoned any element of their franchise operations in response to the elimination of the rent subsidy, the Court concluded that they could not maintain a constructive termination claim. Next, plaintiffs claimed that the offer of new franchise agreements that calculated rent with a different formula was a "constructive nonrenewal" of their franchise relationships. Plaintiffs signed these renewal agreements "under protest." The First Circuit reversed the jury verdict in favor of the plaintiffs and held that a franchisee that chooses to accept a renewal agreement cannot thereafter assert a claim for unlawful nonrenewal under the PMPA. The Court agreed, noting that the PMPA prohibits only unlawful failures to renew a franchise relationship and there was no failure to renew where a renewal agreement was indeed signed, even if it was signed "under protest."

Gibson Dunn – Counsel for Dow Jones & Company, Inc.

35. ***Reed Elsevier, Inc. v. Muchnick*, No. 08-103 (2d Cir., 509 F.3d 116; cert. granted Mar. 2, 2009, limited to the Question Presented that is quoted below; SG as amicus, supporting vacatur and remand; argued on Oct. 7, 2009). This case involves a class-action settlement that sought to resolve a nationwide dispute over compensation to freelance authors and photographers when their creative work was included in the electronic databases of newspapers and magazines. The petition for certiorari posed two questions: (1) whether the usual power of lower courts to approve a comprehensive settlement releasing claims that would be outside the courts' subject matter jurisdiction to adjudicate was eliminated in copyright infringement actions by 17 U.S.C. § 411(a); and (2) whether the Second Circuit erred by ignoring the assurance in *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001), that the problem of compromised electronic news archives could be remedied by "[t]he Parties (Authors and Publishers) [entering] into an agreement allowing continued electronic reproduction of the Authors' works . . . and remunerating authors for their distribution." The Court, however, limited the Question Presented to the following: "Does 17 U.S.C. § 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?"**

    Decided Mar. 2, 2010 (559 U.S. ___). Second Circuit/Reversed and remanded. Justice Thomas for an 8-0 Court (Ginsburg, J., concurring in part and concurring in the judgment, joined by Stevens and Breyer, JJ.; Sotomayor, J., took no part in the consideration or decision of the case). The Court held that the Copyright Act's requirement that a copyright holder register its work before filing an infringement suit, *see* 17 U.S.C. § 411(a), is non-jurisdictional. The Court will generally not interpret the elements of a claim to be jurisdictional requirements without a clear statutory statement to that effect. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Section 411(a) makes no such clear statement regarding the registration requirement. Moreover, the statutes creating federal court jurisdiction over copyright claims, *see* 28 U.S.C. §§ 1331, 1338(a), do not refer to the registration requirement. Furthermore, additional provisions in § 411(a) and § 411(c)

expressly allow courts to adjudicate four exceptions to the registration requirement. The Court distinguished *Bowles v. Russell*, 551 U.S. 205 (2007), which held that 28 U.S.C. § 2107's thirty-day time limit for filing a notice of appeal in a civil case is a jurisdictional requirement (despite the lack of a clear statutory statement to that effect), on the basis that the Court has "long treated" appellate time limits to be jurisdictional.

36. ***Kiyemba v. Obama*, No. 08-1234 (D.C. Cir., 555 F.3d 1022; cert. granted Oct. 20, 2009; parties directed on Feb. 12, 2010 to file letter briefs addressing an additional question by Feb. 19, 2010).[2] The Question Presented is whether a federal court exercising its habeas jurisdiction, as confirmed by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy. The question that the Court ordered to be addressed in the letter briefs pertains to the effect, if any, that certain developments discussed in letters submitted on February 3 and February 5 have on the Court's grant of certiorari in this case.**

    Decided Mar. 1, 2010 (559 U.S. ___). D.C. Circuit/Vacated and remanded. Per Curiam. The Court vacated the judgment and remanded the case to the D.C. Circuit for a determination of what further proceedings "are necessary and appropriate for the full and prompt disposition of the case in light of . . . new developments." The Court had granted certiorari to decide whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners being held at Guantanamo Bay where the Executive detention is indefinite and without legal authorization, and release into the continental United States is the only possible effective remedy. The Court noted, however, that, "[b]y now, . . . each of the detainees at issue in this case has received at least one offer of resettlement in another country." The Court explained that this factual development could affect the legal issues presented, and it declined to be the first court to decide the legal issues in light of the new facts.

37. ***Maryland v. Shatzer*, No. 08-680 (Md., 405 Md. 585; cert. granted Jan. 26, 2009; SG as amicus, supporting Petitioner; argued on Oct. 5, 2009). Whether *Edwards v. Arizona*, 451 U.S. 477 (1981), which bars police from initiating questioning with criminal suspects who have invoked their right to counsel, applies to an interrogation that takes place nearly three years after the suspect asked for counsel.**

    Decided Feb. 24, 2010 (559 U.S. ___). Court of Appeals of Maryland/Reversed and remanded. Justice Scalia for 9-0 Court (Thomas, J., concurring in part and concurring in the judgment; Stevens, J., concurring in the judgment). The Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), bars police from initiating questioning with criminal suspects who have invoked their right to counsel. The rationale behind *Edwards* was a recognition that once a suspect "indicates that he is not capable of undergoing [custodial] questioning without advice of counsel, any subsequent waiver that has come at the

[2] This case initially had been set for oral argument, but oral argument was then canceled and the case was decided without argument.

authorities' behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect." Slip. op. at 5 (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)) (internal quotation marks omitted). In this case, the Court explained that a judicially created rule such as *Edwards* is "justified only by reference to its prophylactic purpose," and hence its application in specific circumstances is subject to cost-benefit analysis. *Davis v. United States*, 512 U.S. 452, 458 (1994) (internal quotation marks omitted). The Court found the benefit of *Edward*s is measured by the number of coerced confessions it suppressed that otherwise would have been admitted. Applying this standard, the Court noted that when one is released from custody and returns to his or her regular life, the risk of a coerced confession is greatly decreased. Thus, the Court held the application of *Edwards* to a situation where a significant period of time has gone by since custodial interrogation would not increase the number of coerced confessions that are excluded. Accordingly, the Court determined that *Edwards* did not apply where there was a sufficient break in custody, and the Court then held that 14 days was a sufficient break in custody for the purpose of this rule. In this case, the defendant had been in prison in the three years between interrogations. The Court held that incarceration was not custody for *Miranda* purposes; therefore, the defendant had not been in custody for three years and his confession was not obtained in violation of *Edwards*.

38. ***Health Care Service Corp. v. Pollitt*, 09-38 (7th Cir., 558 F.3d 615; cert. granted Oct. 13, 2009; SG as amicus, supporting Respondents).**[3] **(1) Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901–14, completely preempts—and therefore makes removable to federal court—a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA. (2) Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state-court suits brought against persons "acting under" a federal officer when sued for actions "under color of [federal] . . . office," encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.**

    Dismissed Feb. 24, 2010. The petition was dismissed pursuant to Rule 46.

39. ***Florida v. Powell*, No. 08-1175 (Fla., 998 So. 2d 531; cert. granted June 22, 2009; SG as amicus, supporting Petitioner; argued on Dec. 7, 2009). (1) Whether a suspect must be expressly advised of his right to counsel during custodial interrogation. (2) If so, whether the failure to provide express advice of the right to the presence of counsel during questioning vitiates *Miranda* warnings that advise of both (a) the right to talk to a lawyer "before questioning" and (b) the ability to invoke one's right to consult a lawyer "at any time" during questioning.**

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[3] This case initially had been set for oral argument, but oral argument was then canceled and the case was dismissed.

Decided Feb. 23, 2010 (559 U.S. ___). Supreme Court of Florida/Reversed and remanded. Justice Ginsburg for a 7-1-1 Court (Stevens, J., dissenting, joined as to Part II by Breyer, J.). In Part II of the Court's opinion, seven Justices reaffirmed the Court's holding in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), that the Court has jurisdiction over state-court cases that appear to rest, at least in part, on federal law, unless the independence and adequacy of a state-law ground for the holding is clear on the face of the opinion. In this case, the Supreme Court of Florida's decision that the police had not satisfactorily notified Powell of his rights before questioning him appeared to rest primarily on its interpretation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and did not clearly identify a state-law ground to support its conclusion. As a result, the Court found that it had jurisdiction. In Part III, eight Justices reaffirmed that a sufficient *Miranda* warning need only be comprehensive and comprehensible when given a commonsense reading; the warning need not be perfectly precise. Accordingly, the Court concluded that a *Miranda* warning that informs suspects that they have "the right to talk to a lawyer before answering" any questions and that they may exercise that right "at any time . . . during the interview," fairly understood, provides adequate notice of an individual's right to have counsel present *during* police questioning. The Court reasoned that the first statement tells suspects that they may consult with a lawyer before answering any particular question and that the second statement confirms that they may exercise that right at any time during an interrogation. Reading the two statements to preclude an attorney's presence during an interrogation, the Court reasoned, would be overly technical and would require believing that suspects are likely to reach the counterintuitive conclusion that to speak with counsel they have to leave the interrogation room before answering each question.

40. ***Hertz Corp. v. Friend*, No. 08-1107 (9th Cir., 297 Fed. App'x 690; cert. granted June 8, 2009; argued on Nov. 10, 2009). Whether the location of a nationwide corporation's headquarters can be considered in determining the corporation's principal place of business for the purpose of diversity jurisdiction. *See* 28 U.S.C. § 1332.**

Decided Feb. 23, 2010 (559 U.S. ___). Ninth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that a corporation's "principal place of business" within the meaning of the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), is where the corporation's "high level officers direct, control, and coordinate the corporation's activities." Respondents, California citizens, brought suit in California state court alleging state-law violations by Petitioner Hertz Corporation, whose corporate headquarters is in New Jersey. Hertz sought removal to federal district court on the basis of diversity jurisdiction. The district court concluded that diversity was lacking under Section 1332(c)(1), which provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The court determined that Hertz was a California citizen under Ninth Circuit precedent, which asked, *inter alia*, whether the amount of the corporation's business activity is "significantly larger" or "substantially predominates" in one State. The Ninth Circuit affirmed. The Supreme Court vacated and remanded. Adopting a bright-line "nerve center" rule for corporate citizenship, the Court rejected the multi-factor "business activity" test that the Ninth Circuit and many other circuits had derived from Section 1332(c)(1). Instead, the Court held that a corporation's principal place of business "should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the 'nerve center,'" and not a site established as a pretense for jurisdictional manipulation.

Three considerations supported this newly clarified "nerve center" approach. First, the statutory text states that courts should choose a *single* "place" that is most important for the corporation, and the phrase "State where it has its principal place of business" suggests that the place is *within* a State, not a State itself. This textual cue signals that courts should not aggregate and weigh a corporation's business activity across each State, but rather should identify the one most significant corporate site—the headquarters. Second, administrative simplicity counsels in favor of a clear rule over a complex, unmanageable standard of the kind many circuit courts have developed. Third, the legislative history confirms that Section 1332(c)(1) was intended to simplify, not complicate, the test for corporate citizenship.

41. ***Briscoe v. Virginia*, No. 07-11191 (Va., 657 S.E.2d 113; cert. granted June 29, 2009; SG as amicus, supporting Respondent; argued on Jan. 11, 2010). If a State allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the State avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?**

    Decided Jan. 25, 2010 (559 U.S. ___). Supreme Court of Virginia/Vacated and remanded. The Court vacated the judgment and remanded the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

42. ***Hemi Group, LLC v. City of New York*, No 08-969 (2d Cir., 541 F.3d 425; cert. granted May 4, 2009; argued on Nov. 3, 2009). Whether a city government meets the Racketeer Influenced and Corrupt Organizations Act's standing requirement that a plaintiff be directly injured in its "business or property" by alleging noncommercial injury resulting from nonpayment of taxes by third parties.**

    Decided Jan. 25, 2010 (559 U.S. ___). Second Circuit/Reversed and remanded. Chief Justice Roberts for a 5-3 Court (Ginsburg, J., concurring in part and concurring in the judgment; Breyer, J., dissenting, joined by Stevens and Kennedy, JJ.; Sotomayor, J., took no part in the decision or consideration of the case). The Court held that civil RICO's causation element—the requirement that the plaintiff suffer harm "by reason of" the defendant's violation of RICO's criminal provisions—requires that the predicate offense (*e.g.,* mail fraud) be the proximate cause of the harm. 18 U.S.C. § 1964(c). There must be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). The City of New York argued that it had been harmed by Respondent cigarette distributor's failure to report the names of its New York customers to the State of New York, as required by the Jenkins Act, 15 U.S.C. §§ 375–378. If the State did not receive the customers' names, it could not forward the names to the City, and the City then could not locate the customers and collect the taxes owed on the cigarette purchases. This "attenuated" "causal chain" does not satisfy civil RICO's "direct relationship" requirement, as set forth in *Holmes* and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and the City therefore failed to state a claim against the cigarette distributor.

43. ***Wood v. Allen*, No. 08-9156 (11th Cir., 542 F.3d 1281; cert. granted May 18, 2009, limited to Questions 1 and 2; argued on Nov. 4, 2009). (1) Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise. (2) Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings.**

    Decided Jan. 20, 2010 (558 U.S. ___). Eleventh Circuit/Affirmed. Justice Sotomayor for a 7-2 Court (Stevens, J., dissenting, joined by Kennedy, J.). The Court held that the state court's factual finding that counsel made a strategic decision not to present evidence of Petitioner's mental deficiencies during the trial's penalty phase was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. Because Petitioner was not entitled to habeas relief even under his reading of the Antiterrorism and Effective Death Penalty Act of 1996, the Court did not resolve one of the two questions on which it granted certiorari. That question was whether, to obtain habeas relief under 28 U.S.C. § 2254(d)(2)—which requires a petitioner's claim to have "resulted in a decision . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"—a petitioner need only establish that the factual determination on which the decision rested was unreasonable, or whether 28 U.S.C. § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the factual determination was correct. In holding that the state court's factual finding that counsel made a strategic decision was reasonable, the Court noted that counsel had read a doctor's mental evaluation, determined that nothing in the report merited further inquiry, and told the sentencing judge that counsel did not intend to introduce the report to the jury. The Court declined to address whether the state-court decision involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), because the argument was not "fairly included" in the Questions Presented pursuant to Supreme Court Rule 14.1(a).

44. ***South Carolina v. North Carolina*, No. 138 Orig. (On Mar. 30, 2009, the Court set the exceptions to the Special Master's report for oral argument in due course; SG as amicus, supporting Plaintiff; argument initially scheduled for Oct. 5, 2009; argued on Oct. 13, 2009). Whether, in an action between two sovereign States seeking an equitable apportionment of an interstate river, an individual user of the river's water has an interest sufficiently distinct from the State's to justify intervention.**

    Decided Jan. 20, 2010 (558 U.S. ___). Original action. Justice Alito for a 6-3 Court (Roberts, C.J., concurring in part and dissenting in part, joined by Ginsburg and Sotomayor, JJ.). The Court held that the Catawba River Water Supply Project ("CRWSP") and Duke Energy Carolinas, LLC were appropriate intervenors in this original action brought by South Carolina, seeking an equitable apportionment with North

Carolina of the Catawba River's waters. The Court held, however, that the City of Charlotte was not an appropriate intervenor. A Special Examiner previously recommended that all parties be granted intervention under the rule that "nonstate entities may become parties to such original disputes in appropriate and compelling circumstances." Declining to adopt this rule, the Court reaffirmed the standard set forth in *New Jersey v. New York*, 283 U.S. 336, 342 (1931), that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." The Court determined that CRSWP, as a "purely bistate entity" whose activities depend upon authority conferred by both states, had a sufficiently compelling and distinct interest to support its intervention. Given the strong relationship between the river flow and Duke Energy's operations, as well as the company's unique interest in protecting its FERC license and a relicensing agreement, the Court found Duke Energy was also an appropriate intervenor. The Court did not believe either State could adequately represent these parties' interests. The Court, however, found that Charlotte's interest as a user of North Carolina's share of the water "falls squarely within the category of interests with respect to which a state must be deemed to represent all its citizens," and thus its intervention was not justified.

45. ***Kucana v. Holder*, No. 08-911 (7th Cir., 533 F.3d 534; cert. granted Apr. 27, 2009; argued on Nov. 10, 2009). What is the scope of the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii)—and does the statute remove jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals?**

    Decided Jan. 20, 2010 (558 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Alito, J., concurring in the judgment). The Court held that a jurisdictional limitation in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") precludes judicial review of Attorney General determinations that the statute itself identifies as discretionary, not determinations made discretionary by regulations. Petitioner Kucana was an immigrant who sought judicial review of a decision by the Board of Immigration Appeals, exercising authority delegated by the Attorney General, to deny Kucana's motion to reopen a removal proceeding. The Seventh Circuit held that it lacked jurisdiction to review the Board's decision. For that conclusion, the court relied on an IIRIRA provision that amended the Immigration & Nationality Act to bar judicial review of any action by the Attorney General "the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The Seventh Circuit reasoned that, even though the relevant statutory provision did not specify that denials of motions to reopen are discretionary, a regulation promulgated by the Attorney General did so specify. The Supreme Court reversed, holding that the IIRIRA jurisdictional limitation applies only to actions made unreviewable by the terms of the immigration statute, not by the agency's own regulations. The Court emphasized the long-standing federal court jurisdiction to review agency rulings on motions to reopen removal proceedings. Against that background, neither the provision's text nor the broader statutory scheme evinced a legislative intent to empower the Attorney General to shield his decisions from judicial review. Any doubt about the scope of the jurisdictional limitation was resolved by the canon of construction favoring judicial review of administrative actions.

46. ***NRG Power Marketing, LLC v. Maine Public Utilities Commission*, No. 08-674 (D.C. Cir., 520 F.3d 464; cert. granted Apr. 27, 2009; argued on Nov. 3, 2009).**

Section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(a), requires that rates for the transmission and sale of electricity in interstate commerce be "just and reasonable." Under the *Mobile-Sierra* doctrine—named for the Court's decisions in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)—the Federal Energy Regulatory Commission ("FERC") must "presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law," and that "presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2737 (2008). In the decision below, the court of appeals held that, "when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply." The Question Presented is the following: Whether *Mobile-Sierra*'s public-interest standard applies when a contract rate is challenged by an entity that was not a party to the contract.

Decided Jan. 13, 2010 (558 U.S. ___). D.C. Circuit/Reversed and remanded. Justice Ginsburg for an 8-1 Court (Stevens, J., dissenting). Under the *Mobile-Sierra* presumption, the Federal Energy Regulatory Commission ("FERC") must presume that electricity rates set by freely negotiated wholesale-energy contracts meet the "just and reasonable" requirement under the Federal Power Act. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest. In this case, the Court held that the *Mobile-Sierra* presumption is "not limited to challenges to contract rates brought by contracting parties," but instead applies to all challenges to contract rates, regardless of the challenger's identity. In reaching its decision, the Court asked rhetorically: "[I]f FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations, how can it be maintained that noncontracting parties nevertheless may escape that presumption?" The Court also relied on *Morgan Stanley Capital Group v. Public Utilities District No. 1 of Snohomish County*, 554 U.S. __ (2008), noting that although it did not reach the question presented in the case, it nonetheless reaffirmed that the "*Mobile-Sierra* public interest standard is not an exception to the just-and-reasonable standard," but "an application of that standard in the context of rates set by contract." The Court added that to protect that standard, whose purpose is to promote the stability of agreements essential to the health of the electricity industry, the presumption must control in challenges to contract rates by noncontracting parties, contracting parties, and FERC itself. Put another way, "[a] presumption applicable to contracting parties only, and inoperative as to everyone else—consumers, advocacy groups, state utility commissions, elected officials acting *parens patriae*—could scarcely provide the stability *Mobile-Sierra* aimed to secure."

47. ***Smith v. Spisak*, No. 08-724 (6th Cir., 465 F.3d 684; cert. granted Feb. 23, 2009; argued on Oct. 13, 2009). (1) Did the Sixth Circuit contravene the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*? (2) Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument**

instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Decided Jan. 12, 2010 (558 U.S. ___). Sixth Circuit/Reversed. Justice Breyer for a 9-0 Court (Stevens, J., concurring in part and concurring in the judgment). The Court reversed on the first Question Presented, concluding that the Ohio Supreme Court's holding was not "clearly contrary" to established state law. Below, Spisak had argued, and the Court of Appeals had held, that the sentencing-phase instructions violated the rule of *Mills v. Maryland*, 486 U.S. 367 (1988), in that the jury instructions required the jury to consider only those mitigating factors that were found unanimously. Reviewing the jury instructions at bar and comparing them to those in *Mills*, the Court concluded that the rule of *Mills*—that the jury cannot be precluded from considering any mitigating evidence—was not implicated. In *Mills*, the instructions had clearly stated that the jury could weigh only those mitigating factors that had been found to exist by all twelve members of the jury. Here, by contrast, the jury was told only that, when balancing the aggravating and mitigating factors, they had to unanimously reject the imposition of a death sentence before imposing a life sentence. The Court then held that the Sixth Circuit's conclusion that this specific instruction was "clearly contrary" to established law was error as the Court had never passed upon the issue; indeed, the Court expressly reserved the issue. On the second Question Presented, the Sixth Circuit had concluded that defense counsel's closing argument in sentencing was inadequate and that prejudice had attached as there was a "reasonable probability" that a competent closing would have resulted in a life sentence. In reversing, the Court first assumed *arguendo* that the argument of defense counsel was inadequate. The Court then found that, even reviewing the matter *de novo*, the defendant could not prove prejudice on the trial record. The Court reviewed how defendant had brutally murdered three individuals in cold blood, and had attempted to murder two others. Further, the Court detailed how defendant not only admitted to these crimes, but reveled in them, and expressed his intent to continue to kill if he ever got out of prison. The Court also noted that at sentencing the only evidence presented was that the defendant was mentally ill; there was no basis to argue other points in mitigation. Finally, the Court concluded that as defense counsel had made numerous implicit pleas for mercy in his closing, further explicit pleas would have been unavailing.

48. ***McDaniel v. Brown*, No. 08-559 (9th Cir., 525 F.3d 787; cert. granted Jan. 26, 2009; SG as amicus, supporting Petitioners).[4] (1) What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")? (2) Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?**

Decided Jan. 11, 2010 (558 U.S. ___). Ninth Circuit/Reversed and remanded. Per Curiam for a 9-0 Court (Thomas, J., concurring, joined by Scalia, J.). The Court held that the Ninth Circuit misapplied *Jackson v. Virginia*, 443 U.S. 307 (1979), when it accepted

[4] This case initially had been set for oral argument, but oral argument was then canceled and the case was decided without argument.

Respondent Troy Brown's argument on habeas that a Nevada jury had convicted him for raping a nine-year-old girl based on constitutionally insufficient evidence. The primary evidence against Brown at trial was DNA recovered from the victim. On federal habeas review, rather than allege a typical *Jackson* claim that the sum of the trial evidence was insufficient to support his conviction, Brown first sought to discredit the DNA evidence. He then argued that absent the DNA evidence, the rest of the evidence against him could not sustain his conviction. To undermine the DNA evidence, Brown relied on an expert report his family had commissioned eleven years after the trial. The Court rejected Brown's invocation of that post-trial report. The Court reaffirmed that *Jackson* sufficiency-of-the-evidence claims must be decided solely on the evidence adduced at trial. The rationale for limiting the habeas record to the trial record is that habeas relief based on insufficient evidence is the equivalent of a judgment of acquittal that would prevent retrial. In dicta, the Court also noted that Brown's post-trial report failed on its own terms to undermine the sufficiency of the evidence against Brown. Accordingly, even if proper as part of the habeas record, the lower court had committed "egregious error" by relying on the report to conclude that the Nevada courts had unreasonably rejected Brown's sufficiency-of-the-evidence claim. The Court also held that Brown forfeited his due process argument. It then remanded the case to the circuit court to consider Brown's as yet unaddressed claim of ineffective assistance of counsel.

49. ***Pottawattamie County v. McGhee*, No. 08-1065 (8th Cir., 547 F.3d 922; cert. granted Apr. 20, 2009; SG as amicus, supporting Petitioners; argued on Nov. 4, 2009). Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's substantive due process rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.**

    Dismissed Jan. 4, 2010. The petition was dismissed pursuant to Rule 46.

50. ***Mohawk Industries, Inc. v. Carpenter*, No. 08-678 (11th Cir., 541 F.3d 1048; cert. granted Jan. 26, 2009; SG as amicus, supporting Respondent; argued on Oct. 5, 2009). Whether, under the collateral-order doctrine, a party may immediately appeal an order that finds waiver of the attorney-client privilege and compels production of privileged materials.**

    Decided Dec. 8, 2009 (558 U.S. ___). Eleventh Circuit/Affirmed. Justice Sotomayor for a 9-0 Court (Thomas, J., concurring in part and concurring in the judgment). The Court held that disclosure orders adverse to the attorney-client privilege are not immediately appealable under the collateral-order doctrine. Petitioner Mohawk Industries attempted to bring a collateral-order appeal after the district court ordered it to disclose certain information on the ground that, although the attorney-client privilege applied to this information, Mohawk had waived the privilege. The Eleventh Circuit dismissed Mohawk's appeal for lack of jurisdiction. The Court affirmed. Because it believed that "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege," the Court held that such disclosure orders are not immediately appealable under the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the Court's view, "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege" inasmuch as "[a]ppellate courts can remedy the improper disclosure of privileged material . . . by vacating an adverse judgment and remanding for a new trial in

which the protected material and its fruits are excluded from evidence." Moreover, litigants faced with "a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal," which options the Court identified as, first, asking the district court to certify an interlocutory appeal under 28 U.S.C. § 1292(b); second, petitioning the court of appeals for a writ of mandamus; and third, defying a disclosure order and incurring court-imposed sanctions (allowing a party to obtain postjudgment review without having to reveal its privileged information) or being held in contempt (allowing a party to appeal directly in some circumstances). The Court also underscored the importance of keeping "the class of collaterally appealable orders 'narrow and selective in its membership,'" particularly in light of "the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable."

51. ***Alvarez v. Smith*, No. 08-351 (7th Cir., 524 F.3d 834; cert. granted Feb. 23, 2009, limited to Question 1; SG as amicus, supporting Petitioner; argued on Oct. 14, 2009). In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976)?**

    Decided Dec. 8, 2009 (558 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Breyer for an 8-1 Court (Stevens, J., concurring in part and dissenting in part). The Court held that the case was moot, vacated the judgment of the Seventh Circuit, and remanded the case to that court with instructions to dismiss. The Court had granted the petition for a writ of certiorari to determine whether the delay in initiating a civil forfeiture proceeding under the Illinois Drug Asset Forfeiture Procedure Act violates the Due Process Clause of the Fourteenth Amendment. During oral argument, however, the Court learned that no dispute remained about ownership or possession of the relevant property, because the six plaintiffs whose property had been seized had either already received their property from Illinois, conceded that Illinois could keep their property, or reached an agreement with Illinois concerning their property. The Court reasoned that because no "case" or "controversy" remained, as required by Article III, the case was moot, and no exception to the mootness doctrine applied. The Court turned next to the question whether to follow its ordinary rule in mootness cases of vacating the lower court's judgment. Plaintiffs argued against vacatur, noting that the "settlement" exception to the vacatur rule should apply, *see Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994), because the State had voluntarily returned the property in question and thus "caused" the mootness. The Court disagreed. In the Court's view, there was not present the kind of "voluntary forfeiture" of a legal remedy as found in *Bancorp*. In particular, no evidence indicated either that the State had coordinated the resolution of the state-court forfeiture cases to avoid review in the federal case, or that the federal case had played any role in causing the termination of those state cases. Thus, the Court reasoned, "the case more closely resembled mootness through 'happenstance' than through 'settlement.'" Accordingly, the Court concluded that vacatur was justified.

52. ***Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region*, No. 08-604 (7th**

Cir., 522 F.3d 746; cert. granted Feb. 23, 2009; argued on Oct. 7, 2009). The Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, establishes a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board (the "Board"). The statute provides that the Board's judgment shall be "conclusive" unless one of three enumerated exceptions applies. This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a conference between the parties. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a purportedly "new rule." The Questions Presented are as follows: (1) Whether the Seventh Circuit erroneously held, in conflict with other Circuits, that the RLA includes an implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process. (2) Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

Decided Dec. 8, 2009 (558 U.S. __). Seventh Circuit/Affirmed. Justice Ginsburg for a 9-0 Court. The Court held that the Railway Labor Act's ("RLA") requirement that parties to minor disputes attempt settlement "in conference" before referring the matter to the National Railroad Adjustment Board ("NRAB") is not a jurisdictional prerequisite to NRAB arbitration. The RLA requires that employees and carriers exhaust certain grievance procedures prior to seeking arbitration. As a final prearbitration effort at settlement, parties must attempt to settle their dispute "in conference." If the parties fail to reach an agreement through these procedures, either party may then refer the matter to the NRAB for arbitration. Unsatisfied with the outcome of prearbitration proceedings, Respondent sought arbitration before an NRAB board. Prior to a hearing before the Board, one of Petitioner's representatives objected, *sua sponte*, to the absence of any proof of conferencing in the record. Though Respondent then submitted evidence of conferencing, the panel concluded that the record could not be supplemented with this evidence, because the panel acts as an appellate tribunal without authority to review *de novo* arguments or evidence. The NRAB panel then dismissed Respondent's petitions for lack of jurisdiction over the claims. Respondent sought review of the dismissal in the district court, asserting that the Board unlawfully held that it lacked authority to assume jurisdiction. The district court affirmed the Board's decision. On appeal, the Seventh Circuit held that evidence of conferencing was not a prerequisite to NRAB arbitration. The Court found that the Seventh Circuit erred in deciding the appeal on constitutional due process, rather than statutory, grounds. Nevertheless, the Court agreed with the Seventh Circuit's conclusion that documentation of prearbitration conferencing was not a prerequisite to NRAB arbitration. The NRAB did not have the authority to declare the conferencing requirement jurisdictional, because Congress alone has the power to define the Board's jurisdiction. Nothing in the RLA suggests that the obligation to conference disputes prior to arbitration is a jurisdictional matter. Instead, the Court concluded that the conferencing requirement is a claim-processing rule, which, unlike a jurisdictional requirement, can be waived if the party asserting the rule does not timely raise the point.

53. ***Beard v. Kindler*, No. 08-992 (3d Cir., 542 F.3d 70; cert. granted May 18, 2009; argued on Nov. 2, 2009). Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine—and therefore**

unenforceable on federal habeas corpus review—because the state rule is discretionary rather than mandatory?

Decided Dec. 8, 2009 (558 U.S. ____). Third Circuit/Vacated and remanded. Chief Justice Roberts for an 8-0 Court. Alito, J., took no part in the consideration or decision of the case. (Kennedy, J., concurring, joined by Thomas, J.). The Court held that a discretionary state procedural rule is not automatically "inadequate" to bar federal habeas review. A Pennsylvania jury had convicted Respondent Kindler of capital murder and recommended a death sentence. Kindler's subsequent prison escape prompted the state trial court to dismiss his postverdict challenges as forfeited. The court refused to reinstate those claims upon his recapture. On federal habeas review, the district court determined that Pennsylvania's fugitive-forfeiture rule was not an adequate state ground and, reaching the merits, found constitutional error in the sentencing instructions. The Third Circuit affirmed, holding that the fugitive forfeiture rule could not preclude federal review because application of the rule was within the trial judge's discretion. In a narrow ruling, the Supreme Court explained that a state procedural rule need not be mandatory to be considered "firmly established and regularly followed," *James v. Kentucky*, 466 U.S. 341, 348 (1984), as the adequate state ground doctrine requires. The Court reasoned that a contrary holding might cause States to sacrifice procedural flexibility to achieve finality of state-court judgments. The goal of federal comity, the Court further explained, would be ill-served by disregarding state procedural rules similar to those given full effect in federal courts. The Court declined to elaborate a precise standard for determining when a discretionary procedural rule constitutes an adequate state ground, but it made clear that "nothing inherent in such a rule renders it inadequate" for that purpose.

Pending Cases

1. ***Schwab v. Reilly*, No. 08-538 (3d Cir., 534 F.3d 173; cert. granted Apr. 27, 2009, limited to Questions 1 and 2; SG as amicus, supporting Petitioner; argued on Nov. 3, 2009). (1) When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value? (2) When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty-day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?**

2. ***Bilski v. Kappos*, No. 08-964 (Fed. Cir., 545 F.3d 943; cert. granted June 1, 2009; argued on Nov. 9, 2009). (1) Whether the Federal Circuit erred by holding that a "process" must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing ("machine-or-transformation" test), to be eligible for patenting under 35 U.S.C. § 101, despite the Court's precedent declining to limit the broad statutory grant of patent eligibility for "any" new and useful process beyond excluding patents for "laws of nature, physical phenomena, and abstract ideas." (2) Whether the Federal Circuit's "machine-or-transformation" test for patent eligibility**

Gibson Dunn – Counsel for *Amici Curiae* in Support of Petitioner

contradicts the clear congressional intent that patents protect "method[s] of doing or conducting business." 35 U.S.C. § 273.

3. ***Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151 (Fla., 998 So. 2d 1102; cert. granted June 15, 2009; SG as amicus, supporting Respondents; argued on Dec. 2, 2009). Florida's Beach and Shore Preservation Act (the "Act") authorizes beach restoration projects in critically eroded areas. Petitioners claim that the State's scheme altered Florida's background property law, which provides that the littoral rights attendant to ocean-front property are constitutionally protected property rights. The Question Presented is the following: Does the Florida Supreme Court's opinion upholding the Act constitute a "judicial taking" under the Fifth and Fourteenth Amendments?**

Gibson Dunn – Counsel for The Center for Audit Quality in Support of Respondent Public Company Accounting Oversight Board

4. ***Free Enterprise Fund v. Public Co. Accounting Oversight Board*, No. 08-861 (D.C. Cir., 537 F.3d 667; cert. granted May 18, 2009; argued on Dec. 7, 2009). (1) Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest." (2) Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product. (3) If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.**

Gibson Dunn – Counsel for Conrad Black

5. ***Black v. United States*, No. 08-876 (7th Cir., 530 F.3d 596; cert. granted May 18, 2009; argued on Dec. 8, 2009). (1) Whether 18 U.S.C. § 1346—which expands the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services"—applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed. (2) Whether the Seventh Circuit erred when it ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights.**

6. ***Weyhrauch v. United States*, No. 08-1196 (9th Cir., 548 F.3d 1237; cert. granted June 29, 2009, limited to the Question Presented as articulated by the Court; argued on Dec. 8, 2009). Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.**

7. ***Granite Rock Co. v. International Brotherhood of Teamsters*, No. 08-1214 (9th Cir., 546 F.3d 1169; cert. granted June 29, 2009; argued on Jan. 19, 2010). (1) Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established? (2) Does Section 301(a) of the Labor-Management Relations Act, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?**

8. ***Astrue v. Ratliff*, No. 08-1322 (8th Cir., 540 F.3d 800; cert. granted Sept. 30, 2009; argued on Feb. 22, 2010). Congress enacted the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, to enable "certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. EAJA authorizes the court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not substantially justified and no special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The Question Presented is whether an "award of fees and other expenses" under the EAJA, 28 U.S.C. § 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States.**

9. ***Holder v. Humanitarian Law Project*, No. 08-1498; *Humanitarian Law Project v. Holder*, No. 09-89 (9th Cir., 552 F.3d 916; cert. granted and cases consolidated Sept. 30, 2009; argued on Feb. 23, 2010). 18 U.S.C. § 2339B(a)(1) makes it a criminal offense for any person within the United States or subject to its jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization. The statute defines "material support or resources" as including "any * * * service, * * * training, [or] expert advice or assistance." 18 U.S.C. § 2339A(b)(1). The Questions Presented are the following: (1) Whether 18 U.S.C. § 2339B(a)(1) is unconstitutionally vague. (2) Whether the criminal prohibitions in 18 U.S.C. § 2339B(a)(1) on provision of "expert advice or assistance" "derived from scientific [or] technical . . . knowledge" and "personnel" are**

unconstitutional with respect to speech that furthers only lawful, nonviolent activities of proscribed organizations.

10. ***Holland v. Florida*, No. 09-5327 (11th Cir., 539 F.3d 1334; cert. granted Oct. 13, 2009; argued on Mar. 1, 2010). Whether "gross negligence" by collateral counsel, which directly results in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling, or whether factors beyond "gross negligence"—such as bad faith, dishonesty, divided loyalty, or mental impairment—must be established before an extraordinary circumstance can be found that would warrant equitable tolling.**

11. ***Skilling v. United States*, No. 08-1394 (5th Cir., 554 F.3d 529; cert. granted Oct. 13, 2009; argued on Mar. 1, 2010). (1) Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, and, if not, whether § 1346 is unconstitutionally vague. (2) When a presumption of jury prejudice arises because of the widespread community impact of the defendant's alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.**

12. ***McDonald v. City of Chicago*, No. 08-1521 (7th Cir., 2009 U.S. App. LEXIS 11721; cert. granted Sept. 30, 2009; argued on Mar. 2, 2010). Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.**

13. ***Hamilton v. Lanning*, No. 08-998 (10th Cir., 545 F.3d 1269; CVSG June 15, 2009; cert. supported Sept. 29, 2009; cert. granted Nov. 2, 2009; SG as amicus, supporting Respondent; argued on Mar. 22, 2010). Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.**

14. ***New Process Steel, L.P. v. NLRB*, No. 08-1457 (7th Cir., 546 F.3d 840; cert. granted Nov. 2, 2009; argued on Mar. 23, 2010; on Apr. 16, 2010, the parties were ordered to file supplemental briefs by Apr. 26, 2010). Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board," but where the Board previously delegated its full powers to a three-member group of the Board that includes the two remaining members?**

15. ***Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, No. 08-1553; *Union Pacific Railroad Co. v. Regal-Beloit Corp.*, No. 08-1554 (9th Cir., 557 F.3d 985; cert. granted and cases consolidated Oct. 20, 2009; SG as amicus, supporting Petitioners; argued on Mar. 24, 2010). Most imports to or exports from the United States are transported in containers that are carried both by sea on ships and by land on trains or trucks. Such "intermodal" or "multimodal" transportation of goods now accounts for more than $1 trillion each year in U.S. trade. The Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (Notes) ("COGSA"), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to such maritime contracts to extend COGSA liability terms by contract for the entire carriage—including any inland leg of the journey. 46 U.S.C. § 30701 (Notes §§ 7, 13). The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. § 11706 (rail carriers) and 49 U.S.C. § 14706 (motor carriers), supplies the default liability regime for rail and motor carrier transportation within the United States. Other provisions of the ICA authorize carriers to contract out of Carmack's default rules. *See* 49 U.S.C. § 10709. The Questions Presented are the following: (1) Whether the Carmack Amendment applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through" bill of lading issued by an ocean carrier that extended COGSA to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation. (2) Whether the Ninth Circuit erred by holding that carriers providing exempt transportation cannot contract out of Carmack under 49 U.S.C. § 10709 or by offering Carmack-compliant terms to the rail carrier's own direct customer.**

16. ***Magwood v. Patterson*, No. 09-158 (11th Cir., 555 F.3d 968; cert. granted Nov. 16, 2009, limited to Question 1; argued on Mar. 24, 2010). When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a "second or successive" claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?**

17. ***Morrison v. National Australia Bank Ltd.*, No. 08-1191 (2d Cir., 547 F.3d 167; CVSG June 1, 2009; cert. opposed Oct. 27, 2009; cert. granted Nov. 30, 2009; SG as amicus, supporting Respondents; argued on Mar. 29, 2010). Whether the judicially implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 should, in the absence of any expression of congressional intent, be extended to permit fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company.**

18. ***Dillon v. United States*, 09-6338 (3d Cir., 572 F.3d 146; cert. granted Dec. 7, 2009; argued on Mar. 30, 2010). (1) Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582. (2) Whether during a §**

3582(c)(2) sentencing, a district court is required to impose sentence based on an incorrectly calculated guideline range.

19. ***Barber v. Thomas*, No. 09-5201 (9th Cir., unpublished opinion below; cert. granted Nov. 30, 2009; argued on Mar. 30, 2010). (1) Whether 18 U.S.C. § 3624(b), which provides that a federal prisoner may receive credit toward the service of his sentence for exemplary conduct, requires the Federal Bureau of Prisons to calculate such credit on the basis of the sentence imposed rather than on the basis of the time served. (2) Whether Congress has delegated the interpretation of Section 3624(b) to the United States Sentencing Commission rather than to the Federal Bureau of Prisons.**

Gibson Dunn – Counsel for *Amici Curiae* in Support of Petitioner

20. ***Carachuri-Rosendo v. Holder*, No. 09-60 (5th Cir., 570 F.3d 263; cert. granted Dec. 14, 2009; argued on Mar. 31, 2010). Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The Question Presented is whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been "convicted" of an "aggravated felony" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.**

Gibson Dunn – Counsel for Gays & Lesbians for Individual Liberty in Support of Petitioner

21. ***Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, No. 08-1371 (9th Cir., 319 Fed. App'x 645; cert. granted Dec. 7, 2009; argued on Apr. 19, 2010). Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.**

22. ***City of Ontario v. Quon*, No. 08-1332 (9th Cir., 529 F.3d 892; cert. granted Dec. 14, 2009; SG as amicus, supporting reversal; argued on Apr. 19, 2010). (1) Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers. (2) Whether the Ninth Circuit erred by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager. (3) Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.**

23. ***Dolan v. United States*, No. 09-367 (10th Cir., 571 F.3d 1022; cert. granted Jan. 8, 2010; argued on Apr. 20, 2010). 18 U.S.C. § 3663A provides that federal courts shall order restitution as part of the sentence in specified criminal**

cases. It further provides that an order of restitution "shall be issued and enforced in accordance with section 3664." ***Id.*** **§ 3663A(d). Section 3664 provides that if the victim's losses cannot be obtained prior to sentencing, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). The Question Presented is the following: Whether a district court can issue a restitution order once the time period set by Section 3664(d)(5) has expired.**

24. ***Krupski v. Costa Crociere, S.p.A.*****, No. 09-337 (11th Cir., 330 F. App'x 892; cert. granted Jan. 15, 2010; argued on Apr. 21, 2010). Whether Federal Rule of Civil Procedure 15(c)(1)(C)—which permits an amended complaint to "relate back" for limitation purposes when the amendment corrects a "mistake concerning the proper party's identity"—permits "mistakes" where the plaintiff had imputed knowledge of the identity of the added defendant prior to filing suit.**

25. ***Rent-A-Center, West, Inc. v. Jackson*****, No. 09-497 (9th Cir., 581 F.3d 912; cert. granted Jan. 15, 2010; argued on Apr. 26, 2010). Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?**

26. ***Monsanto Co. v. Geertson Seed Farms*****, No. 09-475 (9th Cir., 570 F.3d 1130; cert. granted Jan. 15, 2010; argued on Apr. 27, 2010). In this case, after finding a violation of the National Environmental Policy Act ("NEPA"), the district court imposed, and the Ninth Circuit affirmed, a permanent nationwide injunction against any further planting of a valuable genetically engineered crop, despite overwhelming evidence that less restrictive measures proposed by an expert federal agency would eliminate any non-trivial risk of harm. The Questions Presented are the following: (1) Whether NEPA plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction. (2) Whether a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction. (3) Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court's decision in** ***Winter v. NRDC*****, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.**

27. ***John Doe #1 v. Reed*****, No. 09-559 (9th Cir., 586 F.3d 671; cert. granted Jan. 15, 2010; argued on Apr. 28, 2010). The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, identifying information about those signing a petition to put a referendum on the ballot ("petition signers"). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of**

petition signers is subject to, and failed, strict scrutiny. The Questions Presented are the following: (1) Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers. (2) Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

To Be Argued October Term 2010

1. ***Abbott v. United States*, No. 09-479 (3d Cir., 574 F.3d 203; cert. granted and case consolidated with No. 09-7073 on Jan. 25, 2010); *Gould v. United States*, No. 09-7073 (5th Cir., 329 F. App'x 569; cert. granted and case consolidated with No. 09-479 on Jan. 25, 2010). 18 U.S.C. § 924(c)(1)(A) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or . . . in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is . . . provided . . . by any other provision of law." The Questions Presented are: (1) Does the term "any other provision of law" include the underlying drug-trafficking offense or crime of violence? (2) If not, does it include another offense for possessing the same firearm in the same transaction? (3) Does the mandatory minimum sentence provided by § 924(c)(1)(A) apply to a count when another count already carries a greater mandatory minimum sentence?**

2. ***Los Angeles County v. Humphries*, No. 09-350 (9th Cir., unreported decision below; cert. granted Feb. 22, 2010, limited to Question 1). Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom, or practice attributable to the local public entity, or are such claims exempt from *Monell*'s requirement?**

3. ***Harrington v. Richter*, No. 09-587 (9th Cir., 578 F.3d 944; cert. granted and additional Question Presented added by the Court Feb. 22, 2010). (1) In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state-court judgment the deference mandated by 28 U.S.C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt? (2) Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?**

4. ***Michigan v. Bryant*, No. 09-150 (Mich., 768 N.W.2d 65; cert. granted Mar. 1, 2010). Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial for the purpose of the Confrontation Clause because the inquiries were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" (with that "emergency" including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual).**

5. ***National Aeronautics and Space Administration v. Nelson*, No. 09-530 (9th Cir.; 530 F.3d 865; 568 F.3d 1028; cert. granted Mar. 8, 2010). (1) Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. § 552a. (2) Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. § 552a.**

6. ***Snyder v. Phelps*, No. 09-751 (4th Cir.; 580 F.3d 206; cert. granted Mar. 8, 2010). (1) Does the prohibition of awarding damages to public figures to compensate for intentional infliction of emotional distress apply to a case involving two private persons and a private matter? (2) Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly? (3) Does an individual attending a family member's funeral constitute a "captive audience" who is entitled to state protection from unwanted communication?**

7. ***Bruesewitz v. Wyeth, Inc.*, No. 09-152 (3d Cir.; 561 F.3d 233; cert. granted Mar. 8, 2010). Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 (the "Act") expressly preempts certain design defect claims against vaccine manufacturers "if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The Question Presented is whether Section 22(b)(1) preempts all vaccine design defect claims, regardless whether the vaccine's side effects were unavoidable.**

8. ***Flores-Villar v. United States*, No. 09-5801 (9th Cir., 536 F.3d 990; cert. granted Mar. 22, 2010). Whether Petitioner's inability to claim derivative citizenship through his United States citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers, *see* former 8 U.S.C. §§ 1401(a)(7) and 1409 (1970), violated the**

equal-protection guarantee of the Fifth Amendment's Due Process Clause and afforded Petitioner a defense to criminal prosecution under 8 U.S.C. § 1326.

9. ***Kasten v. Saint-Gobain Performance Plastic*, No. 09-834 (7th Cir., 585 F.3d 310; cert. granted Mar. 22, 2010). Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?**

10. ***Connick v. Thompson*, No. 09-571 (5th Cir., 578 F.3d 293; cert. granted Mar. 22, 2010, limited to Question 1). Whether a single *Brady* violation by a prosecutor can give rise to a failure-to-train claim sufficient to satisfy the causation and culpability standard for imposing Section 1983 liability on a municipal entity.**

11. ***Belleque v. Moore*, No. 09-658 (9th Cir., 574 F.3d 1092; cert. granted Mar. 22, 2010). (1) Whether the *Fulminante* standard—that the erroneous admission of a coerced confession at trial is not harmless—applies when a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no-contest plea, even though no record of a trial is available for review. (2) Whether, if the *Fulminante* standard applies, it is "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1).**

12. ***Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (9th Cir., 541 F.3d 982; CVSG Oct. 5, 2009; cert. opposed Mar. 17, 2010; cert. granted Apr. 19, 2010). Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135, 138 (1998), this Court posed the Question Presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The Question Presented in this case is the following: Whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.**

13. ***Staub v. Proctor Hospital*, No. 09-400 (7th Cir., 560 F.3d 647; CVSG Nov. 9, 2009; cert. supported Mar. 16, 2010, cert. granted Apr. 19, 2010). In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced, but did not make, the ultimate employment decision?**

14. ***United States v. Tohono O'odham Nation*, No. 09-846 (Fed. Cir., 559 F.3d 1284; cert. granted Apr. 19, 2010). Under 28 U.S.C. § 1500, the Court of Federal Claims ("CFC") does not have jurisdiction over "any claim for or in respect to which the plaintiff . . . has . . . any suit or process against the United States" or its agents "pending in any other court." The Question Presented**

is: Whether 28 U.S.C. § 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

15. ***Ransom, v. MBNA, American Bank, N.A.*, No. 09-907 (9th Cir., 577 F.3d 1026; cert. granted Apr. 19, 2010). In calculating a debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B), may a bankruptcy court allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles?**

16. ***Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448 (9th Cir., 556 F.3d 950; cert. granted Apr. 26, 2010). California Civil Code §§ 1746–1746.5 prohibit the sale of violent video games to minors under the age of 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The Questions Presented are: (1) Does the First Amendment bar a State from restricting the sale of violent video games to minors? (2) If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?**

17. ***Ortiz v. Jordan*, No. 09-737 (6th Cir., 316 Fed. App'x. 449; cert. granted Apr. 26, 2010). May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?**

18. ***Wall v. Kholi*, No. 09-868 (1st Cir., 582 F.3d 147; cert. granted May 17, 2010). Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas petition?**

19. ***Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (Cal. Ct. App., 84 Cal. Rptr. 3d 545; CVSG Oct. 5, 2009; cert. supported but limited to the first Question Presented Apr. 23, 2010; cert. granted but limited to the first Question Presented May 24, 2010). Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a**

state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

20. ***Sossamon v. Texas*, No. 08-1438 (5th Cir., 560 F.3d 316; CVSG Nov. 2, 2009; SG's brief filed Mar. 18, 2010, in which the SG recommended that (1) as to Question 1, the petition should be held pending the disposition of *Cardinal v. Metrish* (No. 09-109) and then disposed of accordingly and (2) as to Question 2, the petition should be denied; cert. granted May 24, 2010, but limited to Question 1). Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000 ed.).**

21. ***AT&T Mobility LLC v. Vincent Concepcion*, No. 09-893 (9th Cir., 584 F.3d 849; cert. granted May 24, 2010). Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.**

22. ***Garriott v. Winn*, No. 09-991; *Arizona Christian Sch. Tuition Org. v. Winn*, No. 09-987 (9th Cir., 562 F.3d 1002; cert. granted and cases consolidated May 24, 2010). (1) Whether respondents have taxpayer standing when they cannot allege that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds. (2) Whether a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorses or advances religion simply because taxpayers choose to direct more contributions to religious organizations than nonreligious organizations.**

23. ***Skinner v. Switzer*, No. 09-9000 (5th Cir., 2010 WL 338018; cert. granted May 24, 2010). Whether a convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action under 42 U.S.C. § 1983, or whether such a claim may be asserted only in a habeas petition.**

24. ***Mayo Foundation for Medical Education & Research v. United States*, No. 09-837 (8th Cir., 568 F.3d 675; cert. granted June 1, 2010). Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."**

Gibson Dunn – Counsel for Petitioners

Opinion In A Reargued Case

Gibson Dunn – Counsel for Citizens United

1. ***Citizens United v. Federal Election Commission*, No. 08-205 (D.D.C., 2008 WL 2788753; probable jurisdiction noted Nov. 14, 2008; argued on Mar. 24, 2009; on June 29, 2009, the Court restored the case to the calendar for reargument on Sept. 9, 2009; reargued Sept. 9, 2009). (1) Whether all as-applied challenges to the disclaimer, disclosure, and reporting requirements imposed on "electioneering communications" by the Bipartisan Campaign Reform Act of 2002 ("BCRA") were resolved by the Court's statement in *McConnell v. FEC* that it was upholding the disclosure requirements against facial challenge for the entire range of electioneering communications set forth in the statute. 540 U.S. 93, 196 (2003). (2) Whether BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering communications protected from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not unambiguously related to the campaign of a particular federal candidate, *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or because the disclosure requirements fail strict scrutiny when so applied. (3) Whether *WRTL II*'s appeal-to-vote test requires a clear plea for action to vote for or against a candidate, so that a communication lacking such a clear plea for action is not subject to the electioneering communication prohibition. 2 U.S.C. § 441b. (4) Whether a broadcast feature-length documentary movie that is sold on DVD, shown in theaters, and accompanied by a compendium book is to be treated as the broadcast ads at issue in *McConnell*, 540 U.S. at 126, or whether the movie is not subject to regulation as an electioneering communication.**

   Decided Jan. 21, 2010 (558 U.S. ___). United States District Court for the District of Columbia/Reversed in part, affirmed in part, and remanded. Justice Kennedy for a 5-4 Court as to the principal issue; Justice Kennedy for an 8-1 Court as to the disclaimer and disclosure requirements (Roberts, C.J., concurring, joined by Alito, J.; Scalia, J., concurring, joined by Alito, J. and joined in part by Thomas, J.; Stevens, J., concurring in part and dissenting in part, joined by Ginsburg, Breyer, and Sotomayor, JJ.; Thomas, J., concurring in part and dissenting in part). In a groundbreaking decision, the Court held that portions of the McCain-Feingold campaign finance law banning corporate and union expenditures on political speech violate the First Amendment. The decision also calls into question similar restrictions on corporate speech in two dozen States. The case arose out of Citizens United's January 2008 release of *Hillary: The Movie*, a 90-minute critical documentary about then-Senator Hillary Clinton, who was a candidate for the Democratic Party's presidential nomination. Citizens United sought to distribute the movie through Video On Demand, but was prohibited from doing so because federal law made it a felony for corporations—including nonprofit corporations—to use their general treasury funds for political advocacy. Citizens United filed suit challenging those restrictions. The Court held that the government cannot prohibit corporations and labor unions from funding political speech. In his opinion for the Court, Justice Kennedy explained that, if the First Amendment "has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." The Court expressly

invalidated the prohibition on corporate and union "electioneering communications" established by McCain-Feingold as well as the prohibition on corporate and union express advocacy, which had stood for more than sixty years. In so doing, the Court explicitly overruled its 1990 decision in *Austin v. Michigan Chamber of Commerce* and portions of its 2003 decision in *McConnell v. Federal Election Commission*, which had upheld the constitutionality of restrictions on corporate and union political speech. *Austin* and *McConnell* rested on the theory that corporate political speech could constitutionally be banned in order to prevent "the corrosive and distorting effects of immense aggregations of [corporate] wealth" that purportedly had "little or no correlation to the public's support for the corporation's political ideas." The Court's decision in *Citizens United* emphatically rejected that so-called "anti-distortion rationale." The Supreme Court's decision frees corporations and unions to disseminate their views about political candidates through independent expenditures that are not coordinated with candidates or their parties, and applies with equal force to nonprofit advocacy groups, such as Citizens United, and large, for-profit corporations. The decision leaves in place the federal prohibition on corporate and union contributions to political campaigns.

Cases Determined Without Argument

1. ***Corcoran v. Levenhagen*, No. 08-10495 (7th Cir.; cert. granted Oct. 20, 2009; vacated and remanded Oct. 20, 2009). Per Curiam. After Corcoran was sentenced to death, he unsuccessfully challenged his sentence in the Indiana courts. He then sought federal habeas relief on numerous grounds. The federal district court granted habeas relief based on Corcoran's Sixth Amendment argument, but the court did not address Corcoran's other arguments relating to his sentence. The Seventh Circuit reversed the district court's Sixth Amendment holding and, without addressing Corcoran's other sentencing claims, the Seventh Circuit remanded with instructions to deny the writ. The Court vacated and remanded the Seventh Circuit's judgment, holding that "the Seventh Circuit erred in disposing of Corcoran's other claims without explanation of any sort."**

2. ***Bobby v. Van Hook*, No. 09-144 (6th Cir.; cert. granted Nov. 9, 2009; reversed and remanded Nov. 9, 2009). Per Curiam. The Sixth Circuit granted Van Hook habeas relief because his counsel performed deficiently in investigating and presenting mitigating evidence. The Court reversed, reasoning that (1) the Sixth Circuit improperly assessed counsel's conduct from the 1980s based on the American Bar Association's 2003 Guidelines, which in any event are non-binding; and (2) counsel's performance was not ineffective under professional standards prevailing in the 1980s.**

3. ***Wong v. Belmontes*, No. 08-1263 (9th Cir.; cert. granted Nov. 16, 2009; reversed and remanded Nov. 16, 2009). Per Curiam (Stevens, J., concurring). Belmontes contended that his counsel "was constitutionally ineffective for failing to investigate and present sufficient mitigating evidence during the penalty phase of his trial." The Court held that, even if Belmontes could establish that his counsel's performance was constitutionally deficient,**

Belmontes could not establish prejudice arising from such deficient performance.

4. ***Porter v. McCollum*, No. 08-10537 (11th Cir.; cert. granted in part Nov. 30, 2009; reversed and remanded Nov. 30, 2009). Per Curiam. Porter's counsel failed to discover or present certain mitigating evidence during the penalty phase of Porter's trial. In this federal post-conviction proceeding, the Court held that "it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented."**

5. ***Michigan v. Fisher*, No. 09-91 (Mich. Ct. App.; cert. granted Dec. 7, 2009; reversed and remanded Dec. 7, 2009). Per Curiam (Stevens, J., dissenting, joined by Sotomayor, J.). The Court held that the emergency aid exception to the Fourth Amendment's warrant requirement applied under the facts of this case; thus, the evidence obtained in the warrantless search was admissible. The presumption that warrantless searches conducted inside a home are unreasonable can be overcome in cases where there is "the need to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). In this case, the officers responded to a complaint at Fisher's residence, where they noticed blood outside the home and could see Fisher inside the house, screaming and throwing objects. The officers subsequently entered the residence without a warrant and obtained evidence used to convict Fisher of assault with a dangerous weapon and possession of a firearm during the commission of a felony. The Michigan Court of Appeals found that the situation did not rise to the level of an emergency justifying a warrantless search and excluded the evidence. The Court reversed, stating that "[a] straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable." Emphasizing that the standard is an objective one, the Court concluded that the exception could be invoked because it was reasonable for the officers to believe that Fisher had hurt himself and needed treatment, or that Fisher was about to hurt, or had already hurt, someone else.**

6. ***McDaniel v. Brown*, No. 08-559 (9th Cir., 525 F.3d 787; cert. granted Jan. 26, 2009; SG as amicus, supporting Petitioners; reversed and remanded Jan. 11, 2010).[5] Per Curiam for a 9-0 Court (Thomas, J., concurring, joined by Scalia, J.). The Court held that the Ninth Circuit misapplied *Jackson v. Virginia*, 443 U.S. 307 (1979), when it accepted Respondent Troy Brown's argument on habeas that a Nevada jury had convicted him for raping a nine-year-old girl based on constitutionally insufficient evidence. The primary evidence against**

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5 This case initially had been set for oral argument, but oral argument was then canceled and the case was decided without argument.

Brown at trial was DNA recovered from the victim. On federal habeas review, rather than allege a typical *Jackson* claim that the sum of the trial evidence was insufficient to support his conviction, Brown first sought to discredit the DNA evidence. He then argued that absent the DNA evidence, the rest of the evidence against him could not sustain his conviction. To undermine the DNA evidence, Brown relied on an expert report his family had commissioned eleven years after the trial. The Court rejected Brown's invocation of that post-trial report. The Court reaffirmed that *Jackson* sufficiency-of-the-evidence claims must be decided solely on the evidence adduced at trial. The rationale for limiting the habeas record to the trial record is that habeas relief based on insufficient evidence is the equivalent of a judgment of acquittal that would prevent retrial. In dicta, the Court also noted that Brown's post-trial report failed on its own terms to undermine the sufficiency of the evidence against Brown. Accordingly, even if proper as part of the habeas record, the lower court had committed "egregious error" by relying on the report to conclude that the Nevada courts had unreasonably rejected Brown's sufficiency-of-the-evidence claim. The Court also held that Brown forfeited his due process argument. It then remanded the case to the circuit court to consider Brown's as yet unaddressed claim of ineffective assistance of counsel.

7. ***Presley v. Georgia*, No. 09-5270 (Ga., 674 S.E.2d 909; cert. granted Jan. 19, 2010; reversed and remanded Jan. 19, 2010). Per Curiam for a 7-2 Court (Thomas, J., dissenting, joined by Scalia, J.). The Court held that the Sixth Amendment right to a public trial in criminal cases extends to the jury selection phase of the trial, including the *voir dire* of prospective jurors. The Court explained that its conclusion was well settled under *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984). In *Press Enterprise*, the Court held that the *voir dire* of prospective jurors must be open to the public under the First Amendment. In *Waller*, the Court relied on *Press-Enterprise* and held that under the Sixth Amendment a pretrial suppression hearing must be open to the public. The Court noted that there are exceptions to the general rule requiring public proceedings, but explained that a trial court must consider all reasonable alternatives to closure even when they are not offered by the parties.**

8. ***Wellons v. Hall*, No. 09-5731 (11th Cir.; cert. granted Jan. 19, 2010; vacated and remanded Jan. 19, 2010). Per Curiam for a 5-4 Court (Scalia, J., dissenting, joined by Thomas, J.; Alito, J., dissenting, joined by Roberts, C.J.). The Court exercised its "GVR" (grant, vacate, and remand) authority by granting Wellons's petition for a writ of certiorari, vacating the Eleventh Circuit's decision, and remanding the case for further consideration. Wellons was convicted of rape and murder and sentenced to death in Georgia state court. After trial, defense counsel learned that there had been unreported *ex parte* contacts between the jury and the judge, including jury members giving the judge chocolate shaped as male genitalia. Wellons tried to raise the issue on direct appeal, but was denied for lack of a record; he later attempted to raise the issue in his federal habeas petition, but was denied because the issue**

had been decided on direct appeal. The Court held that the Eleventh Circuit's decision to deny Wellons an evidentiary hearing and discovery was an error under the Court's recent holding in *Cone v. Bell*, 129 S. Ct. 1769 (2009), that when a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. The Court also addressed the appropriateness of GVR in the case, concluding that intervening developments revealed a reasonable probability that the decision below rested on a premise that the lower court would reject if given the opportunity for redetermination. The Court rejected both dissents' suggestion that the case should be either summarily reversed or set for argument, commenting that GVR conserves the Court's scarce resources.

9. ***Wilkins v. Gaddy*, No. 08-10914 (4th Cir.; cert. granted Feb. 22, 2010; reversed and remanded Feb. 22, 2010). Per Curiam for a 9-0 Court (Thomas, J., concurring in the judgment, joined by Scalia, J.). The Court held that the district court erred in dismissing Petitioner Wilkins's excessive force complaint on the grounds that his injuries were *de minimis*. Petitioner Wilkins filed suit in district court pursuant to 42 U.S.C. § 1983, claiming that he was "maliciously and sadistically" assaulted, "[w]ithout any provocation," by Gaddy, a corrections officer. The district court, on its own motion, dismissed Wilkins's complaint for failure to state a claim, citing to Fourth Circuit precedent indicating that a plaintiff advancing an Eighth Amendment excessive force claim must show that he suffered more than *de minimis* injury. Because Wilkins's injuries were no more severe than those deemed *de minimis* in prior Circuit decisions and because Wilkins did not allege that his injuries required medical attention, the district court concluded that his injuries were *de minimis*. Wilkins filed a motion for reconsideration, asserting that he was unaware that failure to allege medical treatment might prejudice his claim and providing medical records to support his contention that his injuries did require medical treatment. The court declined to reconsider its ruling. The Fourth Circuit affirmed. The Supreme Court then explained that "[i]n requiring what amounts to a showing of significant injury in order to state an excessive force claim, the Fourth Circuit has strayed from the clear holding of this Court in *Hudson*." In *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court rejected the notion that "significant injury" is a threshold requirement for stating an excessive force claim; the Court intended in *Hudson* to shift the focus of the excessive force inquiry from the extent of injury suffered by the plaintiff to the nature of the force applied. The Court found the Fourth Circuit's reading of *Hudson*, which approved the use of injury as a proxy for force, indefensible. Relying on the absence of alleged significant injury to dismiss Wilkins's claim, the district court wrongly failed to consider whether the force applied was used "maliciously and sadistically to cause harm," the question at the center of the *Hudson* inquiry.**

10. ***Thaler v. Haynes*, No. 09-273 (5th Cir.; cert. granted Feb. 22, 2010; reversed and remanded Feb. 22, 2010). Per Curiam for a unanimous Court. The Court held that its previous decisions did not "clearly establish" that a judge,**

in ruling on an objection to a peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based. The Court determined that the Fifth Circuit went beyond the holdings in *Batson* and *Snyder v. Louisiana*, 552 U.S. 472 (2008), when it held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor. Under *Batson*, a judge ruling on an objection to a peremptory challenge must take into account the circumstantial and direct evidence of the prosecutor's intent. In *Snyder*, the Court held that a peremptory challenge could not be sustained on a demeanor-based ground, one of two reasons given for exercising the peremptory challenge, when the trial court did not explain its ruling. The Court concluded that neither *Batson* nor *Snyder* established the categorical rule upon which the Fifth Circuit apparently relied.

11. ***Kiyemba v. Obama*, No. 08-1234 (D.C. Cir., 555 F.3d 1022; cert. granted Oct. 20, 2009; parties directed on Feb. 12, 2010 to file letter briefs addressing an additional question by Feb. 19, 2010; vacated and remanded Mar. 1, 2010).**[6] **Per Curiam for a unanimous Court. The Court vacated the judgment and remanded the case to the D.C. Circuit for a determination of what further proceedings "are necessary and appropriate for the full and prompt disposition of the case in light of . . . new developments." The Court had granted certiorari to decide whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners being held at Guantanamo Bay where the Executive detention is indefinite and without legal authorization, and release into the continental United States is the only possible effective remedy. The Court noted, however, that, "[b]y now, . . . each of the detainees at issue in this case has received at least one offer of resettlement in another country." The Court explained that this factual development could affect the legal issues presented, and it declined to be the first court to decide the legal issues in light of the new facts.**

12. ***Jefferson v. Upton*, No. 09-8852 (11th Cir.; cert. granted May 24, 2010; vacated and remanded May 24, 2010). Per Curiam for a 7-2 Court (Scalia, J., dissenting, joined by Thomas, J.). The Court held that the Eleventh Circuit erred when, in determining whether a state court correctly decided a factual issue, the Eleventh Circuit considered only one of eight exceptions set forth in 28 U.S.C. §§ 2254(d)(1)–(8) (1994). Because the habeas application was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the case was governed by federal habeas law as it existed prior to the passage of AEDPA. Under federal habeas law, a state court's determination of a factual issue was presumed correct unless the defendant**

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[6] This case initially had been set for oral argument, but oral argument was then canceled and the case was decided without argument.

established that one of eight exceptions applied. *See* 28 U.S.C. §§ 2254(d)(1)–(8) (1994). In this case, the state court made an *ex parte* request to the State, asking the State to draft an order denying Jefferson's writ of habeas corpus. Jefferson was not given an opportunity to respond to the drafted order, and the state court adopted the order in its entirety. Despite Jefferson's claims regarding an improper factual finding by the state court, the Eleventh Circuit considered only the eighth exception listed in § 2254(d). The Court held that the Eleventh Circuit erred in this respect. Additionally, the Court, in dicta, expressed concern with the process used by the state court, but did not rule on whether the state court erred or whether any of § 2254(d)'s exceptions applied. The Court remanded for the lower courts to determine whether the state court's factual findings warrant a presumption of correctness and to conduct any further proceedings as may be appropriate.

Pending Cases Calling For The Views Of The Solicitor General

1. ***Placer Dome, Inc. v. Provincial Gov't of Marinduque*, No. 09-944 (9th Cir., 582 F.3d 1083, CVSG Apr. 19, 2010). (1) Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem International Co. v. Malaysia International Shipping Corp*., 549 U.S. 422, 425 (2007), and apply an incorrect standard of review? (2) Does federal-question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint?**

2. ***Hogan v. Kaltag Tribal Council*, No. 09-960 (9th Cir., 2009 WL 2736172, CVSG Apr. 26, 2010). Whether the Ninth Circuit correctly held that Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a non-member of a tribe and then to compel the State to give full faith and credit to the decrees entered in such proceedings.**

3. ***Simmons v. Galvin*, No. 09-920 (1st Cir., 575 F.3d 24, CVSG May 3, 2010). (1) Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, applies to state felon disenfranchisement laws that result in discrimination on the basis of race. (2) Whether the Massachusetts felon disenfranchisement scheme established in 2000 violates the *Ex Post Facto* Clause as applied to those Massachusetts felons who were incarcerated but had the right to vote prior to 2000.**

4. ***Louisiana Safety Ass'n v. Certain Underwriters at Lloyd's, London*, No. 09-945 (5th Cir., 587 F.3d 714, CVSG May 17, 2010). The McCarran-Ferguson Act provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act**

of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201-08, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does not specifically relate to the business of insurance. The question presented is: Whether Chapter 2 of the FAA, 9 U.S.C. §§ 201-08, is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.

5. ***PLIVA, Inc. v. Mensing*, No. 09-993; *Actavis Elizabeth, LLC v. Mensing*, No. 09-1039 (8th Cir., 588 F.3d 603, CVSG May 24, 2010). The Drug Price Competition and Patent Term Restoration Act (the "Act") provides for expedited Food & Drug Administration ("FDA") approval of generic versions of previously approved drugs. The Question Presented is: Whether the Eighth Circuit abrogated the Act by allowing state tort liability for failure to warn in direct contravention of the Act's requirement that a generic drug's labeling be the same as the FDA-approved labeling for the listed (or branded) drug.**

6. ***Maxwell-Jolly v. Independent Living Center of Southern Cal.*, 09-958 (9th Cir., 572 F.3d 644; CVSG May 24, 2010). (1) Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act by asserting that the provision preempts a state law reducing reimbursement rates. (2) Whether a state law reducing Medicaid reimbursement rates may be held preempted by Section 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Lewis v. City of Chicago*, No. 08-974 (7th Cir., 528 F.3d 488; CVSG May 18, 2009; cert. supported Aug. 21, 2009; cert. granted Sept. 30, 2009; SG as amicus, supporting Petitioners; argued on Feb. 22, 2010). Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the *announcement* of the practice, or may a plaintiff file a charge within 300 days after the employer's *use* of the discriminatory practice?**

   Decided May 24, 2010 (560 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Scalia for a unanimous Court. The Court held that a plaintiff who does not file a timely charge challenging the adoption of an employment practice under Title VII may assert a disparate impact claim challenging the employer's later use of that practice, so long as the

plaintiff alleges each of the elements of a disparate impact claim. Plaintiffs, a class of African-American firefighter applicants, alleged that the City's use of test results in hiring decisions had a disparate impact on African-Americans in violation of Title VII. The City argued that the only actionable discrimination occurred when it used examination results to create a hiring eligibility list, which limited hiring to applicants who achieved a certain score on the exam. The City asserted that Plaintiffs did not have a cognizable disparate impact claim because they failed to file a timely charge challenging the decision to create that list and the exclusion of Plaintiffs was an automatic consequence of the test scores. The Seventh Circuit agreed. Reversing the Seventh Circuit, the Court defined the issue as whether the alleged employment practice could be the basis for a disparate impact claim. Here, the Court found that the City's practice of excluding passing applicants who scored below the cutoff score when making hiring decisions constituted an employment practice under 42 U.S.C. § 2000e-2(k) and thus served as an independent basis for a disparate impact claim, distinct from the City's original decision to administer the exam and create the eligibility list. Plaintiffs filed timely charges challenging these hiring decisions. Thus, the Court concluded that Plaintiffs had stated a cognizable disparate impact claim under Title VII. The Court also noted in *dictum* that, unlike under disparate treatment claims, disparate impact plaintiffs need not demonstrate deliberate discrimination within the limitations period. Rather, they must only show use of an employment practice that causes disparate impact.

2. ***Hamilton v. Lanning*, No. 08-998 (10th Cir., 545 F.3d 1269; CVSG June 15, 2009; cert. supported Sept. 29, 2009; cert. granted Nov. 2, 2009; SG as amicus, supporting Respondent; argued on Mar. 22, 2010). Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.**

3. ***Staub v. Proctor Hospital*, No. 09-400 (7th Cir., 560 F.3d 647; CVSG Nov. 9, 2009; cert. supported Mar. 16, 2010, cert. granted Apr., 19, 2010). In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced, but did not make, the ultimate employment decision?**

4. ***Cardinal v. Metrish*, No. 09-109 (6th Cir., 564 F.3d 794; CVSG Nov. 2, 2009; cert. supported Mar. 18, 2010). The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. The Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against States and state officials in their official capacities. The Question Presented is whether States and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act.**

5. ***Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (Cal. Ct. App., 84 Cal. Rptr. 3d 545; CVSG Oct. 5, 2009; cert. supported but limited to the first Question Presented Apr. 23, 2010; cert. granted but limited to the first**

Question Presented May 24, 2010). (1) Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions? (2) Under *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

6. ***CSX Transportation, Inc. v. Alabama Department of Revenue*, No. 09-520 (11th Cir.; unpublished opinion below; CVSG Feb. 22, 2010; cert. supported May 14, 2010). Whether a State's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge as "another tax that discriminates against a rail carrier" under § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4).**

7. ***Chase Bank USA, N.A. v. McCoy*, No. 09-329 (9th Cir., 559 F.3d 963; CVSG Jan. 25, 2010; GVR recommended May 19, 2010). When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does "Regulation Z," 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?**

8. ***Virginia Office for Protection and Advocacy v. Reinhard*, No. 09-529 (4th Cir., 568 F.3d 110; CVSG Jan. 19, 2010; cert. supported May 21, 2010). Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex Parte Young*.**

9. ***Chamber of Commerce of the United States v. Candelaria*, No. 09-115 (9th Cir., 544 F.3d 976, amended at 558 F.3d 856; CVSG Nov. 2, 2009; cert. supported but limited to the first Question Presented May 28, 2010). (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note. (3) Whether the Arizona statute is impliedly preempted because it undermines the**

"comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Patton v. Harris*, No. 08-7683 (7th Cir.; CVSG Apr. 27, 2009; cert. opposed Aug. 25, 2009; cert. denied Oct. 5, 2009). 28 U.S.C. § 1915(b)(1) provides that "if a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee." The circuits are divided on the following question: When a prisoner files a notice of appeal and application to proceed *in forma pauperis*, and his (or her) application is denied, should the prisoner be treated as having "file[d] an appeal *in forma pauperis*" so that the fee requirement attaches?**

2. ***Trainer Wortham & Co. v. Betz*, No. 07-1489 (9th Cir., 519 F.3d 863; CVSG Oct. 6, 2008; cert. opposed Apr. 22, 2009; cert. granted May 3, 2010; vacated and remanded May 3, 2010). Whether the two-year deadline for filing securities fraud lawsuits begins to run as soon as the investor knows enough to suspect fraud, as soon as a "reasonable person" would have uncovered sufficient facts to support a fraud claim, when the investor made an investigation to check on evidence of fraud, or when the investor has proof that a broker intended to commit fraud.**

3. ***Morrison v. National Australia Bank Ltd.*, No. 08-1191 (2d Cir., 547 F.3d 167; CVSG June 1, 2009; cert. opposed Oct. 27, 2009; cert. granted Nov. 30, 2009; SG as amicus, supporting Respondents; argued on Mar. 29, 2010). Whether the judicially implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 should, in the absence of any expression of congressional intent, be extended to permit fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company.**

4. ***Robertson v. United States ex rel. Watson*, No. 08-6261 (D.C. Court of Appeals, 940 A.2d 1050; CVSG Mar. 23, 2009; cert. opposed Nov. 6, 2009; cert. granted Dec. 14, 2009; argued on Mar. 31, 2010). Whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States.**

   Decided May 24, 2010 (560 U.S. ___). Writ of certiorari dismissed as improvidently granted.

5. ***Missouri Gas Energy v. Schmidt*, No. 08-1458 (Okla., 2008 Okla. LEXIS 98; CVSG Oct. 5, 2009; cert. opposed Jan. 26, 2010; cert. denied Mar. 1, 2010). This case tests a State's power to tax natural gas that is temporarily stored in an interstate pipeline system.**

6. ***American Home Products Corp. v. Ferrari*, No. 08-1120 (Ga., 668 S.E.2d 236; CVSG June 8, 2009; brief of the United States filed Jan. 29, 2010, in which the SG stated that the petition should be held pending the disposition of *Bruesewitz v. Wyeth, Inc.*, No. 09-152 or should be denied). Whether the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-22(b)(1), expressly preempts a state-law claim against a vaccine manufacturer based on an allegation that the vaccine-related injury could have been avoided by a vaccine design that was allegedly safer than the one approved by the Food and Drug Administration for use nationwide.**

7. ***Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (9th Cir., 541 F.3d 982; CVSG Oct. 5, 2009; cert. opposed Mar. 17, 2010; cert. granted Apr. 19, 2010). Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza* Research *International, Inc.*, 523 U.S. 135, 138 (1998), this Court posed the question presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The Question Presented in this case is the following: Whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.**

8. ***Sossamon v. Texas*, No. 08-1438 (5th Cir., 560 F.3d 316; CVSG Nov. 2, 2009; SG's brief filed Mar. 18, 2010, in which the SG recommended that (1) as to Question 1, the petition should be held pending the disposition of *Cardinal v. Metrish* (No. 09-109) and then disposed of accordingly and (2) as to Question 2, the petition should be denied; cert. granted but Question Presented revised May 24, 2010). Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000 ed.).**

9. ***Ortho Biotech Products, L.P. v. United States ex rel. Duxbury*, No. 09-654 (1st Cir., 579 F.3d 13; CVSG Feb. 22, 2010; cert. opposed May 19, 2010). (1) Whether a federal court lacks subject-matter jurisdiction over a *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, that repeats publicly disclosed allegations from prior litigation, where the FCA relator did not provide the government with information on the suit's allegations before the public disclosure. (2) Whether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) of the Federal Rules of Civil Procedure without identifying a**

single false or fraudulent claim, but merely by alleging facts sufficient "to strengthen the inference of fraud beyond possibility."

Gibson Dunn – Counsel for Janus Capital Group

10. ***Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 (4th Cir., 566 F.3d 111; CVSG Jan. 11, 2010; cert. opposed May 19, 2010; cert. granted June 28, 2010). (1) Whether a service provider—for instance, a lawyer, accountant, or investment adviser—can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" its client's alleged misstatements. (2) Whether a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.**

11. ***Holy See v. Doe*, No. 09-1 (9th Cir., 557 F.3d 1066; CVSG Nov. 16, 2009; GVR or denial of cert. recommended May 21, 2010). Respondent seeks to hold Petitioner Holy See, a recognized foreign sovereign, vicariously liable for sexual abuse committed by a Catholic priest in Oregon. To establish jurisdiction over a foreign sovereign, the tort exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(5), requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment[.]" This case presents the following question: Whether the FSIA's tort exception confers jurisdiction when the tortious act itself falls outside the scope of employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.**

12. ***Thompson v. North American Stainless, LP*, No. 09-291 (6th Cir., 567 F.3d 804; CVSG Dec. 14, 2009; cert. opposed May 25, 2010). Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The Questions Presented are as follows: (1) Does Section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party—such as a spouse, family member, or fiancé—who is closely associated with the employee who engaged in such protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?**

13. ***Providence Hospital v. Moses*, No. 09-438 (6th Cir., 561 F.3d 573; 573 F.3d 397; CVSG Jan. 25, 2010; cert. opposed May 25, 2010). The Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd ("EMTALA"), requires hospitals to "screen" any individual who "comes to the emergency department" and to "stabilize" an individual who is determined to have an "emergency medical condition." The Questions Presented are the following: (1) Whether EMTALA's requirement that any individual who comes to a hospital's emergency department with an emergency medical condition be screened and stabilized should be expanded to continue indefinitely, after the individual has been admitted as an inpatient to the hospital for care or treatment. (2) Whether the CMS's regulation clarifying that EMTALA is inapplicable to hospital inpatients, 42 C.F.R. § 489.24(d)(2)(i), is valid, and applies retroactively.**

Gibson Dunn – Counsel for Cigna Corp.

14. ***Amara v. Cigna Corp.*, No. 09-784 (2d Cir., 2009 WL 3199061; CVSG Mar. 8, 2010; cert. opposed May 27, 2010). (1) Whether a district court, after finding violations of the advance notice of reduction requirement in ERISA § 204(h), errs in concluding that it lacks the authority to require the prior benefit provisions to be reinstated. (2) Whether a district court, after finding that participants were promised "comparable" or "larger" future retirement benefits in a Summary of Material Modification that ERISA § 102 requires to be accurate and understandable to the average plan participant, errs in concluding that it lacks the authority to require at least "comparable" future benefits to be provided.**

Gibson Dunn – Counsel for Cigna Corp.

15. ***Cigna Corp. v. Amara*, No. 09-804 (2d Cir., 2009 WL 3199061; CVSG Mar. 8, 2010; cert. opposed May 27, 2010). Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.**

16. ***Pfizer Inc. v. Abdullahi*, No. 09-34 (2d Cir., 562 F.3d 163; CVSG Nov. 2, 2009; cert. opposed May 28, 2010). In the midst of an unprecedented bacterial meningitis epidemic in Nigeria, petitioner Pfizer Inc. conducted a clinical trial of an antibiotic medication. Respondents filed suit in two United States district courts, invoking federal subject matter jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The complaints (1) alleged that Pfizer had violated international law by failing to obtain adequate consent from patients and (2) alleged that the Nigerian government assisted generally in the importation of the medicine and provision of hospital facilities, but not that the government knew of or participated in the failure to obtain adequate consent. The Questions Presented are the following: (1) Whether ATS jurisdiction can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law. (2) Whether, absent state action, a complaint that a private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar to new private causes of action" under the ATS that this Court recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).**

17. ***Triple-S Management Corp. v. Municipal Revenue Collection Center*, No. 09-233 (Supreme Court of Puerto Rico, unpublished opinion below; CVSG Jan. 11, 2010; cert. opposed May 28, 2010). Is the Executive Branch, unlike the Legislative Branch, free of all due process constraints on retroactive government action, as long as the Executive Branch asserts that its earlier interpretation of law was "wrong"?**

18. ***Carmichael v. Kellogg, Brown & Root Service, Inc.*, No. 09-683 (11th Cir., 572 F.3d 1271; CVSG Mar. 8, 2010; cert. opposed May 28, 2010). (1) Whether a private military contractor in Iraq should be afforded *de facto* immunity**

under the political question doctrine for catastrophically injuring a U.S. soldier in an automobile wreck during a routine convoy. (2) Whether a U.S. soldier catastrophically injured in Iraq during a routine convoy can recover against a private military contractor when the civilian driver who caused the wreck was unqualified and overworked.

Gibson Dunn – Counsel for Retail Industry Leaders Association, et al.

19. ***Golden Gate Restaurant Ass'n v. City and County of San Francisco*, No. 08-1515 (9th Cir., 546 F.3d 639; CVSG Oct. 5, 2009; cert. opposed May 28, 2010). San Francisco's Health Care Security Ordinance mandates either ongoing employer contributions at set minimum rates for employee health benefits or equal payments to the City's Health Access Program, along with extensive recordkeeping and reporting and disclosure requirements. The Question Presented is whether ERISA Section 514(a), 29 U.S.C. § 1144(a), preempts local laws mandating ongoing employer contributions for employee health benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements.**

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