GIBSON DUNN
Supreme Court Round-Up

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The Supreme Court Round-Up recaps the 2009 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.

October Term 2009

1. *McDonald v. City of Chicago*, No. 08-1521 (7th Cir., 567 F.3d 856; 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 Clause or Due Process Clause.

Decided June 28, 2010 (561 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Scalia, J., concurring; Thomas, J., concurring in part and concurring in the judgment; Stevens, J., dissenting; Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.). The Court held that the Second Amendment right to keep and bear arms for the purpose of self-defense is incorporated by the Fourteenth Amendment and is therefore fully applicable to the States. After the Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), which held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, Petitioners brought a constitutional challenge to Chicago's firearms ordinance, which effectively bans handgun possession by nearly all private citizens who live in Chicago. The Court traced the history of its selective incorporation doctrine, whereby the Court has held that the Due Process Clause of the Fourteenth Amendment incorporates certain rights contained in the first eight Amendments. The Court's jurisprudence has made clear that to be incorporated by the Fourteenth Amendment, the right at issue must be "fundamental to our scheme of ordered liberty and system of justice" and "deeply rooted in this Nation's history and tradition." Relying upon its decision in *Heller*, the Court reasoned that self-defense is a basic right and is the central component of the Second Amendment right. Further, the Court concluded that the right of citizens to use handguns for the purpose of self-defense is a right deeply rooted in this Nation's history and tradition. In particular, the Court cited the Freedmen's Bureau Act of 1866 as evidence of Congress's aim to safeguard the right to keep and bear arms. That Act provided that the "constitutional right to bear arms" would be provided to all citizens without respect to race, color, or previous condition of slavery. Also citing state constitutions that protected the right to bear arms, the Court concluded that the Framers counted the right to keep and bear arms among the "fundamental rights necessary to our ordered system of liberty."


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

2. ***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.**

Decided June 28, 2010 (561 U.S. ___). Ninth Circuit/Affirmed and remanded. Justice Ginsburg for a 5-4 Court (Stevens, J. concurring; Kennedy, J. concurring; Alito, J. dissenting, joined by Roberts, C.J., and Scalia and Thomas, JJ.). The Court held that Hastings College of Law ("Hastings") did not transgress constitutional limits when it implemented a policy requiring the Christian Legal Society ("CLS") to choose between accepting all students as members and forgoing the benefits of official recognition. The Court explained that the facts in the case required analysis under the limited-public-forum category of cases, because CLS was (1) seeking what was effectively a state subsidy and (2) facing only indirect pressure to modify its membership policies. The Court noted its previously stated rule, that the "State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint." The Court concluded that the Hastings policy requiring all recognized student groups to accept any student was a reasonable, viewpoint-neutral condition on access to the student-organization forum.

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

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

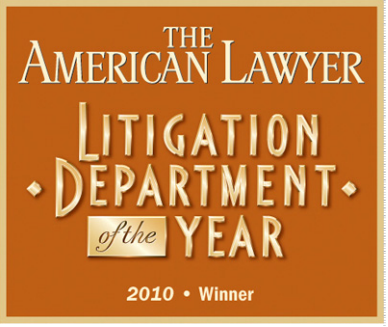
Decided June 28, 2010 (561 U.S. ___). Federal Circuit/Affirmed. Justice Kennedy for a 9-0 Court (Stevens, J., concurring in the judgment, joined by Ginsburg, Breyer, and Sotomayor, JJ.; Breyer, J., concurring in the judgment, joined in part by Scalia, J.). The Court rejected a patent application on the grounds that it did not constitute a "process" due to the unpatentability of abstract ideas. Petitioners filed a patent application seeking protection for a claimed invention that contains a procedure for instructing buyers and sellers how to protect against the risk of price fluctuations in energy markets. In affirming the rejection of the patent application by the patent examiner, the Federal Circuit relied solely on the so-called machine-or-transformation test under the Patent Act, 35 U.S.C. § 101. While the Court agreed with the Federal Circuit's ultimate dismissal of the patent application, the Court rejected the idea that the machine-or-transformation test could be the sole test for deciding whether an invention is a patent-eligible "process" under § 101. The Court also held that § 101 does not categorically exclude "business methods" from patent eligibility. The Court decided the case narrowly, on the basis of the statute's text

and the Court's prior decisions showing "that petitioners' claims are not patentable processes because they are an attempt to patent abstract ideas." The Court, however, did not attempt to define what constitutes a patentable process under the Act.

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 (the "Act") 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.**

Decided June 28, 2010 (561 U.S. ___). D.C. Circuit/Affirmed in part, reversed in part, and remanded. Chief Justice Roberts for a 5-4 Court (Breyer, J., dissenting, joined by Stevens, Ginsburg, and Sotomayor, JJ.). The Court held that a provision of the Sarbanes-Oxley Act that protects members of the Public Company Accounting Oversight Board from removal except for good cause violates Article II of the Constitution. Because the Board is overseen by the Securities and Exchange Commission, whose members are also removable only for cause, "such multilevel protection from power is contrary to Article II's vesting of the executive power in the President." The Court noted that the Constitution gives the President the responsibility to ensure that the laws are faithfully executed and that, in fulfilling this responsibility, the President is empowered to select and remove inferior government officials. Past Supreme Court decisions have sanctioned two types of good-cause limitations on the President's removal power. First, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court held that Congress could confer good-cause tenure on the principal officers of the Federal Trade Commission. And second, in *United States v. Perkins*, 116 U.S. 483 (1885), and *Morrison v. Olson*, 487 U.S. 654 (1988), the Court approved statutes that protect inferior officers from removal for good cause when good cause is judged by principal officials whom the President can fire at will. In this case, however, the SEC cannot remove members of the Board without good cause, and the President cannot remove members of the SEC without good cause. "That arrangement," the Court held, "is contrary to Article II's vesting of the executive power in the President" because "the President is no longer the judge of the Board's conduct." In fashioning a remedy, the Court declined to find that the Board itself was unconstitutional but instead excised from the statute the for-cause tenure restriction.



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The preeminence of Gibson Dunn's Appellate Group is also underscored by its placement on *The National Law Journal*'s "2008 Appellate Hot List," a first-time survey of top appellate law practices.

5. ***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.**

Decided June 24, 2010 (561 U.S. ___). Fifth Circuit/Affirmed in part, vacated in part, and remanded. Justice Ginsburg for a 6-3 Court as to the fair-trial issue and for a 9-0 Court as to the "honest services" fraud issue (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J., and joined by Kennedy, J., except as to Part III; Alito, J., concurring in part and concurring in the judgment; Sotomayor, J., concurring in part and dissenting in part, joined by Stevens and Breyer, JJ.). The Court held that (1) Skilling "did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him" and (2) the honest-services statute, 18 U.S.C. § 1346, covers *only* bribery and kickback schemes. The fair-trial claim of Jeffrey Skilling, a former Enron executive, involved two distinct components. First, Skilling contended that the district court erred "by failing to move the trial to a different venue based on a presumption of prejudice." Second, Skilling argued that actual prejudice tainted his jury. As to the first point, the Court noted that a presumption of prejudice is reserved for "only the extreme case." In this case, however, news about Enron "did not present the kind of vivid, unforgettable information [the Court has] recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact." As to the second issue, the Court rejected Skilling's contention that *voir dire* "did not adequately detect and defuse juror bias"; in fact, the process successfully "secured jurors who were largely untouched by Enron's collapse." Having rejected Skilling's fair-trial arguments, the Court proceeded to address whether Skilling's conspiracy conviction rested on an improper theory of honest-services fraud. Skilling argued that § 1346 is unconstitutionally vague, but the Court started from the premise that "§ 1346 should be construed rather than invalidated." The Court concluded "there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks." In addition, the Court concluded that interpreting the statute to encompass more than bribes and kickbacks would raise constitutional concerns. Accordingly, the Court held that § 1346 criminalizes *only* bribery and kickbacks. Finally, the Court rejected the government's argument that § 1346 encompasses certain undisclosed self-dealing. The Court reasoned that "[i]n light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases."

6. ***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**

Gibson Dunn – Counsel for Conrad Black

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.

Decided June 24, 2010 (561 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Ginsburg for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment, joined by Thomas, J.; Kennedy, J., concurring in part and concurring in the judgment). The Court concluded that its holding in *Skilling v. United States*—that 18 U.S.C. § 1346 "criminalizes only schemes to defraud that involve bribes or kickbacks"—rendered erroneous the honest-services instructions in this case. But the government urged that the convictions must be affirmed for an independent reason. At trial, the government pursued two alternative theories: (1) a money-or-property fraud theory and (2) an honest-services fraud theory. The government proposed special interrogatories that would have made clear whether the jury based its verdict on the first theory, the second theory, or both. The Seventh Circuit "held that the defendants, by opposing the Government-suggested special interrogatories, forfeited their objection to the honest-services-fraud instructions given to the jury." The Court reversed the Seventh Circuit's ruling on the forfeiture issue, holding that a "criminal defendant need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt."

7. ***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.**

   Decided June 24, 2010 (561 U.S. ___). Ninth Circuit/Vacated and remanded. Per Curiam. The Court vacated the judgment and remanded the case to the Ninth Circuit for further consideration in light of *Skilling v. United States*, in which the Court construed the honest-services fraud statute, *see* 18 U.S.C. § 1346.

8. ***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?**

   Decided June 24, 2010 (561 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Thomas for a 5-4 Court (Breyer, J., concurring in part and concurring in the judgment, joined by Stevens and Sotomayor, JJ.; Kennedy, J., dissenting, joined by Roberts, C.J., and Ginsburg and Alito, JJ.). Petitioner was sentenced to death for

murdering a sheriff. After state courts denied relief, Petitioner filed an application for a writ of habeas corpus in federal district court, challenging both his conviction and his sentence. The district court conditionally granted the writ as to the sentence, after which the state court held a new hearing and again sentenced Petitioner to death. Petitioner filed an application for a writ of habeas corpus in federal court challenging his new death sentence. The district court conditionally granted the writ, but the Eleventh Circuit held that Petitioner's challenge to his new death sentence was an unreviewable "second or successive" challenge under 28 U.S.C. § 2244(b) because Petitioner could have raised the same challenge to his first death sentence. The Court reversed, holding that Petitioner's habeas application was not "second or successive" under § 2244(b) because it "challenge[d] a new *judgment* for the first time." (Emphasis added.) Section 2244(b) applies only to a "'second or successive' application challenging the same state-court *judgment*," and Petitioner's resentencing in this case "led to a new judgment." Accordingly, Petitioner's first application challenging the new judgment could not be "second or successive."

9. ***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?**

Decided June 24, 2010 (561 U.S. ___). Ninth Circuit/Reversed in part, affirmed in part, and remanded. Justice Thomas for a 7-2 Court as to Question 1, and a unanimous Court as to Question 2 (Sotomayor, J., concurring in part and dissenting in part, joined by Stevens, J.). The Court held that the district court had jurisdiction to determine whether a collective bargaining agreement was formed when it was disputed whether any binding contract exists, but no party made an independent challenge to the arbitration clause apart from claiming it is inoperative prior to the creation of a binding contract. The Court began by noting that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." (Emphasis in original.) In making this determination, courts must resolve disputes regarding the formation or applicability of the arbitration clause to the specific dispute at issue. The Court rejected the International Brotherhood of Teamsters' ("IBT") argument that these standard principles do not apply in labor disputes because of federal policies favoring arbitration of such disputes. In this case, the collective bargaining agreement ("CBA") made arbitrable only those claims "arising under" it. The Court held that the dispute as to when the CBA was formed was not subject to arbitration and was therefore within the jurisdiction of the district court. As to § 301(a) of the Labor-Management Relations Act, *see* 29 U.S.C. § 185(a), the Court rejected Granite Rock's invitation to create a federal common-law tort claim. The Court began its analysis by noting that although § 301 authorizes federal courts to create a body of federal law to enforce CBAs, it does so in a carefully balanced statutory scheme that the Court is hesitant to disrupt. The Court then held that Granite

Rock did not lack an effective remedy. Accordingly, the Court refused to create the requested federal common-law tort action on the record before it.

10. ***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.**

Decided June 24, 2010 (561 U.S. ___). Second Circuit/Affirmed. Justice Scalia for an 8-0 Court (Breyer, J., concurring in part and concurring in the judgment; Stevens, J., concurring in the judgment, joined by Ginsburg, J.; Sotomayor, J., took no part in the consideration or decision of the case). The Court first held that the question whether § 10(b) of the Securities Exchange Act of 1934 applies to potentially extraterritorial conduct is a merits question, not a jurisdictional question. The Court then held that § 10(b) does not apply extraterritorially. The Court based its holding on the "longstanding principle" that legislation is presumed to apply only to the "territorial jurisdiction" of the United States unless a contrary intent is "clearly expressed," and the fact that the text of § 10(b) "contains nothing to suggest it applies abroad." The Second Circuit and other courts had erred by seeking to "discern" Congress's intent regarding extraterritorial application of § 10(b) instead of applying the presumption against extraterritoriality. The Court therefore rejected the "complex" and "unpredictable" tests that the courts of appeals had developed in this area, including the Second Circuit's "effects" and "conduct" tests. Finally, the Court held that § 10(b) applies only to "purchases or sales of securities in the United States," *i.e.*, "transactions in securities listed on domestic exchanges, [or] domestic transactions in other securities." Merely alleging that deceptive conduct took place in the United States, when that conduct was unconnected to purchases or sales of securities in the United States, fails to state a claim under § 10(b). The Court rejected the Solicitor General's proposed test, which would have applied § 10(b) to securities fraud involving "significant conduct in the United States that is material to the fraud's success," finding no support for that test in the text of the Exchange Act; the Solicitor General had drawn the proposed formulation from *United States v. Pasquantino*, 544 U.S. 349 (2005) (interpreting the wire-fraud statute, 18 U.S.C. § 1343). The conduct in the instant case, involving deceptive acts in the United States connected only to foreign transactions in foreign securities, could not violate § 10(b) (or, consequently, § 20(a) or SEC Rule 10b-5); Petitioners had therefore failed to state a claim upon which relief could be granted.

11. ***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.

Decided June 24, 2010 (561 U.S. ___). Ninth Circuit/Affirmed. Chief Justice Roberts for an 8-1 Court (Breyer, J., concurring; Alito, J., concurring; Sotomayor, J., concurring, joined by Stevens and Ginsburg, JJ.; Stevens, J., concurring in part and concurring in the judgment, joined by Breyer, J.; Scalia, J., concurring in the judgment; Thomas, J., dissenting). The Court held that the compelled disclosure of signatory information in referendum petitions under the Washington Public Records Act ("PRA")—a Washington statute making all "public records" available for public inspection and copying—does not as a general matter violate the First Amendment. In reaching its decision, the Court rejected Respondents' argument that such disclosure is not subject to First Amendment review, concluding that petition-signing expresses a political view that implicates a First Amendment right. The Court then applied an "exacting scrutiny" standard to the challenged disclosure requirement, querying whether a "substantial relation [exists] between the disclosure requirement and a sufficiently important governmental interest." Under that standard, the Court held that the State's interest in preserving the integrity of the electoral process—particularly with respect to rooting out fraud, curing simple mistakes, and promoting transparency and accountability in the electoral process—was sufficient to defeat the argument that the PRA is unconstitutional as applied to referendum petitions in general. Finally, in response to Petitioners' argument that disclosure would burden their First Amendment rights by subjecting them to threats and reprisals, the Court determined that such arguments rested on the specific harm that would attend disclosure of information on the particular petition at issue. That question, the Court found, was not before the Court but was properly to be decided by the district court in the first instance.

12. ***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.**

Decided June 21, 2010 (561 U.S. ___). Ninth Circuit/Reversed and Remanded. Justice Alito for a 7-1 Court (Stevens, J., dissenting; Breyer, J. took no part in the decision of the

case). After finding that Petitioners had standing to seek Supreme Court review and that Respondents had standing to seek injunctive relief, the Court primarily held that the district court abused its discretion when it (1) enjoined the Animal and Plant Health Inspection Service ("APHIS") from partially deregulating Ready Roundup Alfalfa ("RRA"), a genetically engineered, pesticide-resistant crop, pending the completion of an environmental impact study ("EIS") and (2) entered a nationwide injunction prohibiting anyone from planting RRA during that time period. Pursuant to U.S. Department of Agriculture regulations, genetically engineered plants like RRA generally cannot be planted unless they are deregulated (in whole or in part) by APHIS. The National Environmental Policy Act ("NEPA") requires that an EIS accompany certain proposed regulatory actions before those actions are implemented. Respondents—conventional alfalfa growers and environmental groups—successfully challenged APHIS's decision to deregulate RRA without an EIS. To remedy the NEPA violation, the district court vacated APHIS's deregulation order, enjoined APHIS from partially deregulating RRA prior to the completion of an EIS, and entered a nationwide permanent injunction prohibiting most future planting of RRA until the agency published an EIS. Petitioners—the owners of the intellectual property rights to RRA—and the government challenged only the scope of the remedy on appeal. The Court held that there is no presumption of injunctive relief in NEPA cases. Accordingly, Respondents were not entitled to injunctive relief because, among other things, they had not shown that they would be irreparably harmed if APHIS were free to partially deregulate RRA. If NEPA requires an EIS to accompany even a partial deregulation decision, Respondents could file a new lawsuit to remedy any harm from that NEPA violation. Perhaps more importantly, any harm respondents might suffer from a partial deregulation is speculative. The limited scope of any partial deregulation would drastically reduce the risk, for example, of harmful "gene flow" from genetically modified crops to non-genetically modified crops. Because enjoining a partial deregulation of RRA until the completion of an RRA was an abuse of discretion, it was also an abuse of discretion to enjoin RRA planting that would be in accordance with such partial deregulation. In any case, Respondents' complaints did not warrant the extraordinary remedy of a permanent injunction against planting RRA because, as they conceded, the district court's vacatur of APHIS's complete deregulation order remedied most (if not all) of their harm.

13. ***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.

Decided June 21, 2010 (561 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for a 6-3 Court (Sotomayor, J., dissenting, joined by Stevens and Ginsburg, JJ.). The Court held that the parties' agreement to litigate the cases in Tokyo was binding, because the Carmack Amendment, 49 U.S.C. § 11706, did not apply. The parties' contracts designated Tokyo as the forum to litigate any disputes. The Carmack Amendment, however, contains venue provisions that would possibly pre-empt the parties' forum-selection clause if the Amendment applied. The issue presented was whether the terms of a through-bill-of-lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier. The Carmack Amendment requires a rail carrier that receives property for transportation while under the Surface Transportation Board's ("STB") jurisdiction to issue a bill of lading. A rail carrier must issue a Carmack-compliant bill of lading if (1) the rail carrier must provide transportation or service subject to the jurisdiction of the STB, and (2) that carrier must receive the property for transportation while under the STB's jurisdiction for domestic rail transport. The Court explained that the receiving rail carrier—but not the delivering or connecting rail carrier—must issue a bill of lading. Neither Kawasaki Kisen Kaisha (which chose to use rail transport to complete one segment of the journey under what was essentially a maritime contract) nor Union Pacific Railroad (which was a connecting or delivering carrier during an international through-shipment) was a "receiving" rail carrier. Thus, the Carmack Amendment and its venue provisions did not apply to the case, and the Court found the parties' forum-selection clause to be valid.

14. ***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?**

Decided June 21, 2010 (561 U.S. ___). Ninth Circuit/Reversed. Justice Scalia for a 5-4 Court (Stevens, J. dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). The Court held that under the Federal Arbitration Act ("FAA"), when the enforceability of an agreement to arbitrate is challenged as a whole, the arbitrator (as opposed to a court) may decide whether the agreement is unconscionable. In this case, Respondent Jackson filed an employment discrimination suit against Rent-A-Center, which then moved to dismiss or stay the proceedings, arguing that Jackson signed an arbitration agreement that precluded him from pursuing his claims. The arbitration agreement at issue provided for arbitration of all disputes arising out of Jackson's employment and contained a delegation provision, which gave the arbitrator the exclusive authority to resolve any dispute relating to the agreement's enforceability. Distinguishing challenges in which the validity of the

agreement to arbitrate alone is challenged from those in which the contract as a whole is challenged, the Court found that Jackson's challenge fell into the latter category, as he did not specifically contest the validity of the delegation provision. Accordingly, the Court concluded that it "must treat [the delegation provision] as valid" and enforce that provision, leaving the challenge to the unconscionability of the agreement as a whole to the arbitrator.

15. ***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.**

Decided June 21, 2010 (561 U.S. ___). Ninth Circuit/Affirmed in part, reversed in part, and remanded. Chief Justice Roberts for a 6-3 Court (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.). The Court held that 18 U.S.C. § 2339B(a)(1)'s prohibition on "knowingly provid[ing] material support or resources to a foreign terrorist organization" does not violate the Fifth Amendment's Due Process Clause or the First Amendment rights to freedom of speech and association as applied to the four types of material support that the plaintiffs sought to pursue—"training," "expert advice or assistance," "service," and "personnel." Regarding the plaintiffs' Fifth Amendment claim, the Court held that, as applied to the plaintiffs, the material-support statute is not unconstitutionally vague. The Court noted that Congress had added narrowing definitions to the statute over time, which increased the clarity of the statute's terms. Congress's limiting definitions of "personnel" and "service" indicate that those terms refer to concerted activity and not to independent advocacy. The Court also noted that most of the activities that the plaintiffs sought to pursue readily fall within the scope of the terms "training" and "expert advice or assistance." A person of ordinary intelligence would understand, for example, that the plaintiffs' proposal to train members of a foreign terrorist organization to "use humanitarian and international law to peacefully resolve disputes" falls within the statute's definition of "training." Regarding the plaintiffs' First Amendment claims, the Court first noted that the statute prohibits material support, which often is not speech at all; where the statute covers speech, Congress prohibited a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. Recognizing that § 2339B regulates speech on the basis of content, the Court nonetheless found that the Government's interest in combating terrorism is "an urgent objective of the highest order" and that Congress and the Executive reasonably concluded that providing material support to a foreign terrorist organization—even ostensibly benign support—bolsters that organization's terrorist activities. Finally, the Court found that the statute did not violate the plaintiffs' freedom of association because § 2339B does not penalize mere association but prohibits the act of

giving foreign terrorist groups material support. Any burden on the plaintiffs' freedom of association by preventing them from providing support to foreign terrorist organizations, but not to other groups, was justified for the same reasons the Court rejected their free-speech challenge. The Court noted, however, that future applications of the statute might fail First Amendment scrutiny.

16. ***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.**

Decided June 17, 2010 (560 U.S. ___). Third Circuit/Affirmed. Justice Sotomayor for a 7-1 Court (Stevens, J. dissenting; Alito, J., took no part in the decision of the case). The Court held that 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. In so doing, the Court rejected the argument that a 18 U.S.C. § 3582(c)(2) proceeding constitutes a "resentencing." As the Court explained, § 3582(c)(2)'s "text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." In reaching this conclusion, the Court held that § 3582(c)(2) authorizes resentencing only when the Sentencing Commission *elects* to amend the Guidelines and then *elects* to make that amendment retroactive. The Court explained that § 3582(c)(2) creates a two-step process. In the first step, a court is required by § 3582(c)(2) to follow the Sentencing Commission's instructions in § 1B1.10 to "determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized." Only after this first step does § 3552(a) come into play. "Given the limited scope and purpose" of § 3582(c)(2), the Court held that it did not implicate the interests identified in *United States v. Booker*, 543 U.S. 220 (2005). Specifically, the Court held that *Booker* was not implicated because the facts found by a judge in a § 3582(c)(2) proceeding do not increase the applicable range of punishment. (Instead, they affect only the judge's discretion *within* the range of punishment authorized by the original judgment of conviction.) The Court also rejected the argument that to make the Guidelines mandatory in § 3582(c)(2) proceedings would be inconsistent with *Booker*. In addition, the Court concluded that under § 3582(c)(2) the district court was not required to recalculate a defendant's sentence. The Court reiterated that a § 3582(c)(2) proceeding is not a resentencing and noted that § 3582(c)(2) contemplates that the original sentencing calculation will be applied and will be modified only by the relevant Guidelines amendment.

17. ***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?

Decided June 17, 2010 (560 U.S. ___). Third Circuit/Reversed and remanded. Justice Thomas for a 6-3 Court (Ginsburg, J., dissenting, joined by Roberts, C.J., and Breyer, J.). When a debtor files a Chapter 7 bankruptcy petition, she may request that certain possessions, set forth in 11 U.S.C. § 522, be exempted from the bankruptcy estate, up to certain maximum value amounts, by listing the possessions on a Schedule C of Federal Rules of Bankruptcy Procedure Official Form 6. In general, if no "party in interest" (such as the bankruptcy trustee) objects to the requested exemptions and estimated values in a timely manner, the possessions remain exempt from the estate. The instant dispute arose when the debtor claimed exemptions that were within § 522's maximum value limits and that exactly matched the estimated value of the possessions. The trustee did not object, but the underlying possessions were later found to be worth more than the estimates listed on Schedule C, exceeding the statutory maximum exemption value limits. The Court held that only the statutorily-allowed dollar amount was exempt from the estate; the possessions themselves were not exempt merely because the total requested exemptions equaled the total estimated value of the possessions on Schedule C. The trustee was not put on notice that the debtor was intending to claim an exemption greater than the statutory limit, and the trustee thus had no duty to object. The Court's holding was based on the statutory definition of the term "property claimed as exempt" as the debtor's "interest" in the possessions, rather than the possessions themselves. 11 U.S.C. § 522(d)(5), (6). Further, the Court explained, a contrary rule would fail to account for other subsections of § 522 that allow some categories of possessions to be exempted in full, regardless of their value. The Court explained that its holding was consistent with the historical treatment of bankruptcy exemptions under prior versions of Schedule C, and with *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), which held that a bankruptcy trustee is put on notice that the debtor is seeking to exempt an amount in excess of the statutory limits when the debtor gives an estimated value of the underlying property as "$ *unknown*."

18. ***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.**

Decided June 17, 2010 (560 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for a 9-0 Court (Stevens, J., concurring; Scalia, J., concurring in part and concurring in the judgment). The Court held that the Ontario Police Department's ("OPD") review of an employee's text messages on an employer-issued pager device was a reasonable search under the Fourth Amendment. The Court reasoned that the search was motivated by a "legitimate work-related purpose"—namely, determining whether

employees were paying out of their own pockets for work-related text messages, or conversely, whether the OPD and the City of Ontario were paying for personal employee communications. The Court also explained that the search was not "excessively intrusive" in light of that justification, because OPD requested only two months worth of transcripts of the employee's text messages and redacted any messages sent while off duty. Importantly, the Court expressly left open the issue whether a government employee has a reasonable expectation of privacy in text messages sent on an employer-issued device.

19. ***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 claimed 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?**

Decided June 17, 2010 (560 U.S. ___). Supreme Court of Florida/Affirmed. Justice Scalia for an 8-0 Court (Kennedy, J., concurring in part and concurring in the judgment, joined by Sotomayor, J.; Breyer, J., concurring in part and concurring in the judgment, joined by Ginsburg, J.; Stevens, J. took no part in the decision of the case). The Court held that the Florida Supreme Court's decision that application of the Florida Beach and Shore Preservation Act does not effectuate a taking of beachfront property owners' property rights was itself not a taking without just compensation in violation of the Fifth and Fourteenth Amendments. Under Florida's common law, the mean high-water boundary demarcates the division between State-owned submerged land and private beachfront property. Land added seaward of that boundary by accretion—gradual and imperceptible additions of land—vests in the beachfront property owners. Land added by avulsions—sudden or perceptible additions of land—vests in the State. After an avulsion, the dividing line between the two property owners remains the mean high-water boundary before the event. The Florida Beach and Shore Preservation Act allows the State to reclaim and preserve beachfront land. When the State reclaims beachfront land it does two things. First, it replaces the common law mean-high-water boundary between State-owned and private land with a fixed "erosion control line." Second, it artificially creates an avulsion that adds dry land seaward of that fixed boundary. Together those actions cut off beachfront property owners' land from contact with the water and make it impossible for beachfront property to grow through future accretions since the private property no longer abuts the water. Notwithstanding those effects, the Florida Supreme Court did not contravene established state property law when it held that the State's beach reclamation efforts do not take property without just compensation. The court's decision did not eliminate the private property owners' right to future accretions; it merely held that the doctrine of avulsion applies even when the State causes the avulsion. And the court's decision did not eliminate any established property right to have beachfront property remain in contact with the water. Such a right would be inconsistent with the doctrine of avulsion; any avulsion that creates land necessarily separates private beachfront property from the water. The Florida Supreme Court's decision did not eliminate eitherbeachfront property owners' right to future accretions or to have their land remain in contact with the water. Accordingly, because the court did not alter any individual's property rights, it did not effect an uncompensated and unconstitutional taking.

20. *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?

Decided June 17, 2010 (560 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Stevens for a 5-4 Court (Kennedy, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). In 1947, Congress increased the size of the National Labor Relations Board from three to five members. *See* 29 U.S.C. § 153(a). At the same time, Congress increased the quorum requirement from two to three members. *See id.* § 153(b). In addition, the Board is permitted to delegate its authority to groups of at least three members. *Id.* In this case, the Court held that, "following a delegation of the Board's powers to a three-member group," two members may not "continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." The Court reasoned that "a straightforward understanding of the [statutory] text, which requires that no fewer than three members be vested with the Board's full authority, coupled with the Board's longstanding practice, point[ed] . . . toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three."

21. *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.

Decided June 14, 2010 (560 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Breyer for a 7-2 Court (Alito, J., concurring; Scalia, J., dissenting, joined by Thomas, J.). The Court held that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling. In 1997, Petitioner Albert Holland was convicted of first degree murder and sentenced to death. After direct appeal of his conviction and a petition for writ of certiorari, attorney Bradley Collins was appointed to represent Holland in state and federal postconviction proceedings. Throughout the course of Holland's state postconviction proceedings, Holland was repeatedly dissatisfied with Collins's communication. Holland wrote Collins many letters asking about the status of his proceedings, to which Collins did not respond. Throughout this time, Holland was focused on making sure that he did not miss the deadline for filing a federal habeas petition once his state proceedings had come to a conclusion. Despite Holland's concerns, Collins did not inform Holland of the conclusion of the state proceedings and Holland missed the one-year deadline for filing his federal habeas petition established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). The Court held that AEDPA's one-year statutory limitations period may be tolled for equitable reasons. The Court reasoned first that the statute of limitations defense is not jurisdictional and thus does not require dismissal whenever the clock has run. Rather, the

Court explained, equitable principles have traditionally governed the substantive law of habeas corpus. Second, the Court distinguished its decisions in *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998), which held that the rebuttable presumption in favor of equitable tolling was overcome in each case. AEDPA's statute of limitations, by contrast, does not contain unusually emphatic language; nor does it reiterate the time limitation, and the period is not particularly long. Third, the Court reasoned that equitable tolling does not undermine AEDPA's basic purpose because although the statute was enacted to eliminate delays in the federal habeas review process, its purpose was not to eviscerate the constitutional right to that review. The Court did not decide whether Holland was entitled to equitable tolling, leaving the question of whether there were "extraordinary circumstances" to the lower court to decide. The Court did hold, however, that attorney misconduct could constitute such extraordinary circumstances.

22. ***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.**

Decided June 14, 2010 (560 U.S. ___). Tenth Circuit/Affirmed. Justice Breyer for a 5-4 Court (Roberts, C.J., dissenting, joined by Stevens, Scalia, and Kennedy, JJ.). The Court held that a sentencing court that misses the deadline for holding a restitution hearing within 90 days after sentencing, *see* 18 U.S.C. § 3664(d)(5), nonetheless retains the power to order restitution—at least where the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the *amount* of restitution. The Court explained that the underlying statute in this case, 18 U.S.C. § 3664(d)(5), was similar to statutes at issue in cases where the Court found that a deadline created speed by establishing a time-related directive that was legally enforceable without depriving a judge or other public official of the power to take action if the deadline is missed. *See, e.g.*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990) (holding that a missed deadline for a bail detention hearing does not require the judge to release the defendant). The Court also concluded that its holding was in accord with the primary importance that the statute's text placed on providing restitution to the victim.

23. ***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. The 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 preexisting debt owed by the prevailing party to the United States.

Decided June 14, 2010 (560 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Thomas for a 9-0 Court (Sotomayor, J., concurring, joined by Stevens and Ginsburg, JJ.). The Court held that an award of fees under 28 U.S.C. § 2412(d) is payable to the prevailing litigant, not to her attorney. Section 204(d) of the Equal Access to Justice Act ("EAJA"), *see* 28 U.S.C. § 2412(d), provides in relevant part that "a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified." In this case, a Social Security claimant "prevailed on a claim for benefits against the United States." The government sought an administrative offset against the fee award, however, because the claimant had a preexisting debt that was owed to the government. The prevailing party's attorney intervened to challenge the offset "on the ground that § 2412(d) fees belong to a litigant's attorney and thus may not be used to offset or otherwise satisfy a litigant's federal debts." The Court sided with the prevailing party, not her attorney. To support its holding, the Court noted that it has "long held that the term 'prevailing party' in fee statutes is a 'term of art' that refers to the prevailing litigant." *See, e.g.*, *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 603 (2001).

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

24. *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.

Decided June 14, 2010 (560 U.S. ___). Fifth Circuit/Reversed. Justice Stevens for a 9-0 Court (Scalia, J., concurring in the judgment; Thomas, J., concurring in the judgment). The Court held that second or subsequent simple-possession offenses are not aggravated felonies for purposes of federal immigration law when the underlying state conviction is not based on the fact of a prior conviction. Petitioner faced deportation after committing two misdemeanor drug-possession offenses—one for possessing less than two ounces of marijuana, and the second, a year later, for possessing one tablet of Xanax without a prescription. The Fifth Circuit found that Petitioner's second conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal. In rejecting the government's stance that these charges *could have been* prosecuted as recidivist possession and that, therefore, the second conviction should be deemed an aggravated felony, the Court held that second or subsequent simple-possession offenses are not aggravated felonies for purposes of federal immigration law when the underlying state conviction is not based on the fact of a prior conviction. The Fifth Circuit's "hypothetical approach," which would treat conduct as a felony conviction when the underlying conduct *could have been* a felony under federal law, ignored the text of the Immigration and

Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq*. The INA limits the Attorney General's cancellation power when, among other things, a noncitizen "has . . . been *convicted* of a[n] aggravated felony." 8 U.S.C. § 1229(a)(3) (emphasis added). To be convicted of an aggravated felony under the applicable statutory provisions, the "maximum term of imprisonment authorized" must be "more than one year." 18 U.S.C. § 3559(a)(5). Under the Controlled Substances Act, simple-possession offenses carry only a one-year sentence unless a prosecutor charges the defendant as a recidivist. Here, Petitioner's record of conviction contained no finding of the fact of his prior drug offense, and a federal immigration court "cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under either state or federal law."

25. ***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.**

Decided June 7, 2010 (560 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Sotomayor for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment). The Court held that relation back under Federal Rule of Civil Procedure 15(c)(1)(C) depends on what the party to be added knew or should have known—not on the amending party's knowledge or its timeliness in seeking to amend the pleading. The Eleventh Circuit held that the plaintiff failed to satisfy Rule 15(c)(1)(C) because the plaintiff knew or should have known of the proper defendant before filing her original complaint—the plaintiff provided her attorney with a document that listed the defendant against which lawsuits should be filed before the running of the statute of limitations. The Court explained that the plaintiff's knowledge of the existence of a party does not foreclose the possibility that she had made a mistake of identity. The Court clarified its decision in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), and explained that *Nelson* does not suggest that Rule 15(c)(1)(C) cannot be satisfied if a plaintiff knew of the prospective defendant's existence at the time she filed her original complaint. Instead, the requirements of Rule 15(c)(1)(C)(ii) are not met if the original complaint and the plaintiff's conduct must compel the conclusion that the failure to name the prospective defendant in the original complaint was the result of a fully informed decision, as opposed to a mistake concerning the proper defendant's identity.

26. ***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, a 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.**

Decided June 7, 2010 (560 U.S. ___). Tenth Circuit/Affirmed. Justice Alito for an 8-1 Court (Scalia, J., dissenting). The Court held that bankruptcy courts should use a "forward-looking approach," rather than a "mechanical approach," in calculating "projected disposable income" under 11 U.S.C. § 1325(b)(1). Section 1325 prevents a

bankruptcy court from confirming a Chapter 13 plan over the objections of an unsecured creditor or the bankruptcy trustee unless the plan provides for the full repayment of unsecured claims, or else "provides that all of the debtor's projected disposable income to be received" during the plan "will be applied to make payments" to the unsecured creditors. The Bankruptcy Code does not define the term "projected" in the term "projected disposable income," but the Code uses a six-month "look-back" period prior to the filing of the bankruptcy petition to define the term "disposable income." A minority of circuits followed the "mechanical approach," under which the monthly "projected disposable income" during the plan period was equal to the monthly disposable income for the six-month "look-back" period. A majority of circuits, by contrast, followed the "forward-looking approach," under which a bankruptcy court could take into account significant post-filing changes in the debtor's monthly income that were "known or virtually certain" to occur. The Court held that the "forward-looking approach" was supported by (a) the ordinary meaning of the term "projected"; (b) the way the term "projected" is used in other federal statutes; and (c) case law predating the 2005 amendments to the Bankruptcy Code. The "mechanical approach," on the other hand, conflicts with other provisions of § 1325, and would produce "senseless" results when applied to debtors who had unusually high or low incomes during the pre-filing "look-back" period.

27. ***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.**

Decided June 7, 2010 (560 U.S. ___). Ninth Circuit/Affirmed. Justice Breyer for a 6-3 Court (Kennedy, J. dissenting, joined by Stevens and Ginsburg, JJ.). The Court held that the method used by the Bureau of Prisons to calculate "good time" sentence reductions, which is based on actual time served rather than the length of the term of imprisonment, reflected the most natural reading of the statute. Under 18 U.S.C. § 3624(b), a federal inmate is entitled to a credit of up to fifty-four days for every year of his "term of imprisonment" if he exhibits exemplary behavior. The Bureau has consistently interpreted "term of imprisonment" to refer to the length of the sentence actually served, as opposed to the entire length of an inmate's sentence as imposed by the district judge. Petitioners, who are federal inmates, argued that this method of calculation is unlawful and causes them to lose months of "good time" credits that they would have received if the calculation was based on the length of their imposed sentences. The Court concluded that the statute's language and purpose supported the Bureau's interpretation, and it rejected Petitioners' reliance on legislative history, the rule of lenity, and *Chevron* deference. While acknowledging that its interpretation of "term of imprisonment" could not be imposed consistently throughout the entire United States Code, the Court emphasized that the prisoners' interpretation would undermine the purpose of the Sentencing Reform Act.

28. ***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 of 1976 ("FSIA"), which governs the determination as to whether a foreign state is entitled to sovereign immunity, does not govern whether an individual foreign official enjoys immunity from suit. The Court reasoned that there is nothing in the text of the FSIA, read as a whole, that suggests that "foreign state" should be read to include an official acting on behalf of that state. The Court also explained that its conclusion is consistent with the history and purpose of the FSIA, because official immunity was not the problem that Congress was addressing when it enacted the FSIA, and thus there is little reason to presume that Congress wanted to codify the law of foreign official immunity when it superseded the common-law regime for claims against foreign states through the FSIA. Finally, the Court held that the question whether Petitioner qualified for common-law immunity should be addressed by the district court in the first instance.

29. ***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) 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.

30. ***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.

31. ***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."

32. *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 involved an interstate dispute in which four States sued the State of North Carolina over enforcement of a regional pact on disposal of radioactive wastes.

Decided June 1, 2010 (560 U.S. ___). Original action. 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.). The Court held that Plaintiffs' seven exceptions to the Special Master's Reports were overruled, as were North Carolina's two exceptions. Plaintiffs, four States belonging to the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact") and the Commission that administered the Compact, filed suit against North Carolina, alleging that North Carolina failed to fulfill its obligation to obtain a license to construct and operate a regional waste disposal facility after it was designated by the Commission as the host state. Plaintiffs sought, among other relief, to recover funds that the Commission had provided to assist North Carolina in the licensing process. The Court found that the terms of the Compact do not authorize the Commission to impose monetary sanctions against North Carolina, rendering moot Plaintiffs' exception that North Carolina could not avoid such sanctions by withdrawing from the Compact. Plaintiffs' exception that North Carolina forfeited its right to object to monetary sanctions by declining to participate in a sanctions hearing was deemed both abandoned and meritless. The Court concluded that, because the express terms of the agreement do not make the Commission the sole arbiter of disputes arising under the Compact, the Court was not bound by the Commission's conclusions. Further, the Court does not apply deferential administrative

law standards of review to the Commission's determinations, but instead makes an independent judgment on issues of both fact and law as "exclusive arbiter of controversies between the States." The Court went on to find that North Carolina did not breach its duty under the Compact to take "appropriate steps" toward obtaining a license; the parties' course of performance established that it was not "appropriate" for North Carolina to proceed in trying to obtain a license absent external financial assistance. The terms of the Compact impose no limitation on a party's right to withdraw, and therefore North Carolina did not breach an implied duty of good faith and fair dealing by exercising that right. The Court approved the Special Master's exercise of discretion in denying North Carolina's motion to dismiss the Commission's claims on the grounds of sovereign immunity and its motions for summary judgment on Counts III-V, because the Special Master reasonably concluded that further development of the relevant facts and law was necessary with respect to those claims.

33. ***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.

34. *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.

35. *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.

36. ***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.

37. *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.

38. *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.

39. ***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.

40. ***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 the 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.

41. ***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 and are 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.

42. ***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 13-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.

43. ***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.

44. *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

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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.

2672," only those portions of the FTCA that establish its remedy are incorporated by § 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.

45. ***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 had made clear he had no objection to religious symbols on private property, he had no standing to contest the expansion of the injunction.

46. ***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 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).

47. ***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 involved 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.

48. *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 was the plan administrator's interpretation of Xerox Corporation's pension plan as it related 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."

49. *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, a debt collector must 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.

50. *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."

51. *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.

52. ***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.

53. ***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 that § 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.

54. *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."

55. *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 Wilson was an employee of the 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

56. *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 advisor 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 advisor 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 advisor'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.

57. *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, the 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.

58. *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.

59. *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 agency" 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.

60. ***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.

61. ***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 that 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.

62. ***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.

63. *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 had 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.

64. *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 a 9-0 Court (Thomas, J., concurring in part and concurring in

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

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 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 that the application of *Edwards* to a situation in which a significant period of time has elapsed 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 had not been obtained in violation of *Edwards*.

65. *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.

66. *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

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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.

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.

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 informs 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 must leave the interrogation room before answering each question.

67. *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.

68. *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).

69. *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 ("RICO") 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.

70. *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).

71. *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 CRWSP, 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.

72. *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 and 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.

73. *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, 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."

74. *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.

75. *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. §

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

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 Respondent Troy Brown's argument on habeas that a Nevada jury had convicted him of 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.

76. *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.

77. *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."

78. *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.

79. ***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 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. Although 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 NRAB'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.

80. ***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 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.

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.

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 the Antiterrorism and Effective Death Penalty Act of 1996's 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), the 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."**

25. ***CSX Transportation, Inc. v. Alabama Department of Revenue*, No. 09-520 (11th Cir., 350 Fed. App'x 318; cert. granted June 14, 2010). When a State exempts the competitors of rail carriers—but not rail carriers themselves—from generally applicable sales and use taxes on fuel, does that make such taxes subject to challenge under 49 U.S.C. § 11501(b)(4) as a tax that discriminates against a rail carrier?**

26. ***Cullen v. Pinholster*, No. 09-1088 (9th Cir., 590 F.3d 651; cert. granted June 14, 2010). (1) Whether it is appropriate under 28 U.S.C. § 2254 for a federal court to conclude that a state court's rejection of a claim was unreasonable in light of facts that an applicant could have (but never) alleged in state court. (2) What standard of review is applicable to claims of ineffective assistance of counsel?**

27. ***Matrixx Initiatives, Inc. v. Siracusano*****, No. 09-1156 (9th Cir., 585 F.3d 1167; cert. granted June 14, 2010). Respondents filed suit under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, alleging that Petitioners committed securities fraud by failing to disclose "adverse event" reports—*i.e.*, reports by users of a drug that they experienced an adverse event after using the drug. The Question Presented is the following: Whether a plaintiff can state a claim under § 10(b) of the Securities Exchange Act and Rule 10b-5 based on a pharmaceutical company's nondisclosure of adverse event reports even though the reports are not alleged to be statistically significant.**

28. ***Schwarzenegger v. Plata*****, No. 09-1233 (E.D. Cal. and N.D. Cal., 2010 WL 99000; on June 14, 2010, the Court ordered that further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits). (1) Whether the three-judge district court had jurisdiction to issue a "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. (2) Whether the court below properly interpreted and applied § 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order." (3) Whether the three-judge court's "prisoner release order"—which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates—satisfies the PLRA's nexus and narrow-tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.**

29. ***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; cert. granted June 21, 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?**

30. ***Virginia Office for Protection & Advocacy v. Reinhard*****, No. 09-529 (4th Cir., 568 F.3d 110; CVSG Jan. 19, 2010; cert. supported May 21, 2010; cert. granted June 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*.**

31. ***Walker v. Martin*****, No. 09-996 (9th Cir., 2009 WL 4884581; cert. granted June 21, 2010). Whether, in federal habeas corpus proceedings, a state law under**

which a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition is "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the State failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases.

32. ***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; cert. granted June 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).**

Gibson Dunn – Counsel for Janus Capital Group

33. ***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.**

34. ***Henderson v. Shinseki*, 09-1036 (Fed. Cir., 589 F.3d 1201; cert. granted June 28, 2010). Whether the time limit in 38 U.S.C. § 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.**

35. ***Milner v. Department of the Navy*, No. 09-1163 (9th Cir., 575 F.3d 959; cert. granted June 28, 2010). Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.**

Gibson Dunn – Counsel for Cigna Corp.

36. ***Cigna Corp. v. Amara*, No. 09-804 (2d Cir., 2009 WL 3199061; CVSG Mar. 8, 2010; cert. opposed May 27, 2010; cert. granted June 28, 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.

37. ***Pepper v. United States*, No. 09-6822 (8th Cir., 570 F.3d 958; cert. granted June 28, 2010). There is a conflict among the federal courts of appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a). The Questions Presented are: (1) Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*. (2) Whether, as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation. (3) Whether, when a district judge is removed from resentencing a defendant after remand and a new judge is assigned, the new judge is obligated under the doctrine of the "law of the case" to follow sentencing findings.**

38. ***Thompson v. North American Stainless, LP*, No. 09-291 (6th Cir., 567 F.3d 804; CVSG Dec. 14, 2009; cert. opposed May 25, 2010; cert. granted June 29, 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?**

Cases Determined Without Argument

1. ***Sears v. Upton*, No. 09-8854 (Ga.; cert. granted June 29, 2010; vacated and remanded June 29, 2010). Per Curiam for a 5-4 Court (Scalia, J., dissenting, joined by Thomas, J.; Roberts, C.J., and Alito, J., would deny the petition for a writ of certiorari). In this case, the state postconviction court found that a criminal defendant's attorney rendered constitutionally deficient performance, but the state court did not determine whether counsel's inadequate investigation might have prejudiced Sears, who was the criminal defendant. "Because Sears' counsel did present *some* mitigation evidence during Sears' penalty phase—but not the significant mitigation evidence a constitutionally adequate investigation would have uncovered—the state court determined it could not speculate as to what the effect of additional evidence would have been." The Court held that the state court had erred by failing to apply the correct prejudice inquiry to Sears' Sixth Amendment claim. The Court explained that the state court had improperly "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness" of the mitigation theory that counsel *did* present. In addition, the Court explained that "[w]e certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an**

inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."

2. ***United States v. Juvenile Male*, No. 09-940 (9th Cir.; question certified to the Supreme Court of Montana June 7, 2010). Per Curiam for a unanimous Court. The government urged the court to grant certiorari in this case to determine whether the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.*, violates the *Ex Post Facto* Clause as applied to individuals who were adjudicated juvenile delinquents under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5301 *et seq.*, prior to SORNA's enactment. The Court explained, however, that "this case likely is moot" because Respondent is no longer subject to the sex-offender-registration conditions of his juvenile supervision. The Court stated that perhaps the most likely potential collateral consequence is the requirement that Respondent remain registered as a sex offender *under Montana law*. Accordingly, the Court concluded that it "must know whether a favorable decision in this case would make it sufficiently likely that respondent 'could remove his name and identifying information from the Montana sex offender registry.'" The Court therefore certified the following question to the Supreme Court of Montana: "Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?" (Citations omitted.)**

3. ***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 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.

4. ***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).**[5] **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.**

5. ***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.**

6. ***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.,**

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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.

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 ground 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.

7. ***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.

8. ***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.**

9. ***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).[6] 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 of 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**

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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.

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.

10. ***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.**

11. ***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."**

12. ***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.

13. ***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.**

14. ***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."**

Pending Cases Calling For The Views Of The Solicitor General

3. ***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?**

4. ***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.**

5. ***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.**

6. ***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.**

7. ***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.**

8. ***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.**

9. ***Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc*., No. 09-1159 (Fed. Cir., 583 F.3d 832; CVSG June 28, 2010). Whether a federal contractor university's statutory right under the Bayh-Dole Act in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.**

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, a 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.**

Decided June 7, 2010 (560 U.S. ___). Tenth Circuit/Affirmed. Justice Alito for an 8-1 Court (Scalia, J., dissenting). The Court held that bankruptcy courts should use a "forward-looking approach," rather than a "mechanical approach," in calculating "projected disposable income" under 11 U.S.C. § 1325(b)(1). Section 1325 prevents a bankruptcy court from confirming a Chapter 13 plan over the objections of an unsecured creditor or the bankruptcy trustee unless the plan provides for the full repayment of unsecured claims, or else "provides that all of the debtor's projected disposable income to be received" during the plan "will be applied to make payments" to the unsecured creditors. The Bankruptcy Code does not define the term "projected" in the term "projected disposable income," but the Code uses a six-month "look-back" period prior to the filing of the bankruptcy petition to define the term "disposable income." A minority of circuits followed the "mechanical approach," under which the monthly "projected disposable income" during the plan period was equal to the monthly disposable income for the six month "look-back" period. A majority of circuits, by contrast, followed the "forward-looking approach," under which a bankruptcy court could take into account significant post-filing changes in the debtor's monthly income that were "known or virtually certain" to occur. The Court held that the "forward-looking approach" was supported by (a) the ordinary meaning of the term "projected"; (b) the way the term "projected" is used in other federal statutes; and (c) case law predating the 2005 amendments to the Bankruptcy Code. The "mechanical approach," on the other hand, conflicts with other provisions of § 1325, and would produce "senseless" results when applied to debtors who had unusually high or low incomes during the pre-filing "look-back" 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; cert. granted June 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; cert. granted June 21, 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; cert. granted June 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; cert. granted June 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.**

   Decided June 24, 2010 (561 U.S. ___). Second Circuit/Affirmed. Justice Scalia for an 8-0 Court (Breyer, J., concurring in part and concurring in the judgment; Stevens, J., concurring in the judgment, joined by Ginsburg, J.; Sotomayor, J., took no part in the consideration or decision of the case). The Court first held that the question whether § 10(b) of the Securities Exchange Act of 1934 applies to potentially extraterritorial conduct is a merits question, not a jurisdictional question. The Court then held that § 10(b) does not apply extraterritorially. The Court based its holding on the "longstanding principle" that legislation is presumed to apply only to the "territorial jurisdiction" of the United States unless a contrary intent is "clearly expressed," and the fact that the text of § 10(b) "contains nothing to suggest it applies abroad." The Second Circuit and other courts had erred by seeking to "discern" Congress's intent regarding extraterritorial application of § 10(b) instead of applying the presumption against extraterritoriality. The Court therefore rejected the "complex" and "unpredictable" tests that the courts of appeals had developed in this area, including the Second Circuit's "effects" and "conduct" tests. Finally, the Court held that § 10(b) applies only to "purchases or sales of securities in the United States," *i.e.*, "transactions in securities listed on domestic exchanges, [or] domestic transactions in other securities." Merely alleging that deceptive conduct took place in the United States, when that conduct was unconnected to purchases or sales of securities in

the United States, fails to state a claim under § 10(b). The Court rejected the Solicitor General's proposed test, which would have applied § 10(b) to securities fraud involving "significant conduct in the United States that is material to the fraud's success," finding no support for that test in the text of the Exchange Act; the Solicitor General had drawn the proposed formulation from *United States v. Pasquantino*, 544 U.S. 349 (2005) (interpreting the wire-fraud statute, 18 U.S.C. § 1343). The conduct in the instant case, involving deceptive acts in the United States connected only to foreign transactions in foreign securities, could not violate § 10(b) (or, consequently, § 20(a) or SEC Rule 10b-5); Petitioners had therefore failed to state a claim upon which relief could be granted.

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), the 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 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.).**

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; cert. denied June 21, 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; cert. denied June 28, 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; cert. granted June 29, 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; cert. denied June 28, 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; cert. granted June 28, 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; cert. denied June 29, 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 the 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; cert. denied June 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; cert. denied June 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 accident 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.**

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; cert. denied June 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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