GIBSON DUNN
Supreme Court Round-Up

Feb. 14, 2012
Vol. 3, No. 3

The Supreme Court Round-Up previews upcoming cases, recaps opinions, and tracks the actions of the 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 2011

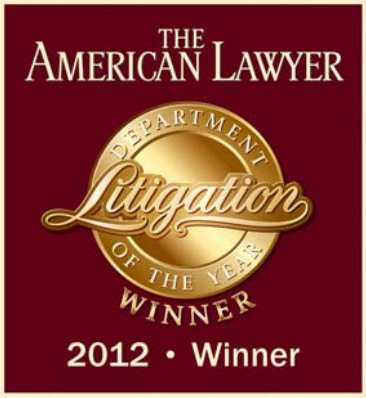
Decided Cases

1. ***United States v. Jones*, No. 10-1259 (D.C. Cir., 615 F.3d 544; cert. granted and additional Question Presented added by the Court June 27, 2011; argued on Nov. 8, 2011). The Questions Presented are: (1) Whether the warrantless use of a tracking device on Respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment. (2) Whether the government violated Respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.**

   Decided Jan. 23, 2012 (565 U.S. ___). D.C. Circuit/Affirmed. Justice Scalia authored the majority opinion for a Court that was 9-0 as to the judgment (Sotomayor, J., concurring; Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, and Kagan, JJ.). The Court held in this case that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" (footnote omitted). The Fourth Amendment recognizes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Court stated that a vehicle constituted an "effect" under that Amendment, and that "[t]he Government physically occupied private property for the purpose of obtaining information." The Court concluded that such actions would have been considered a "search" under the Fourth Amendment at the time of its adoption because they would have been considered a trespass upon an area enumerated by the Fourth Amendment. The majority's analysis was based on a property-based approach instead of the "reasonable expectation of privacy" standard from *Katz v. United States*, 389 U.S. 347 (1967). The majority explained that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Finally, the Court noted that it was not resolving the Government's alternative argument that the attachment and use of the GPS device was a reasonable, and thus lawful, search.

Theodore B. Olson
202.955.8500
tolson@gibsondunn.com

Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com



Gibson Dunn was named the 2012 Litigation Department of the Year by *The American Lawyer* for an unprecedented second time. Appellate Group co-chair Ted Olson was named a finalist in the inaugural "Litigator of the Year" competition.

The National Law Journal named Gibson Dunn to its 2011 Appellate Hot List, which recognized 17 firms that "made exemplary contributions to appellate practice."

2. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioner; argued on Nov. 9, 2011). The Questions Presented are: (1) Whether the Ninth Circuit erred in holding that a "presumption against preemption" requires a "narrow interpretation" of the Federal Meat Inspection Act's ("FMIA") express preemption provision, in conflict with the Court's decision in *Jones v. Rath Packing Co*., 430 U.S. 519 (1977), that the provision must be given "a broad meaning." (2) Whether, when federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, the Ninth Circuit erred in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA. (3) Whether the Ninth Circuit erred in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.**

   Decided Jan. 23, 2012 (565 U.S. ___). Ninth Circuit/Reversed and Remanded. Justice Kagan for a 9-0 Court. The Court held that the Federal Meat Inspection Act ("FMIA"), which regulates slaughterhouses to ensure both the safety of meat and the humane handling of animals, expressly preempted a California law dictating requirements for the treatment of nonambulatory pigs. The FMIA and its implementing regulations establish procedures for the inspection of each animal brought to a slaughterhouse. If an inspector determines that an animal is dead, dying, or afflicted with a serious disease or condition, he must designate the animal as "U.S. Condemned," the animal must be separately killed, and no part of the carcass may be sold for human consumption. If the animal has a less severe condition, the inspector must classify the animal as "U.S. Suspect"—a classification that includes all nonambulatory animals not subject to condemnation. Suspect animals must be slaughtered separately, but parts of the carcass may be processed into food for humans after inspection. The FMIA also preempts all state laws "which are in addition to, or different than those made under" the FMIA. California's law bars slaughterhouses from buying, selling, or receiving a nonambulatory animal, bars them from selling meat from such an animal, and requires them to immediately euthanize the animal. In essence, the California law adds additional requirements for the treatment of nonambulatory animals not found in the federal scheme. The state law is therefore preempted by the FMIA.

3. ***Reynolds v. United States*, No. 10-6549 (3d Cir., 380 F. App'x 125; cert. granted Jan. 24, 2010; argued on Oct. 3, 2011). The federal Sex Offender Registration and Notification Act ("SORNA") requires every sex offender to register in any State that has a sex-offender registration requirement—as all fifty States do. In 2007, the Attorney General issued a rule that the federal registration requirement would apply to all sex offenders, even if the offense**

occurred prior to SORNA's enactment. The Question Presented is: Whether the Petitioner, a convicted sex offender who pleaded guilty to failing to register, has standing under the plain reading of SORNA to challenge the Attorney General's registration rule.

Decided Jan. 23, 2012 (565 U.S. ___). Third Circuit/Reversed and Remanded. Justice Breyer for a 7-2 Court (Scalia, J., dissenting, joined by Ginsburg, J.). The Court held that the federal Sex Offender Registration and Notification Act did not require sex offenders who had been convicted before the Act's enactment—so-called "pre-Act offenders"—to register before the Attorney General validly specified that the Act's registration provisions applied to them. Petitioner Reynolds, a pre-Act offender, was indicted for failing to meet the Act's registration requirements when he moved from Missouri to Pennsylvania. Reynolds challenged the indictment, arguing that the Act's registration requirements did not apply to him at the time because the Attorney General had failed to promulgate a valid rule specifying that the Act applied to pre-Act offenders. In doing so, Reynolds challenged the validity of the Attorney General's promulgation of an Interim Rule specifying the registration requirements' applicability to pre-Act offenders. The district court rejected the Petitioner's legal challenge to the Interim Rule, and the Third Circuit, without reaching the merits of this challenge, held that the Act's registration requirements instead applied to pre-Act offenders from the date of the law's enactment. The Supreme Court reversed based on the "natural reading of the textual language" of the Act. The Act provides that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." The Court explained that this language is "more naturally read as conferring the authority [on the Attorney General] to *apply* the Act [to pre-Act offenders], not the authority to make exceptions," as the government argued. Therefore, the Court concluded that the Act did not apply to pre-Act offenders until the Attorney General so specified.

4. ***Perry v. Perez*, No. 11-713; *Perry v. Davis*, No. 11-714; *Perry v. Perez*, No. 11-715 (W.D. Tex., unpublished; probable jurisdiction noted and cases consolidated Dec. 9, 2011; SG as amicus, supporting affirmance in part and vacatur in part; argued on Jan. 9, 2012). Whether the district court's redistricting plan is constitutional.**

Decided Jan. 20, 2012 (565 U.S. ___). W.D. Tex./Vacated and Remanded. Per Curiam (Thomas, J., concurring in the judgment). The Court held that a district court should defer to a state's submitted redistricting plan except for those portions of it that do not have a reasonable probability of achieving preclearance under Section 5 of the Voting Rights Act. After the census, the State of Texas submitted its redistricting plan for preclearance, as required by Section 5 of the Voting Rights Act. While that process was pending, various plaintiffs challenged Texas's plan under the Constitution and Section 2 of the Voting Rights Act. Faced with an impending election and those two ongoing proceedings, a three-judge district court endeavored to draw an "independent" redistricting map, reasoning that it was not required to give any deference to Texas's plan. The Court held that the district

court's determination was erroneous. The three-judge district court should have deferred to those portions of the State's plan that do not stand a reasonable probability of failing to gain preclearance. That is because of the need to avoid prejudging the merits of preclearance. Because it was unclear whether the three-judge district court followed the appropriate standard, the Court vacated the orders implementing the district court's maps and remanded for further proceedings.

5. ***Maples v. Thomas*, No. 10-63 (11th Cir., 586 F.3d 879; cert. granted Mar. 21, 2011, limited to Question 2; argued on Oct. 4, 2011). In this capital case, a state inmate missed a filing deadline, thereby procedurally defaulting for purposes of federal court review of his constitutional claims. The Question Presented is whether the Eleventh Circuit properly held that there was no "cause" to excuse any procedural default where Petitioner was blameless for the default, the State's own conduct contributed to the default, and Petitioner's attorneys of record were no longer functioning as his agents at the time of any default.**

   Decided Jan. 18, 2012 (565 U.S. ___). Eleventh Circuit/Reversed and Remanded. Justice Ginsburg for a 7-2 Court (Alito, J., concurring; Scalia, J., dissenting, joined by Thomas, J.). The Court held that a state postconviction attorney's abandonment of his prisoner-client without notice may constitute "cause" sufficient to overcome any procedural default resulting from the prisoner's unknowing deprivation of attorney representation. As a general rule, the Court held in *Coleman v. Thompson*, 501 U.S. 722 (1991), that negligence on the part of a prisoner's postconviction attorney is not "cause" to excuse noncompliance with state procedural rules because the attorney acts as the prisoner's agent. When the attorney severs the principal-agent relationship, however, the Court reasoned that he then no longer serves as the client's representative, and therefore the attorney's subsequent acts or omissions cannot be attributed to the client. Here, because Petitioner Maples's attorneys abandoned him before and during the critical time period for filing a state postconviction appeal without notifying Maples or seeking permission from the trial court to withdraw their representation, Maples had sufficiently demonstrated "cause" to excuse his failure to meet the deadline for filing a notice of appeal.

6. ***Golan v. Holder*, No. 10-545 (10th Cir., 609 F.3d 1076; cert. granted Mar. 7, 2011; argued on Oct. 5, 2011). Section 514 of the Uruguay Round Agreements Act of 1994 "restored" copyright protection in thousands of works that the Copyright Act had placed in the public domain, where they remained for years as the common property of all Americans. Petitioners are orchestra conductors, educators, performers, film archivists, and motion picture distributors, who relied for years on the free availability of these works in the public domain, which they performed, adapted, restored, and distributed without restriction. The enactment of Section 514 therefore had an effect on Petitioners' free speech and expression rights, as well as their economic interests. Section 514 eliminated Petitioners' right to perform, share, and build upon works they had once been able to use freely. The Questions Presented are the following: (1) Does the Copyright Clause of the**

United States Constitution prohibit Congress from taking works out of the public domain? (2) Does Section 514 violate the First Amendment?

Decided Jan. 18, 2012 (565 U.S. ___). Tenth Circuit/Affirmed. Justice Ginsburg for a 6-2 Court (Breyer, J., dissenting, joined by Alito, J.; Kagan, J., took no part in the consideration or decision of this case). The Court held that § 514 of the Uruguay Round Agreements Act ("URAA") does not exceed Congress's authority under the Copyright Clause and that the First Amendment does not prohibit § 514's restoring to copyright works that had entered the public domain. Section 514 grants copyright protection to preexisting works of member countries to the Berne Convention for the Protection of Literary and Artistic Works, which were protected in their own countries but lacked U.S. protection for any of three reasons, including that the United States did not protect works from the country of origin at the time of publication. Some foreign works restored to copyright had entered the public domain in the United States. Petitioners, who had enjoyed free access to works that § 514 removed from the public domain, challenged § 514 under both the Copyright Clause and the First Amendment. Regarding the Copyright Clause challenge, the Court first observed that the "text of the Copyright Clause does not exclude application of copyright protection to works in the public domain." The Court highlighted its decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), which found that Congress did not violate the Copyright Clause by extending the terms of existing copyrights. Rejecting Petitioners' attempt to distinguish *Eldred* on the grounds that the "limited time" had already passed for works in the public domain, the Court observed that "a 'limited time' of exclusivity must begin before it may end" and that historical practice indicated that "[o]n occasion . . . Congress has seen fit to protect works once freely available." The Court also rejected Petitioners' claim that § 514 does not "promote the Progress of Science and useful Arts" because it deals solely with works already created, noting that "[n]othing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation.'" Rejecting the claim that the First Amendment prohibits § 514's restoring to copyright works that had entered the public domain, the Court concluded that § 514 does not disturb the "traditional contours" of copyright protection—the "idea/expression dichotomy" and the "fair use" defense—and that "nothing in the historical record, congressional practice, or [the Court's] jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain."

7. ***Mims v. Arrow Financial Services, LLC*, No. 10-1195 (11th Cir., unpublished; cert. granted June 27, 2011; argued on Nov. 28, 2011). Whether Congress divested the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act.**

Decided Jan. 18, 2012 (565 U.S. ___). Eleventh Circuit/Reversed and Remanded. Justice Ginsburg for a 9-0 Court. The Court held that federal and state courts have concurrent jurisdiction over private suits arising under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Because federal law creates the right

of action and provides the rule of decision in a private TCPA enforcement action, such an action arises under the laws of the United States within the meaning of 28 U.S.C. § 1331. The Court rejected the Petitioner's argument that the provision of the TCPA that authorizes a private citizen to bring an enforcement action in state court constitutes a grant to state courts of exclusive jurisdiction over such actions. There is a deeply rooted presumption of concurrent jurisdiction under § 1331, and the Court concluded that nothing in the language of the TCPA reflects an intention either to make the state courts' jurisdiction exclusive or to divest the federal courts of their general federal-question jurisdiction. Emphasizing that jurisdiction under § 1331 should not be displaced by a mere implication flowing from subsequent legislation, the Court rejected the Petitioner's remaining arguments, which pointed to the floor statements of the TCPA's sponsor and raised a policy concern over the federal courts being inundated by a flood of small-value TCPA claims, a concern the Court dismissed as "more imaginary than real."

8. ***Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, No. 10-553 (6th Cir., 597 F.3d 769; cert. granted Mar. 28, 2011; argued on Oct. 5, 2011). Whether the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions, applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.**

Decided Jan. 11, 2012 (565 U.S. ___). Sixth Circuit/Reversed. Chief Justice Roberts for a 9-0 Court (Thomas, J., concurring; Alito, J., concurring, joined by Kagan, J.). The Court held that a "ministerial exception," grounded in the Religion Clauses of the First Amendment, barred an employment discrimination suit brought against a religious church and school on behalf of a Lutheran minister. Respondent was a "called" teacher and a "commissioned minister" at a Lutheran primary school. After she fell ill, the school board asked for her resignation. When she refused to tender it and threatened to sue, the board terminated her employment. The EEOC brought suit against the school, alleging that Respondent was fired in retaliation for threatening to sue under the Americans with Disabilities Act ("ADA"); Respondent intervened and claimed unlawful retaliation under the ADA and Michigan law. The Court held that a "ministerial exception" barred such claims. Focusing on the primacy of religious institutions' "internal governance," the Court reasoned that "[t]he Establishment Clause [of the First Amendment] prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." Although it declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," the Court held that Respondent did so qualify, emphasizing that she had "been ordained or commissioned as a minister" and had undertaken "significant religious training," with "a recognized religious mission underl[ying] the description of [her] position." That "lay" teachers performed similar duties, and that Respondent's "religious duties consumed only 45 minutes of each workday," were relevant to, but not dispositive of, the inquiry. Moreover, the suggestion that "Hosanna-Tabor's asserted religious reason for

firing" Respondent was pretextual "misse[d] the point of the ministerial exception[,] . . . [which] ensures that the authority to select and control who will minister to the faithful . . . is the church's alone." Because the exception applied, the Court held that Respondent's case must be dismissed.

9. ***Pacific Operators Offshore, LLP v. Valladolid*, No. 10-507 (9th Cir., 604 F.3d 112; cert. granted Feb. 22, 2011; argued on Oct. 11, 2011). The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 ("OCSLA"), governs those who work on oil drilling platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b) (2006). The Question Presented is the following: When an outer continental shelf worker is injured on land, is he (or his heir): (1) always eligible for compensation, because his employer's operations on the shelf are the but-for cause of his injury; (2) never eligible for compensation, because the Act applies only to injuries occurring on the shelf; or (3) sometimes eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf?**

Decided Jan. 11, 2012 (565 U.S. ___). Ninth Circuit/Affirmed and Remanded. Justice Thomas for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment, joined by Alito, J.). The Court held that the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(b), extends coverage to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the outer continental shelf ("OCS"). The OCSLA extends the federal workers' compensation scheme established in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*., to injuries "occurring as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting natural resources from the shelf, 43 U.S.C. § 1333(b). The widow of a Pacific Operators Offshore employee who worked on and off of the OCS sued for worker compensation benefits after the death of her husband during off-OCS maintenance activities. The Court rejected the argument by Pacific Operators Offshore that § 1333(b) of the OCSLA extends worker compensation benefits only to injuries sustained on the OCS. Similarly, the Court rejected the test proffered by the Fifth Circuit, which applied a "situs-of-injury" test, *see Mills v. Director, Office of Workers' Compensation Programs*, 877 F.2d 356 (5th Cir. 1989) (en banc); the view of the Third Circuit, which held that § 1333(b) extends to all injuries that would not have occurred "but for" operations on the OCS, *see Curtis v. Schlumberger Offshore Service, Inc*., 849 F.2d 805 (3d Cir. 1988); and the Solicitor General's argument that § 1333(b) should be construed to cover (1) on-OCS injuries suffered by employees of companies engaged in resource extraction on the OCS, and (2) off-OCS injuries of employees who spend a substantial portion of their time engaged in extractive operations on the OCS. Reasoning that the text of § 1333(b) demands only that extractive operations be "conducted on the [OCS]," and the employee's injury occur "as the result of" those operations, the Court adopted the Ninth Circuit's requirement that a claimant seeking worker compensation benefits under the OCSLA demonstrate a

substantial nexus between his employer's extractive operations on the outer continental shelf and his injury. The Court noted that its reading of § 1333(b) was not foreclosed by *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), or *Offshore Logistics, Inc. v. Talentire*, 477 U.S. 207 (1986).

10. ***Perry v. New Hampshire*, No. 10-8974 (N.H., unpublished; cert. granted May 31, 2011; SG as amicus, supporting Respondent; argued on Nov. 2, 2011). Whether the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, or only when the suggestive circumstances were orchestrated by the police.**

Decided Jan. 11, 2012 (565 U.S. ___). Supreme Court of New Hampshire/Affirmed. Justice Ginsburg for an 8-1 Court (Thomas, J., concurring; Sotomayor, J., dissenting). The Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Petitioner argued that trial judges should be required to prescreen all identifications made under suggestive circumstances because eyewitness identifications are uniquely unreliable. After examining its precedents, however, the Court indicated that it had only required such due process checks for reliability after a defendant had shown improper state action. The Court noted that a primary rationale for excluding identifications procured under unnecessarily suggestive circumstances is deterrence of police misconduct. Because the deterrence rationale is inapplicable in cases lacking improper police conduct and the reliability of evidence is typically within the jury's purview, the Court declined to "enlarge the domain of due process" in this case. In reaching its decision, the Court emphasized that there are multiple other safeguards of reliability applicable to criminal trials, including the presence of counsel at post-indictment line-ups, the right to confront and thoroughly cross-examine any eyewitnesses, the ability to object to introduction of prejudicial evidence under applicable evidentiary rules, and the opportunity to request a jury instruction related to the fallibility of eyewitness identifications.

11. ***CompuCredit Corp. v. Greenwood*, No. 10-948 (9th Cir., 615 F.3d 1204; cert. granted May 2, 2011; argued on Oct. 11, 2011). Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.**

Decided Jan. 10, 2012 (565 U.S. ___). Ninth Circuit/Reversed and Remanded. Justice Scalia for an 8-1 Court (Sotomayor, J., concurring in the judgment, joined by Kagan, J.; Ginsburg, J., dissenting). The Court held that the Credit Repair Organizations Act ("CROA") did not preclude enforcement of an arbitration agreement in a lawsuit alleging violations of that Act. The Federal Arbitration Act ("FAA") requires courts to enforce agreements to arbitrate, even when the claims at issue are federal statutory claims, unless the FAA's mandate is overridden by a contrary congressional command. The CROA requires entities that offer services for the purpose of "improving any consumer's credit record, credit history, or credit rating" or "providing advice or assistance to any consumer with regard to

any [such] activity or service" to provide its consumers with a written statement before any contract is executed. *See* 15 U.S.C. § 1679a(3). One sentence of this required disclosure reads, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a). The CROA also treats as invalid any waiver by any consumer "of any protection provided by or any right of the consumer under this subchapter." *Id.* § 1679f(a). These provisions, according to the Court, do not convey to consumers a right to sue under the CROA in federal court that cannot be waived by an arbitration agreement. The disclosure provision grants to consumers only "the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides." As a result, the nonwaiver provision protects only the consumer's right to receive the statement, not the right to sue in federal court. Because the CROA does not prohibit consumers from waiving any right to sue in federal court, an agreement to arbitrate claims arising under the CROA is enforceable.

12. ***Minneci v. Pollard,* No. 10-1104 (9th Cir., 629 F.3d 843; cert. granted May 16, 2011; SG as amicus, supporting Petitioners; argued on Nov. 1, 2011). Whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the federal government to provide prison services, where the plaintiff has adequate alternative remedies for the harm alleged and the defendants have no employment or contractual relationship with the government.**

Decided Jan. 10, 2012 (565 U.S. ___). Ninth Circuit/Reversed. Justice Breyer for an 8-1 Court (Scalia, J., concurring, joined by Thomas, J.; Ginsburg, J., dissenting). The Court held that it could not "imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison" because "state law authorize[d] adequate alternative damages actions . . . that provided both significant deterrence and compensation." Respondent Pollard had sued several employees of a privately operated federal prison in federal court, claiming that these employees had deprived him of adequate medical care in violation of the Eighth Amendment's prohibition against "cruel and unusual" punishment. The district court dismissed Pollard's complaint after holding that the Eighth Amendment did not allow for a *Bivens* action against privately managed prison personnel, and the Ninth Circuit reversed on appeal. The Supreme Court reversed, concluding that Pollard could not assert a *Bivens* claim under the circumstances of this case. The Court explained that it had "primarily" reached its holding because "Pollard's Eighth Amendment claim focuse[d] upon a kind of conduct that typically falls within the scope of traditional state tort law." The Court also distinguished its prior decision in *Carlson v. Green*, 446 U.S. 14 (1980), where the Court implied a *Bivens* action under the Eighth Amendment against prison personnel at *government*-operated federal prisons, explaining that the "critical difference" was that the claims in *Carlson* sought damages from prison personnel employed by the government. While prisoners ordinarily can recover damages under state law from employees of a private firm, they ordinarily cannot do so against employees of the Federal

Government. Under the Court's reasoning, it did not matter that Pollard's recovery under state tort law could be "less generous" than under a *Bivens* action, because the availability of a *Bivens* action turns instead on the question of "whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations." Because the Court found this standard to be satisfied here, it concluded that it could not imply a *Bivens* remedy.

13. ***Gonzalez v. Thaler*, No. 10-895 (5th Cir., 623 F.3d 222; cert. granted June 13, 2011, limited to the following two questions; SG as amicus, supporting Respondent; argued on Nov. 2, 2011). The Questions Presented are: (1) Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate Petitioner's appeal? (2) Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"?**

Decided Jan. 10, 2012 (565 U.S. __). Fifth Circuit/Affirmed. Justice Sotomayor for an 8-1 Court (Scalia, J., dissenting). Interpreting two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court held that 28 U.S.C. § 2253(c)(3) was a mandatory but nonjurisidictional rule. The Court also held that when a state habeas prisoner does not appeal to a State's highest court, a judgment becomes "final" under 28 U.S.C. § 2244(d)(1)(A) at the "expiration of the time for seeking such review." Section 2253(c)(1) of AEDPA requires a habeas prisoner to procure a certificate of appealability in order to appeal a district court's final order in a habeas proceeding. Section 2253(c)(3) states that a certificate of appealability "shall indicate which specific issue" satisfies the showing required by § 2253(c)(2), a "substantial showing of the denial of a constitutional right." Petitioner Gonzalez obtained a certificate of appealability from a Fifth Circuit judge, but the certificate failed to specifically "indicate" a constitutional issue. After Petitioner's subsequent unsuccessful appeal, and petition for a writ certiorari to the Court, the State raised the argument that the Fifth Circuit lacked jurisdiction over Petitioner's appeal due to the § 2253(c)(3) defect. The Court applied a clear-statement principle, and determined that § 2253(c)(3) was not jurisdictional because it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." The Court noted that neighboring provisions' use of unambiguous jurisdictional terms indicated that Congress would have used clearer language in § 2253(c)(3) if it had meant for its indication requirement to be jurisdictional. The Court also emphasized that treating § 2253(c)(3) as jurisdictional "would thwart Congress' intent in AEDPA" to eliminate delays in the federal habeas review process. With regard to the interpretation of § 2244(d)(1)(A), that provision marks finality as "the conclusion of direct review or the expiration of the time for seeking such review." Clarifying previous precedent on the provision, the Court stated that the provision set out two prongs, each of which relates to a "distinct category of petitioners." For Petitioners who pursued direct review, a "final" judgment occurs at the "conclusion of direct review." For all other Petitioners, that is those who do

not pursue direct review, the judgment is deemed "final" at the "expiration of the time for seeking such review." As the Petitioner in the instant case fell into the latter category, the Court found that Gonzalez's judgment became final "when his time for seeking review with the State's highest court expired." The Court rejected Gonzalez's definition of the "conclusion of direct review" as the date on which state law marked finality. The Court also rejected his alternative construction of § 2244(d)(1)(A) as allowing judges to calculate and select the later-in-time date of the two prongs.

14. ***Smith v. Cain*, No. 10-8145 (La., 45 So. 3d 1065; cert. granted June 13, 2011; argued on Nov. 8, 2011). In this case, the state trial and appellate courts denied Petitioner Juan Smith postconviction relief. Petitioner contends that the state courts reached this result only by disregarding firmly established Supreme Court precedent regarding the suppression of material evidence favorable to a defendant and the presentation of false or misleading evidence by a prosecutor. The Questions Presented are: (1) Whether there is a reasonable probability that the outcome of Smith's trial would have been different but for *Brady* and *Giglio*/*Napue* errors. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). (2) Whether the state courts violated the Due Process Clause by rejecting Smith's *Brady* and *Giglio*/*Napue* claims.**

Decided Jan. 10, 2012 (565 U.S. ___). Criminal District of Louisiana, Orleans Parish/Reversed and Remanded. Chief Justice Roberts for an 8-1 Court (Thomas, J., dissenting). The Court held that the Petitioner's murder conviction must be reversed because the prosecution failed to disclose an eyewitness's statements that were both favorable to the defense and material to the Petitioner's guilt. Under the Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. In this case, the state did not dispute that the eyewitness's prior statements, which conflicted with the eyewitness's trial testimony identifying the Petitioner as a perpetrator in the crime, were favorable to the Petitioner and yet were not disclosed. Rejecting the state's argument that the statements were not material, the Court explained that evidence is "material" for purposes of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have differed. Although evidence impeaching an eyewitness may not be material if the state's other evidence is strong enough to sustain confidence in the verdict, the eyewitness's testimony in this case represented the only evidence that linked the Petitioner to the crime.

15. ***Judulang v. Holder*, No. 10-694 (9th Cir., 249 F. App'x 499; cert. granted Apr. 18, 2011; argued on Oct. 12, 2011). For more than twenty-five years, the Board of Immigration Appeals ("BIA") held that a legal permanent resident ("LPR") who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA**

changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "nunc pro tunc" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The Question Presented is whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

Decided Dec. 12, 2011 (565 U.S. ___). Ninth Circuit/Reversed and Remanded. Justice Kagan for a 9-0 Court. The Court held that the Board of Immigration Appeals' ("BIA") policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed immigration law is arbitrary and capricious. The BIA determined whether an alien was eligible for discretionary relief from deportation based on whether the crime that served as the ground for deportation was comparable to one on the list of crimes that would render an alien excludable from the country. In the Court's view, that policy hinged eligibility for relief on a matter that is irrelevant to an alien's fitness to reside in the country—namely, the chance correspondence between statutory categories of crimes. That irrelevance, the Court concluded, rendered the BIA's policy arbitrary and capricious under the Administrative Procedure Act.

16. ***Greene v. Fisher*, No. 10-637 (3d Cir., 606 F.3d 85; cert. granted Apr. 4, 2011; argued on Oct. 11, 2011). For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from the Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?**

Decided Nov. 8, 2011 (565 U.S. ___). Third Circuit/Affirmed. Justice Scalia for a 9-0 Court. The Court held that "clearly established Federal law," for the purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), includes decisions of the Supreme Court only as of the time of the relevant state-court adjudication on the merits, even if that adjudication precedes the date on which the defendant's conviction becomes final. Although finality marks the temporal cutoff for purposes of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989), AEDPA is not strictly analogous to *Teague* retroactivity, and that decision cannot alter the plain meaning of the statute's text. Because Greene's direct appeal on the merits to the Pennsylvania

Superior Court was adjudicated almost three months before the Court's decision in *Gray v. Maryland*, 523 U.S. 185 (1998), that ruling could not provide him grounds for habeas relief under AEDPA.

Pending Cases

1. ***Douglas v. Independent Living Center of Southern California, Inc.*, No. 09-958; *Douglas v. California Pharmacists Association*, No. 09-1158; *Douglas v. Santa Rosa Memorial Hospital*, No. 10-283 (9th Cir., 572 F.3d 644, 596 F.3d 1098, 380 F. App'x 65; CVSG in No. 09-958 on May 24, 2010; cert. opposed in No. 09-958 on Dec. 3, 2010; cert. granted Jan. 18, 2011, limited to Question 1; cases consolidated Jan. 18, 2011; SG as amicus, supporting Petitioner; argued on Oct. 3, 2011). Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a State that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and Respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the text of the statute, and because the reductions were motivated by budgetary considerations. The Question Presented is as follows: Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.**

2. ***Martinez v. Ryan*, No. 10-1001 (9th Cir., 623 F.3d 731; cert. granted June 6, 2011; SG as amicus, supporting Respondent; argued on Oct. 4, 2011). Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first postconviction proceeding, has a federal constitutional right to effective assistance of first postconviction counsel specifically with respect to the ineffective-assistance-of-trial-counsel claim.**

3. ***Howes v. Fields*, No. 10-680 (6th Cir., 617 F.3d 813; cert. granted Jan. 24, 2010; SG as amicus, supporting Petitioner; argued on Oct. 4, 2011). Whether this Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always "in custody" for purposes of the *Miranda* warning any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison.**

4. ***Florence v. Board of Chosen Freeholders of the County of Burlington*, No. 10-945 (3d Cir., 621 F.3d 296; cert. granted Apr. 4, 2011; SG as amicus, supporting Respondents; argued on Oct. 12, 2011). Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense.**

5. ***Lafler v. Cooper*, No. 10-209 (6th Cir., 376 F. App'x 563; cert. granted Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Oct. 31, 2011). Respondent Anthony Cooper faced charges for assault with intent to murder. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial. On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on the State reoffering the plea agreement. The Questions Presented are as follows: (1) Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain, but the defendant is later convicted and sentenced pursuant to a fair trial? (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?**

6. ***Missouri v. Frye*, No. 10-444 (Mo. Ct. App., 311 S.W.3d 350; cert. granted and additional Question Presented added by the Court Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Oct. 31, 2011). The Questions Presented are as follows: (1) Contrary to *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?**

7. ***Rehberg v. Paulk*, No. 10-788 (11th Cir., 611 F.3d 828; cert. granted Mar. 21, 2011; SG as amicus, supporting Petitioner; argued on Nov. 1, 2011). In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court held that law enforcement officials enjoy absolute immunity from civil liability under 42 U.S.C. § 1983 for perjured testimony that they provide at trial. But in *Malley v. Briggs*, 475 U.S. 335 (1986), the Court held that law enforcement officials are *not* entitled to absolute immunity when they act as "complaining witnesses" to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as "complaining witnesses" by testifying before a grand jury or at another judicial proceeding. The Question Presented is whether a government official who acts as a**

"complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

8. ***Zivotofsky v. Clinton*, No. 10-699 (D.C. Cir., 571 F.3d 1227; cert. granted and additional Question Presented added by the Court May 2, 2011; argued on Nov. 7, 2011). Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad. The Questions Presented are the following: (1) Whether the political question doctrine deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport. (2) Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.**

9. ***Kawashima v. Holder*, No. 10-577 (9th Cir., 615 F.3d 1043; cert. granted May 23, 2011, limited to the first Question Presented; argued on Nov. 7, 2011). Whether the Ninth Circuit erred in holding that Petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and that Petitioners were therefore removable.**

10. ***Kurns v. Railroad Friction Products Corp.*, No. 10-879 (3d Cir., 620 F.3d 392; cert. granted June 6, 2011; SG as amicus, supporting Petitioners; argued on Nov. 9, 2011). Whether Congress intended the Federal Railroad Safety Acts to preempt state law-based tort lawsuits.**

11. ***First American Financial Corp. v. Edwards*, No. 10-708 (9th Cir., 610 F.3d 514; CVSG Feb. 28, 2011; cert. opposed May 19, 2011; cert. granted June 20, 2011, limited to the second Question Presented; argued on Nov. 28, 2011). Section 8(a) of the Real Estate Settlement Procedures Act of 1974 (the "Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2). Under the Act, a person seeking a monetary recovery need not show that the kickback arrangement affected the price, the quality, or any other characteristic of the settlement service. The Ninth Circuit held that an invasion of this statutory right by itself constitutes an injury for purposes of Article III standing, regardless of whether the plaintiff can demonstrate an additional harm resulting from the invasion of that right. The Question**

Presented is whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.

12. ***Hall v. United States*, No. 10-875 (9th Cir., 617 F.3d 1161; cert. granted June 13, 2011; argued on Nov. 29, 2011). Whether 11 U.S.C. § 1222(a)(2)(A) authorizes the bankruptcy court, in a case brought under Chapter 12 of the Bankruptcy Code, to treat as a dischargeable non-priority claim a federal tax debt arising out of the debtor's post-petition sale of a farm asset.**

13. ***Credit Suisse Securities v. Simmonds*, No. 10-1261 (9th Cir., 638 F.3d 1072; cert. granted June 27, 2011; SG as amicus, supporting neither party; argued on Nov. 29, 2011). Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.**

14. ***Setser v. United States*, No. 10-7387 (5th Cir., 607 F.3d 128; cert. granted June 13, 2011; argued on Nov. 30, 2011). The Questions Presented are: (1) Whether a district court has authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence. (2) Whether it is reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences.**

15. ***FAA v. Cooper*, No. 10-1024 (9th Cir., 622 F.3d 1016; cert. granted June 20, 2011; argued on Nov. 30, 2011). Whether a plaintiff who alleges only mental and emotional injuries can establish "actual damages" within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. § 552a(g)(4)(A).**

Gibson Dunn – Counsel for Novo Nordisk A/S and Novo Nordisk Inc.

16. ***Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, No. 10-844 (Fed. Cir., 601 F.3d 1359; CVSG Mar. 28, 2011; cert. supported May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). When the Food & Drug Administration ("FDA") approves a drug for multiple uses, the Hatch-Waxman Act (the "Act") allows generic drug makers to avoid contested patent litigation by marketing generic versions of the drug solely for non-patented uses. According to Petitioners, the FDA defers to name-brand drug companies' 140-character descriptions of the scope of their method of use patents, and such companies can therefore block the approval of generic drugs by submitting overbroad patent method of use descriptions to the FDA. The Act allows a "counterclaim seeking an order requiring the [patent] holder to correct or delete the patent information submitted by the holder . . . on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(j)(5)(C)(ii)(I). The Question Presented is whether the Act's counterclaim provision applies where (1) there is "an approved method of using the drug" that "the patent does not claim," and (2) the brand submits "patent information" to the FDA that misstates the patent's scope, requiring "correct[ion]."**

17. ***Messerschmidt v. Millender*, No. 10-704 (9th Cir., 620 F.3d 1016; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). The Questions Presented are: (1) Whether officers are entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her; a district attorney had approved the application; no factually on-point case law prohibited the search; and the alleged overbreadth in the warrant did not expand the scope of the search. (2) Whether *United States v. Leon*, 468 U.S. 897 (1984), and *Malley v. Briggs*, 475 U.S. 335 (1986), should be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases.**

18. ***Martel v. Clair*, No. 10-1265 (9th Cir., unpublished; cert. granted June 27, 2011; argued on Dec. 6, 2011). Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.**

19. ***Williams v. Illinois*, No. 10-8505 (Ill., 238 Ill. 2d 125; cert. granted June 28, 2011; SG as amicus, supporting Respondent; argued on Dec. 6, 2011). Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.**

20. ***Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, No. 10-1150 (Fed. Cir., 628 F.3d 1347; cert. granted June 20, 2011; SG as amicus, supporting neither party; argued on Dec. 7, 2011). Whether 35 U.S.C. § 101 is satisfied by a patent claim that covers observed correlations between blood test results and patient health, so that the claim effectively preempts all uses of the naturally occurring correlations, simply because well-known methods used to administer prescription drugs and test blood may involve "transformations" of body chemistry.**

21. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010; cert. opposed May 20, 2011; cert. granted June 20, 2011, limited to the first Question Presented; SG as amicus, supporting Petitioner; argued on Dec. 7, 2011). Whether the constitutional test for determining whether a section of a river is navigable for title purposes requires a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union, or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use.**

22. ***Sackett v. EPA*, No. 10-1062 (9th Cir., 622 F.3d 1139; cert. granted and Questions Presented reworded June 28, 2011; argued on Jan. 9, 2012). The Questions Presented are: (1) Whether Petitioners may seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. (2) If not, whether Petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violates their rights under the Due Process Clause.**

23. ***Kappos v. Hyatt*, No. 10-1219 (Fed. Cir., 625 F.3d 1320; cert. granted June 27, 2011; argued on Jan. 9, 2012). The Questions Presented are: (1) Whether a plaintiff, who is appealing the denial of an application of a patent by commencing a civil action against the Director of the United States Patent and Trademark Office ("PTO") in a federal district court pursuant to 35 U.S.C. § 145, may introduce new evidence that could have been presented to the agency in the first instance. (2) Whether, when new evidence is introduced under § 145, the district court may decide *de novo* the factual questions to which the evidence pertains, without giving deference to the prior decision of the PTO.**

24. ***Knox v. Service Employees International Union*, No. 10-1121 (9th Cir., 628 F.3d 1115; cert. granted June 27, 2011; argued on Jan. 10, 2012). The Questions Presented are: (1) Whether a State may, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a notice that includes information about that assessment and provides an opportunity to object to its exaction. (2) Whether a State may, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures.**

25. ***FCC v. Fox Television Stations*, No. 10-1293 (2d Cir., 613 F.3d 317; cert. granted and Question Presented reworded June 27, 2011; argued on Jan. 10, 2012). Whether the FCC's current indecency enforcement regime violates the First or Fifth Amendments to the United States Constitution.**

26. ***Coleman v. Court of Appeals of Maryland*, No. 10-1016 (4th Cir., 626 F.3d 187; cert. granted June 27, 2011; argued on Jan. 11, 2012). Whether Congress constitutionally abrogated States' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.**

27. ***Roberts v. Sea-Land Services*, No. 10-1399 (9th Cir., 625 F.3d 1204; cert. granted Sept. 27, 2011, limited to Question 1; argued on Jan. 11, 2012). The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") provides generally for compensation for total disability in periodic payments at a rate of two-thirds of the "average weekly wage of the injured employee at the time of the injury," and for most partial disabilities the same fraction of the difference between that weekly wage and the**

Gibson Dunn – Counsel to NBC Universal Media LLP, et al.

worker's residual "wage-earning capacity." *Id.* §§ 8-10, 33 U.S.C. §§ 908-10. But it has always imposed upper and lower limits on the rate payable as so determined. Section 6(b) of the Act, 33 U.S.C. § 906(b), provides that the compensation rate cannot be more than twice "the applicable national average weekly wage," as determined for each fiscal year; nor can compensation for total disability be less than the lesser of half the "applicable national average weekly wage" so determined and the worker's full preinjury earnings. The question which fiscal year's limits are the "applicable" ones is addressed by § 6(c): "Determinations under subsection (b)(3) of this section with respect to a [fiscal year] shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." 33 U.S.C. § 906(c). The identity of the years whose limits are "applicable" under this provision has divided the two courts of appeals with the heaviest Longshore Act dockets. The Question Presented is whether the phrase "those newly awarded compensation during such period" in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first entitled to compensation during such period," regardless of when it is awarded.

28. ***United States v. Home Concrete & Supply*, No. 11-139 (4th Cir., 634 F.3d 249; cert. granted Sept. 27, 2011; argued on Jan. 17, 2012). As a general matter, the Internal Revenue Service ("IRS") has three years to assess additional tax if the agency believes that the taxpayer's return has understated the amount of tax owed. 26 U.S.C. § 6501(a). That period is extended to six years, however, if the taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the [taxpayer's] return." 26 U.S.C. § 6501(e)(1)(A). The Questions Presented are: (1) Whether an understatement of gross income attributable to an overstatement of basis in sold property is an "omi[ssion] from gross income" that can trigger the extended six-year assessment period. (2) Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.**

29. ***Filarsky v. Delia*, No. 10-1018 (9th Cir., 621 F.3d 1069; cert. granted Sept. 27, 2011; SG as amicus, supporting Petitioner; argued on Jan. 17, 2012). Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.**

30. ***Holder v. Gutierrez*, No. 10-1542; *Holder v. Sawyers*, No. 10-1543 (9th Cir., 411 F. App'x 121, 399 F. App'x 313; cert. granted Sept. 27, 2011; cases consolidated Sept. 27, 2011; argued on Jan. 18, 2012). The Questions Presented are: (1) Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an**

unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years." (2) Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

Gibson Dunn – Counsel for National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner

31. ***Vartelas v. Holder*, No. 10-1211 (2d Cir., 620 F.3d 108; cert. granted Sept. 27, 2011; argued on Jan. 18, 2012). The Court in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), held that a lawful permanent resident ("LPR") may make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry. The Illegal Immigration Reform and Responsibility Act, 8 U.S.C. § 1101(a)(13)(C)(v), abrogates that holding with respect to an LPR who "has committed" a certain type of criminal offense. The Question Presented is whether the Act should be applied retroactively to a guilty plea taken prior to the effective date of the Act.**

Cases To Be Argued

1. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011; cert. supported Aug. 25, 2011; cert. granted Oct. 11, 2011; SG as amicus, supporting Petitioners; argument scheduled Feb. 21, 2012). Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." The Question Presented is whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.**

2. ***Taniguchi v. Kan Pacific Saipan, Ltd.*, No. 10-1472 (9th Cir., 633 F.3d 1218; cert. granted Sept. 27, 2011; argument scheduled Feb. 21, 2012). Section 1920 of 28 U.S.C. sets out the categories of costs that may be awarded to the prevailing party in a federal lawsuit. One of the listed categories is "compensation of interpreters." *Id.* § 1920(6). The Question Presented is whether costs incurred in translating written documents are "compensation of interpreters" and may therefore be awarded to the prevailing party in a federal lawsuit under 28 U.S.C. § 1920(6).**

3. ***United States v. Alvarez*, No. 11-210 (9th Cir., 617 F.3d 1198; cert. granted Oct. 17, 2011; argument scheduled Feb. 22, 2012). The Stolen Valor Act, 18 U.S.C. § 704(b), makes it a crime when anyone "falsely represents himself or herself, . . . verbally or in writing, to have been awarded any decoration or**

medal authorized by Congress for the Armed Forces of the United States." The Question Presented is whether the Stolen Valor Act is facially invalid under the Free Speech Clause of the First Amendment.

4. ***Blueford v. Arkansas*, No. 10-1320 (Ark., 2011 Ark. 8; cert. granted Oct. 11, 2011; argument scheduled Feb. 22, 2012). Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.**

5. ***Elgin v. Dep't of Treasury*, No. 11-45 (1st Cir., 641 F.3d 6; cert. granted Oct. 17, 2011; argument scheduled Feb. 27, 2012). Whether federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees or whether the Civil Service Reform Act impliedly precludes that jurisdiction.**

6. ***Wood v. Milyard*, No. 10-9995 (10th Cir., 403 F. App'x 335; cert. granted and Questions Presented reworded Sept. 27, 2011; SG as amicus, supporting Respondents; argument scheduled Feb. 27, 2012). The Questions Presented are: (1) Does an appellate court have the authority to raise sua sponte a 28 U.S.C. § 2244(d) statute of limitations defense? (2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?**

7. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, to be argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting Petitioners; argument scheduled Feb. 28, 2012). The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other private party defendant under the ATS.**

8. ***Mohamad v. Rajoub*, No. 11-88 (D.C. Cir., 634 F.3d 604; cert. granted Oct. 17, 2011, to be argued in tandem with *Kiobel v. Royal Dutch Petroleum*, No. 10-1491; SG as amicus, supporting affirmance; argument scheduled Feb. 28, 2012). Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants that are not natural persons.**

9. ***Magner v. Gallagher*, No. 10-1032 (8th Cir., 619 F.3d 823; cert. granted Nov. 7, 2011; SG as amicus, supporting neither party; argument scheduled Feb. 29, 2012). The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Respondents are owners of**

rental properties who argue that Petitioners violated the Fair Housing Act by "aggressively" enforcing the City of Saint Paul's housing code. According to Respondents, because a disproportionate number of renters are African-American, and Respondents rent to many African-Americans, requiring them to meet the housing code will increase their costs and decrease the number of units they make available to rent to African-American tenants. Reversing the district court's grant of summary judgment for Petitioners, the Eighth Circuit held that Respondents should be allowed to proceed to trial because they presented sufficient evidence of a "disparate impact" on African-Americans. The Questions Presented are: (1) Whether disparate impact claims are cognizable under the Fair Housing Act. (2) If such claims are cognizable, whether they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test.[1]

10. ***Armour v. City of Indianapolis,*** **No. 11-161 (Ind., 946 N.E.2d 553; cert. granted Nov. 14, 2011; argument scheduled Feb. 29, 2012). Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.**

11. ***Astrue v. Capato,*** **No. 11-159 (3d Cir., 631 F.3d 626; cert. granted Nov. 14, 2011; argument scheduled Mar. 19, 2012). Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq*.**

12. ***Southern Union Co. v. United States,*** **No. 11-94 (1st Cir., 630 F.3d 17; cert. granted Nov. 28, 2011; argument scheduled Mar. 19, 2012). Whether the Fifth and Sixth Amendment principles that this Court established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to the imposition of criminal fines.**

13. ***Miller v. Alabama,*** **No. 10-9646 (Ala., 63 So. 3d 676; cert. granted Nov. 7, 2011, to be argued in tandem with *Jackson v. Hobbs*, No. 10-9647; argument scheduled Mar. 20, 2012). Evan Miller was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was only fourteen years old. Evan is one of only seventy-**

---

[1] The parties have requested that the Court dismiss this case pursuant to Rule 46. Lyle Denniston, Fair Housing Case Dismissed, SCOTUSblog (Feb. 10, 2012), http://www.scotusblog.com/2012/02/fair-housing-case-dismissed/.

three fourteen-year-olds nationwide who are serving such sentences. The Questions Presented are: (1) Whether imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children. (2) Whether imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide—a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances—violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments.

14. ***Jackson v. Hobbs*, No. 10-9647 (Ark., 2011 Ark. 9; cert. granted Nov. 7, 2011, to be argued in tandem with *Miller v. Alabama*, No. 10-9646; argument scheduled Mar. 20, 2012). Kuntrell Jackson has been sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old. He is one of only 73 fourteen-year-olds serving such a sentence throughout the United States. His case presents an ideal vehicle for this Court's consideration of the question left undecided by *Graham v. Florida* and *Sullivan v. Florida*—whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense—because, while Kuntrell's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. Kuntrell himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery "plan," such as it was, was spur-of-the-moment, formed just before the robbery, while Kuntrell, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Kuntrell's homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. Under these circumstances, the Questions Presented are: (1) Whether imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children. (2) Whether such a sentence violates the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed. (3) Whether such a sentence violates the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances.**

15. ***Vasquez v. United States*, No. 11-199 (7th Cir., 635 F.3d 889; cert. granted Nov. 28, 2011; argument scheduled Mar. 21, 2012). The Questions Presented are: (1) Whether the Seventh Circuit violated this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all. (2) Whether the Seventh Circuit violated Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case.**

16. ***Reichle v. Howards*, No. 11-262 (10th Cir., 634 F.3d 1131; cert. granted Dec. 5, 2011; SG as amicus, supporting Petitioners; argument scheduled Mar. 21, 2012). Petitioners, two Secret Service agents on protective detail, arrested Respondent following an encounter with Vice President Richard Cheney. Petitioners had probable cause to arrest Respondent, who in violation of 18 U.S.C. § 1001 falsely denied making unsolicited physical contact with the Vice President. Respondent thereafter brought a First Amendment retaliatory arrest claim against Petitioners. The Questions Presented are: (1) Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim, including under *Hartman v. Moore*, 547 U.S. 250 (2006). (2) Whether the Tenth Circuit erred by denying qualified and absolute immunity to Petitioners where probable cause existed for Respondent's arrest, the arrest comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.**

17. ***Department of Health and Human Services v. Florida*, No. 11-398 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011, limited to Question 1 and additional Question Presented; additional Question Presented scheduled for argument Mar. 26, 2012; Question 1 scheduled for argument Mar. 27, 2012). Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A. The Questions Presented are: (1) Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision. (2) Whether the suit brought by Respondents to challenge the minimum coverage provisions of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(A).**

18. ***National Federation of Independent Business v. Sebelius*, No. 11-393 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011; consolidated for argument with respect to Question 3 of No. 11-400; argument scheduled Mar. 28, 2012). Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "ACA" or "Act"). But the Eleventh Circuit and the Sixth Circuit now have issued directly conflicting final judgments about the facial constitutionality of the ACA's mandate that virtually every individual American must obtain health insurance. 26 U.S.C. § 5000A. Moreover, despite the fact that the mandate is a "requirement" that Congress itself deemed "essential" to the Act's new insurance regulations, 42 U.S.C. § 18091(a)(2)(I), the Eleventh Circuit held that the mandate is severable from the remainder of the Act. The Question Presented is whether the ACA must be invalidated in its entirety because it is non-severable from the individual mandate that exceeds Congress's limited and enumerated powers under the Constitution.**

19. ***Florida v. Department of Health and Human Services*, No. 11-400 (11th Cir., 648 F.3d 1235; cert. granted Nov. 14, 2011, limited to Questions 1 and 3; consolidated with No. 11-393 with respect to Question 3; argument scheduled Mar. 28, 2012). The Questions Presented are: (1) Whether Congress exceeds its enumerated powers and violates basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply. (2) Whether the Affordable Care Act's mandate that virtually every individual obtain health insurance exceeds Congress's enumerated powers and, if so, to what extent (if any) the mandate can be severed from the remainder of the Act.**

20. ***Christopher v. SmithKline Beecham Corp.*, No. 11-204 (9th Cir., 635 F.3d 383; cert. granted Nov. 28, 2011; SG as amicus, supporting Petitioners; argument scheduled Apr. 16, 2012). The outside sales exemption of the Fair Labor Standards Act exempts from the overtime requirements of the Act "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)." 29 U.S.C. § 213(a)(1). The Secretary of Labor has implemented various regulations that "define and delimit" the outside sales exemption and, filing as *amici* in this and other related matters, has interpreted these regulations to find the exemption inapplicable to pharmaceutical sales representatives. A split exists between the Second and Ninth Circuits concerning whether this interpretation is owed deference and whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives. The Questions Presented are: (1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales**

exemption and related regulations. (2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

21. ***Dorsey v. United States*, No. 11-5683; *Hill v. United States*, No. 11-5721 (7th Cir., 635 F.3d 336, 417 F. App'x 560; cert. granted Nov. 28, 2011; cases consolidated Nov. 28, 2011; argument scheduled Apr. 17, 2012). The Fair Sentencing Act of 2010 lowered the penalties for certain cocaine-base offenses by increasing the threshold quantities of cocaine base that trigger certain mandatory-minimum sentences. The Seventh Circuit held that the Act applies only to offenses committed after its enactment. The Question Presented is whether the Seventh Circuit erred when, in conflict with the First and Eleventh Circuits, it held that the Act does not apply to all defendants sentenced after its enactment, regardless of when the offense was committed.**

22. ***Salazar v. Ramah Navajo Chapter*, No. 11-551 (10th Cir., 644 F.3d 1054; cert. granted Jan. 6, 2012; argument scheduled Apr. 18, 2012). Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*., where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.**

23. ***Radlax Gateway Hotel v. Amalgamated Bank*, No. 11-166 (7th Cir., 651 F.3d 642; cert. granted Dec. 12, 2011; argument scheduled Apr. 23, 2012). Section 1129(b)(2)(A) of the Bankruptcy Code sets forth three alternative standards for determining if a chapter 11 plan is "fair and equitable" with respect to an objecting class of secured creditors. Petitioners, the Debtors, proposed a chapter 11 plan involving the sale of assets free of liens that satisfies one of these standards by providing their secured lender with the "indubitable equivalent" of its claim pursuant to Section 1129(b)(2)(A)(iii). In an appeal certified directly from the bankruptcy court, the Seventh Circuit held that the Debtors could only satisfy the statute by allowing their secured creditor to bid its claim in lieu of cash (i.e., credit bid) at the sale pursuant to Section 1129(b)(2)(A)(ii). This holding directly conflicts with the Third Circuit's decision in *In re Philadelphia Newspapers*, 599 F.3d 298 (3d Cir. 2010), and the Fifth Circuit's decision in *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Comm.* (*In re Pacific Lumber Co*.), 584 F.3d 229 (5th Cir. 2009). The Question Presented is: Whether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code.**

24. ***Match-E-Be-Nash-She-Wish Band v. Patchak*, No. 11-246; *Salazar v. Patchak*, No. 11-247 (D.C. Cir., 632 F.3d 702; cert. granted and cases consolidated Dec. 12, 2011; argument scheduled Apr. 24, 2012). The Questions Presented are: (1) Whether 5 U.S.C. § 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an**

Indian Tribe. (2) Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

25. ***Arizona v. United States*, No. 11-182 (9th Cir., 641 F.3d 339; cert. granted Dec. 12, 2011; argument scheduled Apr. 25, 2012). Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) to address the illegal immigration crisis in the State. The four provisions of S.B. 1070 enjoined by the courts below authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law and impose penalties under state law for non-compliance with federal immigration requirements. The Question Presented is whether the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and impliedly preempt these four provisions of S.B. 1070 on their face.**

26. ***Florida v. Jardines*, No. 11-564 (Fl., 73 So. 3d 34; cert. granted Jan. 6, 2012, limited to Question 1). Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.**

27. ***Kloeckner v. Solis*, No. 11-184 (8th Cir., 639 F.3d 834; cert. granted Jan. 13, 2012). The Merit Systems Protection Board is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is: If the Board decides a mixed case without determining the merits of the discrimination claim, whether the court with jurisdiction over that claim is the Court of Appeals for the Federal Circuit or a district court.**

28. ***United States v. Bormes*, No. 11-192 (Fed. Cir., 626 F.3d 574; cert. granted Jan. 13, 2012). Whether the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*.**

29. ***Cavazos v. Williams*, No. 11-465 (9th Cir., 646 F.3d 636; cert. granted Jan. 13, 2012, limited to Question 1). Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.**

Cases Determined Without Argument

1. ***Cavazos v. Smith*, No. 10-1115 (9th Cir., 624 F.3d 1235; cert. granted Oct. 31, 2011; reversed and remanded Oct. 31, 2011).** Per Curiam (Ginsburg, J., joined

by Breyer, J., and Sotomayor, J., dissenting). The Supreme Court held that, in reviewing a state-court criminal conviction, a federal court must defer to the state court's resolution of conflicting evidence. A California jury convicted Shirley Ree Smith of assault on a child resulting in death, concluding that she had shaken her grandson to death. The Ninth Circuit determined that no rational jury could have convicted Smith and set the jury verdict aside. The Supreme Court reversed, holding that conflicting evidence was insufficient for a federal court to overturn a state-court conviction. Instead, the reviewing federal court must assume that the trier of fact resolved conflicting evidence in favor of the prosecution. The Court examined the conflicting evidence and concluded that, while there could be room for doubt, the jury's conclusion was supported by some evidence and therefore the Ninth Circuit erred in setting aside the state court's judgment.

2. ***KPMG LLP v. Cocchi*, No. 10-1521 (Fl. Ct. of App., 51 So. 3d 1165; cert. granted Nov. 7, 2011; vacated and remanded Nov. 7, 2011).** Per Curiam. The Court held that state and federal courts must examine each claim in multiple claim lawsuits "in order to separate arbitrable from nonarbitrable claims" under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985), the Court explained that the Federal Arbitration Act requires that all arbitrable claims in multiple claim lawsuits be sent to arbitration "even if this will lead to piecemeal litigation." Therefore, the Court of Appeal erred in upholding the trial court's "blanket refusal" to compel arbitration of Respondents' claims after determining that only two of the four claims in the complaint were nonarbitrable.

3. ***Bobby v. Dixon*, No. 10-1540 (6th Cir., 627 F.3d 553; cert. granted Nov. 7, 2011; reversed and remanded Nov. 7, 2011).** Per Curiam. The Court held that the Sixth Circuit erroneously granted habeas relief to a convicted murderer under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a federal court may only grant an application for a writ of habeas corpus to a state prisoner if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Dixon was convicted of murder after an Ohio state court refused to exclude his confession to the murder charge taken after he was arrested and questioned on separate forgery charges. The court excluded Dixon's confession to the forgery charges because the police failed to provide him with the required warning under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Ohio Supreme Court affirmed the conviction, holding that Dixon's confession to the murder charges, given after a proper *Miranda* warning, was admissible because both confessions were given voluntarily. Under the court's reasoning, the prior, unwarned confession to forgery did not require exclusion of the later, warned confession to murder. On habeas review, a federal district court denied relief. The Sixth Circuit reversed, holding that the police interrogation constituted a "deliberate question-first, warn-later strategy" in violation of Dixon's constitutional rights. The Supreme Court disagreed, holding that it was "not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision."

4. ***Hardy v. Cross*, No. 11-74 (7th Cir., 632 F.3d 356; cert. granted Dec. 12, 2011; reversed Dec. 12, 2011).** Per Curiam. The Court held that the Seventh Circuit erroneously granted habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In the Court's view, the Illinois Court of Appeals reasonably concluded that state prosecutors conducted the good-faith search for a witness that is required under the Confrontation Clause before that witness is declared unavailable and her prior testimony is read into a subsequent trial. That the federal court identified additional steps that might have been taken was insufficient under AEDPA's deferential standard of review, especially because those steps in this case were not likely to have been successful.

5. ***Ryburn v. Huff*, No. 11-208 (9th Cir., 632 F.3d 539; cert. granted Jan. 23, 2012; reversed Jan. 23, 2012).** Per Curiam. The Court held that police officers who entered a house when investigating rumors of a threatened school shooting were entitled to qualified immunity. Respondents brought a § 1983 action against the police officers, alleging that the officers violated Respondents' Fourth Amendment rights by entering their home without obtaining a warrant. According to the Court, a "reasonable police officer could read [the Court's] decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." In this case, in which an individual immediately turned and ran into her house when the officers asked whether there were guns inside, the Court explained that reasonable officers "could have come to the conclusion that there was an imminent threat to their safety and to the safety of others."

Pending Cases Calling For The Views Of The Solicitor General

1. ***Faculty Senate of Florida International University v. Florida*, No. 10-1139 (11th Cir., 616 F.3d 1206; CVSG May 16, 2011). The Questions Presented are: (1) Whether Florida's prohibition on the use of state or private funds by universities to support academic travel to Cuba and other disfavored nations is consistent with the Court's decision in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). (2) Whether state-enacted economic sanctions that restrict the use of both public and private funds are preempted by federal law.**

2. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011).[2] Whether 18 U.S.C. § 3599(a)(2), which provides that an indigent capital state inmate pursuing federal habeas relief "shall be entitled to the appointment of**

---

2 The Solicitor General filed a brief on February 9, 2012, but the brief is not yet publicly available.

one or more attorneys," entitles a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel.

3. ***Bank Melli Iran New York Representative Office v. Weinstein*, No. 10-947 (2d Cir., 609 F.3d 43; CVSG June 13, 2011). In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), the Court held that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27. That principle is also reflected in numerous treaties that require the United States to recognize the juridical status of foreign entities. In the decision below, the Second Circuit held that a judgment-creditor of Iran could execute against assets of an Iranian bank that is juridically separate from the Iranian government, even though the bank was not a party to the judgment and has no relation to the events underlying it. The court reached that conclusion by construing a parenthetical reference in the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, to override *Bancec*. The court then applied its interpretation retroactively to the already final pre-TRIA judgment in this case. The Questions Presented are: (1) Whether the TRIA overrides this Court's holding in *Bancec* and applicable treaty provisions by authorizing creditors of a foreign sovereign to execute against assets of the sovereign's juridically distinct instrumentalities. (2) Whether Congress violated *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), by retroactively revising the parties bound by a judgment that was already final when the statute was enacted.**

4. ***DirectTV, Inc. v. Levin*, No. 10-1322 (Ohio, 941 N.E.2d 1187; CVSG Oct. 3, 2011). The Questions Presented are: (1) Whether, in a Commerce Clause challenge to a state statute, courts need not examine the effects of the statute if it can be characterized as distinguishing between two competitors based upon their different methods of operation. (2) Whether courts need not examine the statute's effects because some of the beneficiaries of the discriminatory scheme are major interstate companies.**

5. ***Cook v. Rockwell International Corp.*, No. 10-1377 (10th Cir., 618 F.3d 1127; CVSG Oct. 3, 2011). The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), establishes a compensation regime for any "nuclear incident," a term that includes radioactive discharges causing "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." 42 U.S.C. § 2014(q). Congress provided that, in suits covered by the Act, "the substantive rules for decision . . . shall be derived from the law of the State in which the nuclear incident involved occurs," unless state law is inconsistent with certain provisions of the Act. *Id.* § 2014(hh). The Questions Presented are: (1) Whether state substantive law controls the standard of compensable harm in suits under the Price-Anderson Act, or whether the Act instead imposes a federal standard. (2) Whether, if a federal standard applies, a property owner whose land has been contaminated by radioactive plutonium, resulting in lost property value, must show some physical injury to the**

property beyond the contamination itself in order to recover for damage to property.

6. ***Pacific Merchant Shipping Ass'n v. Goldstene*, No. 10-1555 (9th Cir., 39 F.3d 1154; CVSG Oct. 3, 2011). On July 1, 2009, the California Air Resources Board began enforcement of regulations that require foreign- and U.S.-flagged ocean-going vessels engaged in international and interstate commerce to use specified low-sulfur fuels whenever those ships are bound to or from California ports and within 24 miles of the California coastline. These rules, adopted to reduce vessel emissions of diesel particulates and other air pollutants, apply, at an aggregate compliance cost estimated at $1,500,000,000, to a predominately foreign-flagged group of ships that call at California ports more than 10,000 times annually and carry more than 40% of the nation's containerized imports into California each year. The Questions Presented are: (1) Whether the Commerce Clause and the Supremacy Clause prohibit California's extraterritorial exercise of its police powers to require the use of specified low-sulfur fuels on foreign- and U.S.-flagged vessels engaged in foreign and interstate commerce while these ships are on the high seas. (2) Whether, by establishing the measure of California's seaward boundary at "three geographical miles distant from its coast line," the Submerged Lands Act, 43 U.S.C. § 1312, preempts California's regulations that require foreign- and U.S.-flagged vessels engaged in international and interstate commerce to use specified low-sulfur fuels while those ships are navigating outside of the State's three-mile seaward territorial boundary so established.**

7. ***Saint-Gobain Ceramics v. Siemens Medical Solutions*, No. 11-301 (Fed. Cir., 647 F.3d 1373; CVSG Nov. 7, 2011). The Patent and Trademark Office ("PTO") determines whether the standards governing patentability are met, including whether a claimed invention is non-obvious over prior art. 35 U.S.C. § 103. Where the PTO finds that these standards are satisfied, the resulting patent (and the patentability determinations underlying it) is presumed valid, *id.* § 282, and that presumption can be overcome only by clear and convincing evidence. *Microsoft Corp. v. i4i. Ltd. P'ship*, 131 S. Ct. 2238 (2011). In light of this scheme, the Questions Presented are: (1) Whether the PTO's presumptively valid finding that an invention is not obvious and is thus patentable over a prior art patent is impermissibly nullified or undermined when a jury is allowed to find, by a mere preponderance of the evidence, that the patented invention is "insubstantially different" from the very same prior art patent, and thus infringes that prior art patent under the "doctrine of equivalents." (2) Whether, as the dissent below warned, the Federal Circuit's failure to impose a heightened evidentiary standard to ensure that juries do not use the doctrine of equivalents to override the PTO's presumptively valid non-obvious determinations undermines the reasonable reliance of competitors and investors on such PTO determinations, thereby intolerably increasing uncertainty over claim scope, fostering litigation, "deter[ring] innovation and hamper[ing] legitimate competition."**

8. ***Corboy v. Louie*, No. 11-336 (Haw., 251 P.3d 601; CVSG Dec. 12, 2011). In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Court held that a state classification of voters according to whether they are "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" was an impermissible racial classification under the Fifteenth Amendment. Respondents have employed the same classification to determine whether a taxpayer is eligible for certain long-term leases that entitle lessees to significant tax exemptions. No equivalent exemption is available to Petitioners because they do not fall within that racial classification. Petitioners paid their taxes under protest and then sought refunds from their respective counties on the ground that their tax bills resulted from a racial classification inconsistent with the Constitution. The Hawaii courts declined to apply *Rice* or subject the classification to strict scrutiny. The Question Presented is: Whether the Hawaii courts erred in failing to recognize that Petitioners have standing to seek a refund of their own taxes and that the Equal Protection Clause precludes a State or municipality from creating tax exemptions that are available only to members of a certain race.**

9. ***Decker v. Northwest Environmental Defense Center*, No. 11-338 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011). Congress has authorized citizens dissatisfied with the Environmental Protection Agency's (EPA's) rules implementing the Clean Water Act's (CWA's) National Pollutant Discharge Elimination System (NPDES) permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding. In addition, in 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14). The Questions Presented are: (1) Whether the Ninth Circuit erred when it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA. (2) Whether the Ninth Circuit erred when it held that storm-water from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.**

10. ***Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011). Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus**

not to require a permit as a point source discharge of pollutants. Under a rule first promulgated in 1976, EPA consistently has defined as nonpoint source activities forest road construction and maintenance from which natural runoff results. And in regulating stormwater discharges under 1987 amendments to the Act, EPA again expressly excluded runoff from forest roads. In consequence, forest road runoff long has been regulated as a nonpoint source using best management practices, like those imposed by the State of Oregon on the roads at issue here. EPA's consistent interpretation of more than 35 years has survived proposed regulatory revision and legal challenge, and repeatedly has been endorsed by the United States in briefs and agency publications. The Ninth Circuit—in conflict with other circuits, contrary to the position of the United States as amicus, and with no deference to EPA—rejected EPA's longstanding interpretation. Instead, it directed EPA to regulate channeled forest road runoff under a statutory category of stormwater discharges "associated with industrial activity," for which a permit is required. The Question Presented is: Whether the Ninth Circuit should have deferred to EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial stormwater subject to NPDES.

11. ***Los Angeles County Flood Control District v. Natural Resources Defense Council*, No. 11-460 (9th Cir., _ F.3d _, 2011 WL 2712963; CVSG Jan. 17, 2012). The Questions Presented are: (1) Whether "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a "navigable water" under the Clean Water Act. (2) When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, whether there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.**

Gibson Dunn – Counsel for EM Ltd., et al.

12. ***EM Ltd. v. Argentina*, No. 11-604 (2d Cir., 652 F.3d 172; CVSG Jan. 17, 2012). Section 1610 of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, sets forth the circumstances in which property of a foreign state or its agency or instrumentality "shall not be immune" from prejudgment attachment or execution in satisfaction of a judgment. 28 U.S.C. § 1610. Section 1611 restores immunity to property "of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent government, has explicitly waived its immunity." *Id.* § 1611(b)(1). In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that in certain circumstances of injustice or control, the separate juridical status of a foreign**

state's agency or instrumentality should be disregarded. *Id.* at 629. In such cases, the agency or instrumentality should be treated as the alter ego of the foreign state, and "one may be held liable for the actions of the other." *Id.* When a central bank has been adjudicated under *Bancec* to be the alter ego of a foreign state that has waived immunity from attachment and execution, does Section 1611(b)(1) of the FSIA immunize the assets held in the name of that bank?

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***John Crane, Inc. v. Atwell*, No. 10-272 (Pa. Super. Ct., 986 A.2d 888, *appeal denied*, 996 A.2d 490; CVSG Nov. 1, 2010; cert. supported May 6, 2011). The Question Presented is whether a federal law, the Boiler Inspection Act, 49 U.S.C. § 20701, preempts the field of locomotive equipment regulation and thus bars state tort claims based on a railroad worker's death from lung cancer following prolonged exposure to asbestos while working as a locomotive repairman.**

2. ***Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, No. 10-844 (Fed. Cir., 601 F.3d 1359; CVSG Mar. 28, 2011; cert. supported May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioners; argued on Dec. 5, 2011). When the Food & Drug Administration ("FDA") approves a drug for multiple uses, the Hatch-Waxman Act (the "Act") allows generic drug makers to avoid contested patent litigation by marketing generic versions of the drug solely for non-patented uses. According to Petitioners, the FDA defers to name-brand drug companies' 140-character descriptions of the scope of their method of use patents, and such companies can therefore block the approval of generic drugs by submitting overbroad patent method of use descriptions to the FDA. The Act allows a "counterclaim seeking an order requiring the [patent] holder to correct or delete the patent information submitted by the holder . . . on the ground that the patent does not claim . . . an approved method of using the drug." 21 U.S.C. § 355(j)(5)(C)(ii)(I). The Question Presented is whether the Act's counterclaim provision applies where (1) there is "an approved method of using the drug" that "the patent does not claim," and (2) the brand submits "patent information" to the FDA that misstates the patent's scope, requiring "correct[ion]."**

3. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011; cert. supported Aug. 25, 2011; cert. granted Oct. 11, 2011; SG as amicus, supporting Petitioners; argument scheduled Feb. 21, 2012). Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b), provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." The Question Presented is whether Section 8(b) of**

Gibson Dunn – Counsel for Novo Nordisk A/S and Novo Nordisk Inc.

RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

CVSG Cases In Which The Solicitor General Opposed Certiorari[3]

1. ***Douglas v. Independent Living Center of Southern California, Inc.*, 09-958 (9th Cir., 572 F.3d 644; CVSG May 24, 2010; cert. opposed Dec. 3, 2010; cert. granted Jan. 18, 2011, limited to Question 1; consolidated with Nos. 09-1158 and 10-283 on Jan. 18, 2011; SG as amicus, supporting Petitioner; argued on Oct. 3, 2011). Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a State that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and Respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the text of the statute, and because the reductions were motivated by budgetary considerations. The Question Presented is as follows: Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.**

2. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010; cert. opposed May 20, 2011; cert. granted June 20, 2011, limited to the first Question Presented; SG as amicus, supporting Petitioner; argued on Dec. 7, 2011). Whether the constitutional test for determining whether a section of a river is navigable for title purposes requires a trial court to**

---

3 In one case, the Court called for the views of the Solicitor General, but the petition was dismissed before those views were submitted: *Sandy Creek Energy v. Sierra Club Club, Inc.*, No. 10-1333 (5th Cir., 627 F.3d 134; CVSG Oct. 3, 2011; petition dismissed Dec. 16, 2011). Whether, after construction of a power plant has begun in reliance on the issuance of a lawful preconstruction permit reflecting that there was no Maximum Achievable Control Technology ("MACT") requirement then in force, a new MACT determination requirement can be compelled during construction, contrary to EPA regulations and judicial interpretations of closely related provisions of the Clean Air Act.

determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union, or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use.

3. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011; cert. granted June 27, 2011; SG as amicus, supporting Petitioner; argued on Nov. 9, 2011). The Questions Presented are: (1) Whether the Ninth Circuit erred in holding that a "presumption against preemption" requires a "narrow interpretation" of the Federal Meat Inspection Act's ("FMIA") express preemption provision, in conflict with the Court's decision in *Jones v. Rath Packing Co*., 430 U.S. 519 (1977), that the provision must be given "a broad meaning." (2) Whether, when federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, the Ninth Circuit erred in holding that a state criminal law which requires that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA. (3) Whether the Ninth Circuit erred in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.**

   Decided Jan. 23, 2012 (565 U.S. ___). Ninth Circuit/Reversed and Remanded. Justice Kagan for a 9-0 Court. The Court held that the Federal Meat Inspection Act ("FMIA"), which regulates slaughterhouses to ensure both the safety of meat and the humane handling of animals, expressly preempted a California law dictating requirements for the treatment of nonambulatory pigs. The FMIA and its implementing regulations establish procedures for the inspection of each animal brought to a slaughterhouse. If an inspector determines that an animal is dead, dying, or afflicted with a serious disease or condition, he must designate the animal as "U.S. Condemned," the animal must be separately killed, and no part of the carcass may be sold for human consumption. If the animal has a less severe condition, the inspector must classify the animal as "U.S. Suspect"—a classification that includes all nonambulatory animals not subject to condemnation. Suspect animals must be slaughtered separately, but parts of the carcass may be processed into food for humans after inspection. The FMIA also preempts all state laws "which are in addition to, or different than those made under" the FMIA. California's law bars slaughterhouses from buying, selling, or receiving a nonambulatory animal, bars them from selling meat from such an animal, and requires them to immediately euthanize the animal. In essence, the California law adds additional requirements for the treatment of nonambulatory animals not found in the federal scheme. The state law is therefore preempted by the FMIA.

4. ***First American Financial Corp. v. Edwards*, No. 10-708 (9th Cir., 610 F.3d 514; CVSG Feb. 28, 2011; cert. opposed May 19, 2011; cert. granted June 20, 2011, limited to the second Question Presented; argued on Nov. 28, 2011). Section 8(a) of the Real Estate Settlement Procedures Act of 1974 (the "Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id*. § 2607(d)(2). Under the Act, a person seeking a monetary recovery need not show that the kickback arrangement affected the price, the quality, or any other characteristic of the settlement service. The Ninth Circuit held that an invasion of this statutory right by itself constitutes an injury for purposes of Article III standing, regardless of whether the plaintiff can demonstrate an additional harm resulting from the invasion of that right. The Question Presented is whether a private purchaser of real estate settlement services has standing to sue under Article III, § 2 of the United States Constitution.**

5. ***Farina v. Nokia, Inc.*, No. 10-1064 (3d Cir., 625 F.3d 9; CVSG May 31, 2011; cert. opposed Aug. 26, 2011; cert. denied Oct. 3, 2011). The Questions Presented are the following: (1) Whether a regulation based on authority conferred by a statute that explicitly disclaims any implied preemptive effect can impliedly preempt state law on a "frustration of purpose" theory of preemption. (2) Whether an agency's National Environmental Policy Act regulation, which imposes no substantive requirements, may preempt substantive state health, safety, or consumer-protection laws.**

6. ***Countrywide Home Mortgages v. Rodriguez*, No. 10-1285 (3d Cir., 629 F.3d 136; CVSG June 20, 2011; cert. opposed Oct. 14, 2011; cert. denied Nov. 14, 2011). Whether the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, takes precedence over a mortgage lender's right under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2609(a)(2), to require a borrower to deposit additional funds into his escrow account after filing for Chapter 13 bankruptcy protection when those funds are needed to cover the borrower's anticipated post-petition taxes, insurance, and other escrow obligations.**

7. ***Compton Unified School District v. Addison*, No. 10-886 (9th Cir., 598 F.3d 1181; CVSG Apr. 18, 2011; cert. opposed Nov. 18, 2011; cert. denied Jan. 9, 2012). Whether the special education due process hearing procedures under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, allow a parent to bring a claim of negligence against a school district, or whether due process hearing claims are limited to disputes regarding intentional decisions made by the school district.**

8. ***Republica Bolivariana de Venezuela v. DRFP L.L.C.*, No. 10-1144 (6th Cir., 622 F.3d 513; CVSG May 16, 2011; cert. opposed Dec. 22, 2011; cert. denied Jan. 23, 2012). Under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602–11, a foreign state is not immune from suit in U.S. court if a claim is based on the state's act outside the United States in connection with a commercial activity abroad, and that act causes a "direct effect" in the United States. *Id.* § 1605(a)(2). In this case, the plaintiff sued to obtain payment on two promissory notes purportedly issued by a Venezuelan state-owned bank. The plaintiff acquired the notes abroad from a foreign entity, brought them into the United States, and demanded payment in Ohio. The Question Presented is whether a foreign state's refusal to honor a demand for payment on the state's alleged securities at a U.S. location causes a "direct effect" in the United States based merely on the failure of the securities to exclude the United States as a place of payment.**

9. ***Fein, Such, Kahn & Shepard, PC v. Allen*, No. 10-1417 (3d Cir., 629 F.3d 36; CVSG Oct. 3, 2011; cert. opposed Dec. 23, 2011; cert. denied Jan. 23, 2012). Whether a communication from a debt collector to a debtor's attorney is actionable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.**

Supreme Court Statistics:

Gibson Dunn has a strong and high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases on behalf of the nation's leading corporations, U.S. states, presidential candidates, and others. Gibson Dunn has had more than 100 Supreme Court arguments among the firm's active lawyers. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant its certiorari petitions nearly forty percent of the time in the last five years.

Appellate and Constitutional Law Group Co-Chairs:

Theodore B. Olson - Washington, D.C. (202.955.8500, tolson@gibsondunn.com)
Theodore J. Boutrous, Jr. - Los Angeles (213.229.7000, tboutrous@gibsondunn.com)
Daniel M. Kolkey - San Francisco (415.393.8200, dkolkey@gibsondunn.com)
Thomas G. Hungar - Washington, D.C. (202.955.8500, thungar@gibsondunn.com)
Miguel A. Estrada - Washington, D.C. (202.955.8500, mestrada@gibsondunn.com)