GIBSON DUNN
Supreme Court Round-Up

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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 2010

Decided Cases

1. *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 (4th Cir., 566 F.3d 111; CVSG Jan. 11, 2010; cert. opposed May 19, 2010; cert. granted June 28, 2010; SG as amicus, supporting Respondent; argued on Dec. 7, 2010). (1) Whether a service provider—for instance, a lawyer, accountant, or investment adviser—can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" its client's alleged misstatements. (2) Whether a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

Decided June 13, 2011 (564 U.S. ___). Fourth Circuit/Reversed. Justice Thomas for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court concluded that Janus Capital Management ("JCM") cannot be held liable in a private suit under the Securities and Exchange Commission's Rule 10b-5 for drafting allegedly misleading prospectuses for the mutual funds it advises. In reaching that conclusion, the Court held that the only proper defendant in a private Rule 10b-5 suit is the "maker" of a statement—"the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it"—and that "[t]he statements in the [mutual fund] prospectuses were made by [the mutual funds], not by JCM." JCM is a registered investment adviser that, among other things, advises the Janus family of mutual funds; the Janus Funds are governed by an independent Board of Trustees, and are not owned or controlled by JCM. First Derivative Traders invested in the stock of JCM's parent company, Janus Capital Group Inc. ("JCG"). It alleged that the price of JCG's stock was artificially inflated as a result of misleading statements in the Janus Funds' prospectuses, and that JCM had drafted those statements. The Court held that "the maker of a statement is the person or entity with ultimate authority over the statement." "Without control," the Court explained, "a person or entity can merely suggest what to say, not 'make' a statement in its own right," and therefore "[o]ne who prepares or publishes a statement on behalf of another is not its maker." The Court noted that it had previously distinguished "between those who are primarily liable (and thus may be pursued in private suits) and those who are secondarily liable (and thus may not be pursued in private suits)." To ensure that this distinction "ha[s] any meaning," the Court

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"dr[e]w a clean line between the two—the maker is the person or entity with ultimate authority over a statement and others are not." Thus, the Court underscored, it "will not expand liability beyond the person or entity that ultimately has authority over a false statement." Applying this test, the Court concluded that "JCM did not 'make' any of the statements in the [Janus Funds] prospectuses" because its alleged "involvement in preparing the prospectuses" was "subject to the ultimate control" of the Janus Funds.

2. ***United States v. Jicarilla Apache Nation*, No. 10-382 (Fed. Cir., 590 F.3d 1305; cert. granted Jan. 7, 2011; argued on Apr. 20, 2011). Whether the attorney-client privilege entitles the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.**

Decided June 13, 2011 (564 U.S. ___). Federal Circuit/Reversed and remanded. Justice Alito for a 7-1 Court (Ginsburg, J., concurring in the judgment, joined by Breyer, J.; Sotomayor, J., dissenting; Kagan, J., took no part in the consideration or decision of the case). The Court held that the fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and Indian tribes. The proceeds from natural resources in the Jicarilla Apache Nation's reservation are held by the United States in trust for the Tribe. In a breach-of-trust action against the Government, the Tribe moved to compel production of certain documents, some of which the Government claimed were protected by attorney-client privilege. The Federal Circuit held that departmental communications relating to the management of trust funds fall within a "fiduciary exception" to the attorney-client privilege. Under that exception, a trustee who obtains legal advice related to trust administration is precluded from asserting the attorney-client privilege against trust beneficiaries. The Supreme Court disagreed with the Federal Circuit, reasoning that the criteria justifying the fiduciary exception are absent in the trust relationship between the United States and Indian tribes. The Court concluded that the United States does not obtain legal advice as a "mere representative" of the Tribe and that the Tribe is not the "real client" for whom that advice is intended. Moreover, the Court noted, the Government does not have the same common-law disclosure obligations as a private trustee.

3. ***Nevada Commission on Ethics v. Carrigan*, No. 10-568 (Nev., 236 P.3d 616; cert. granted Jan. 7, 2011; argued on Apr. 27, 2011). The Nevada Supreme Court held that the vote of an elected official is protected speech under the First Amendment and that the recusal provision of the Nevada Ethics in Government Law is subject to strict scrutiny. Under that standard of review, the court concluded that a portion of the recusal statute was overbroad and facially unconstitutional. The Question Presented is whether the First Amendment subjects state restrictions on voting by elected officials to (a) strict scrutiny, (b) the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), for government-employee speech, or (c) rational-basis review.**

Decided June 13, 2011 (564 U.S. ___). Supreme Court of Nevada/Reversed and remanded. Justice Scalia for a 9-0 Court (Kennedy, concurring; Alito, J., concurring in part and concurring in the judgment). The Court held that the provision in Nevada's Ethics in Government law requiring a public official to recuse from voting on or

advocating passage of a matter with respect to which his independence of judgment may be suspect does not violate the First Amendment. Observing that a universal and long-established practice creates a strong presumption of constitutionality, the Court emphasized that recusal provisions similar to that in Nevada's law have existed since the Nation's beginning. Turning to First Amendment doctrine, the Court held that such recusal provisions do not violate the First Amendment because restrictions on voting are not restrictions on legislators' protected speech. Rather, a legislator votes as a trustee for the public, and his vote is not a symbolic action.

4. ***Flores-Villar v. United States*, No. 09-5801 (9th Cir., 536 F.3d 990; cert. granted Mar. 22, 2010; argued on Nov. 10, 2010). Whether Petitioner's inability to claim derivative citizenship through his United States citizen father because of residency requirements applicable to unwed citizen fathers, but not to unwed citizen mothers, *see* former 8 U.S.C. §§ 1401(a)(7) and 1409 (1970), violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause and afforded Petitioner a defense to criminal prosecution under 8 U.S.C. § 1326.**

Decided June 13, 2011 (564 U.S. ___). Ninth Circuit/Affirmed by an equally divided Court. Per Curiam (Kagan, J., took no part in the consideration or decision of the case). The judgment was affirmed by an equally divided Court.

5. ***Sykes v. United States*, No. 09-11311 (7th Cir., 598 F.3d 334; cert. granted Sept. 28, 2010; argued on Jan. 12, 2011). Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).**

Decided June 9, 2011 (564 U.S. ___). Seventh Circuit/Affirmed. Justice Kennedy for a 6-3 Court (Thomas, J., concurring in the judgment; Scalia, J., dissenting; Kagan, J., dissenting, joined by Ginsburg, J.). The Court held that the Indiana state-law felony of vehicle flight from a law enforcement officer is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Under ACCA's punishment enhancement provisions, convicted felons found in unlawful possession of a firearm are subject to a mandatory minimum fifteen-year prison term if they already have three prior convictions for violent felonies or serious drug offenses. While ACCA enumerates four specific offenses that qualify as violent felonies, it also contains a "residual clause" encompassing any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The Court consistently employs a "categorical approach" when determining whether a particular offense is a violent felony for ACCA purposes; it looks only to the elements of the offense, rather than the specific circumstances of the individual offender's conduct. Here, taking into account the characteristics of the offense, as well as statistics showing that the risks of vehicle flight "may outstrip the dangers" of both burglary and arson, the Court concluded that "Indiana's vehicular flight crime is a violent felony." The Court also clarified that for an offense that does not involve strict liability, negligence, or recklessness, the relevant criterion for determining whether it should be considered an ACCA predicate is the level of risk it poses—not, as Petitioner suggested, whether it is "purposeful, violent, and aggressive." Acknowledging the difficulty inherent in implementing "a normative principle" rather than "a list of specific covered offenses," the Court nonetheless found that ACCA "states an intelligible principle and provides guidance that allows a person to

'conform his or her conduct to the law.'" Accordingly, even though "Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms," the Court found ample basis for classifying Indiana's vehicle flight felony as a "violent felony."

6. ***Talk America, Inc., v. Michigan Bell Telephone Co.*, 10-313; *Isiogu v. Michigan Bell Telephone Co.*, No. 10-329 (6th Cir., 597 F.3d 370; cert. granted and cases consolidated Dec. 10, 2010; SG as amicus, supporting Petitioners; argued on Mar. 30, 2011). To promote competition for local telephone service, the Telecommunications Act of 1996 (the "Act") requires incumbent telephone companies to make entrance facilities available to competitors (1) for network interconnection at cost-based rates and (2) as unbundled network elements. In the *Triennial Review Remand Order* ("*TRRO*"), the Federal Communications Commission ("FCC") maintained the incumbent local telephone company's obligation to provide entrance facilities, which allow for interconnection, at cost-based rates, but found that competitors could effectively compete without access to entrance facilities as unbundled network elements. The Questions Presented are the following: (1) Whether the Sixth Circuit erred by determining that the Act and *TRRO* permit incumbent local telephone companies to charge competing telephone companies competitive rates—*i.e.*, more than cost-based rates—for entrance facilities used for interconnection. (2) Whether the Sixth Circuit erred by disregarding the FCC's interpretation of its regulations, contrary to the deference standard established by the Court in *Auer v. Robbins*, 519 U.S. 452 (1997). (3) Whether a public service commission was barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors entrance facilities at cost-based rates under § 251(c)(2) of the Act as a result of an FCC rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose.**

Decided June 9, 2011 (564 U.S. ___). Sixth Circuit/Reversed. Justice Thomas for an 8-0 Court (Scalia, J., concurring; Kagan, J., took no part in the consideration or decision of the case). The Court held that the FCC had advanced a reasonable interpretation of its regulations when the agency required AT&T to makes its existing entrance facilities available to competitors at cost-based rates under 47 U.S.C § 251(c)(2). The Telecommunications Act of 1996 requires incumbent providers of local telephone services to share their physical networks with competitors in order to reduce barriers to market entry. Section 251(c)(3) requires incumbent providers to lease access to their physical networks on an unbundled basis—*i.e.*, a la carte—and at cost-based rates, where failure to do so would impair the competitor's provision of service. In addition, § 251(c)(2) requires incumbent providers to "provide interconnection" between their networks and the networks of their competitors. Under 47 C.F.R. § 51.321, the FCC has construed § 251(c)(2) to require incumbent providers to lease, at cost-based rates but not on an unbundled basis, any requested facilities for obtaining interconnection "at any technically feasible point within the carrier's network." In its *Triennial Review Order* and *Triennial Review Remand Order*, the FCC decided that entrance facilities—transmission facilities (typically wires or cables) that connect the networks of two providers—were not subject § 251(c)(3) because failure to provide access to such facilities would not impair competitors' service. The FCC also decided, however, that entrance facilities were subject to § 251(c)(2) because they are part of the incumbent provider's network. Accordingly, the FCC required incumbent providers to provide competitors with access to

entrance facilities at cost-based rates, but not on an unbundled basis. AT&T challenged an order pursuant to this requirement. The Court found no unambiguous statute or regulation that barred the FCC's interpretation of § 251(c)(2). Relying on *Auer v. Robbins*, 519 U.S. 452, the Court deferred to the FCC's interpretation of its own regulations on the grounds that the interpretation was not "plainly erroneous or inconsistent with the regulation[s]" and there was no "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."

7. ***DePierre v. United States*, No. 09-1533 (1st Cir., 599 F.3d 25; cert. granted Oct. 12, 2010; argued on Feb. 28, 2011). Federal law requires the imposition of a ten-year mandatory minimum sentence upon persons who engage in a drug-related offense involving either (a) five kilograms or more of "coca leaves" or "cocaine," or (b) fifty grams (.05 kilograms) or more of those substances, or of a mixture of those substances, "which contain[ ] cocaine base." 21 U.S.C. § 841(b)(1)(A). The Question Presented is whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base, or whether the term "cocaine base" is limited to "crack" cocaine.**

   Decided June 9, 2011 (564 U.S. ___). First Circuit/Affirmed. Justice Sotomayor for a 9-0 Court (Scalia, J., concurring in part and concurring in the judgment). The Court held that the term "cocaine base," as used to determine mandatory minimum sentences under the Anti-Drug Abuse Act of 1986 ("ADAA"), means not just "crack cocaine," but cocaine in its chemically basic form. The ADAA established a mandatory minimum sentence of 10 years for certain drug offenses involving 5 kilograms or more of "a mixture or substance containing a detectable amount of" specific cocaine-related elements, including coca leaves, cocaine, and cocaine salts. Additionally, the ADAA mandated the same sentence for offenses involving only 50 grams or more of "a mixture or substance . . . which contains cocaine base." 21 U.S.C. §§ 841(b)(1)(A)(ii) and (iii). Coca paste, "crack cocaine," and "freebase" all contain cocaine in its chemically basic form, but powder cocaine does not. The Court rejected Petitioner's argument that Congress intended lower triggering-threshold quantities only for offenses involving "crack cocaine," explaining that "the most natural reading of the term 'cocaine base' . . . reaches more broadly than just crack cocaine." Accordingly, any mixture or substance containing the chemically basic cocaine molecule, including coca paste, "freebase," and "crack cocaine," contains "cocaine base" for the purpose of mandatory heightened sentence application under the ADAA.

8. ***Microsoft Corp. v. i4i Limited Partnership*, No. 10-290 (Fed. Cir, 598 F.3d 831; cert. granted Nov. 29, 2010; SG as amicus, supporting Respondents; argued on Apr. 18, 2011). The Patent Act provides that "[a] patent shall be presumed valid" and that "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." 35 U.S.C. § 282. The Federal Circuit held below that Microsoft was required to prove its defense of invalidity under 35 U.S.C. § 102(b) by "clear and convincing evidence," even though the prior art on which the invalidity defense rests was not considered by the Patent and Trademark Office prior to the issuance of the asserted patent. The Question Presented is as follows: Whether the court of appeals erred in holding that Microsoft's invalidity defense must be proved by clear and convincing evidence.**

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Decided June 9, 2011 (564 U.S. ___). Federal Circuit/Affirmed. Justice Sotomayor for an 8-0 Court (Breyer, J., concurring, joined by Scalia and Alito, JJ.; Thomas, J., concurring in the judgment; Roberts, C.J., took no part in the consideration or decision of the case). The Court held that a party seeking to establish the invalidity of a patent must prove such invalidity by clear and convincing evidence. The Patent Act provides that a "patent shall be presumed valid" and that "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." 35 U.S.C. § 282. In this case, i4i sued Microsoft, claiming that certain Microsoft Word products infringed its patents. The Federal Circuit held that Microsoft was required to prove its defense of patent invalidity by "clear and convincing evidence," even though the prior art Microsoft relied upon was never considered by the Patent and Trademark Office ("PTO"). The Court acknowledged that § 282 "includes no express articulation of the standard of proof," but focused its analysis on Congress's use of the term "presumed valid." In the patent context, the Court observed, that term had a "settled meaning at common law" that not only allocated the burden of proof to one party, but also imposed a heightened standard of proof. Concluding that Congress intended to codify the common-law presumption when it enacted § 282, the Court held that the statute requires an invalidity defense to be proved by clear and convincing evidence. The standard applies in all cases, even those where new evidence of invalidity, never considered by the PTO, is presented to the jury. In such cases, the Court concluded, the PTO's judgment of validity has less force, "the challenger's burden to persuade the jury of its invalidity defense by clear and convincing evidence may be easier to sustain," and "a jury instruction on the effect of new evidence can, and when requested, most often should be given."

9. ***Fox v. Vice*, No. 10-114 (5th Cir., 594 F.3d 423; cert. granted Nov. 1, 2010; argued on Mar. 22, 2011). 42 U.S.C. § 1988, authorizes courts to award reasonable attorney's fees to prevailing parties in civil rights litigation. The Court has recognized that the purpose of this statute is to ensure effective access to the judicial process for civil rights plaintiffs, and that fees may not be awarded to a prevailing defendant except where the plaintiff's action was frivolous, unreasonable, or without foundation. Petitioner filed a lawsuit against a municipality and its police chief, alleging various state common law torts and a federal civil rights claim arising from the same facts. In response to the Defendants' motion for judgment on the pleadings and for summary judgment, Petitioner admitted that he had failed to properly present any federal cause of action. The district court therefore dismissed the suit and granted defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988, on the ground that Petitioner's federal claims were frivolous. The Fifth Circuit affirmed. The Questions Presented are the following: (1) Can defendants be awarded attorneys' fees under § 1988 in an action based on a dismissal of a claim, where the plaintiff has asserted other interrelated and non-frivolous claims? (2) Is it improper to award defendants all of the attorney's fees they incurred in an action, where the fees were spent defending non-frivolous claims that were intertwined with the frivolous claim?**

Decided June 6, 2011 (563 U.S. ___). Fifth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that 42 U.S.C. § 1988 permits defendants in certain civil rights cases to recover reasonable attorney's fees for costs they would not have incurred but for a plaintiff's frivolous claims, even if non-frivolous claims remain

pending. Just as prevailing plaintiffs may recover fees under § 1988 even if they are not successful in every claim, a defendant may recover even if only some of the plaintiff's claims are frivolous. Denying fees to the defendant because of the existence of one legitimate claim would invite plaintiffs to tack on multiple frivolous claims to a meritorious one; this result would frustrate Congress's goal of protecting defendants against needless and burdensome litigation. On the other hand, awarding fees more liberally could grant the defendant an undeserved windfall simply because the plaintiff pressed one too many claims. The "but-for" standard adopted by the Court balances these two concerns while fulfilling the statute's purpose. In some cases, the standard will allow a defendant to recover costs related to both frivolous and meritorious claims, provided the costs would not have been incurred but for the frivolous claim—for instance, if a frivolous claim enables removal to federal court, thus increasing the costs of the entire litigation. The Court remanded the case for determination of the fee issue under the proper standard.

10. ***McNeill v. United States*, No. 10-5258 (4th Cir, 598 F.3d 161; cert. granted Jan. 7, 2011; argued on Apr. 25, 2011). The Armed Career Criminal Act ("ACCA") applies to a person who "violates section 922(g)" and "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). The Fourth Circuit affirmed the district court's classification of Petitioner's North Carolina drug offenses as "serious drug offenses" under the ACCA, even though at the time of Petitioner's federal sentencing, North Carolina's current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Fourth Circuit held that since North Carolina did not apply its current sentencing law retroactively, the fact that Petitioner's drug offenses were punishable by imprisonment for at least ten years under the version of the law in effect at the time he committed these offenses qualified them as "serious drug offenses" under the ACCA. The Question Presented is as follows: Whether the plain meaning of the phrase "is prescribed by law" in the ACCA's definition of a "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by state law at the time of federal sentencing, regardless of whether the State has made the law retroactive.**

Decided June 6, 2011 (563 U.S. ___). Fourth Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that, for purposes of determining whether a defendant's prior offense is a "serious drug offense," the maximum sentence is the maximum sentence applicable to the offense at the time when the defendant was convicted. The Armed Career Criminal Act ("ACCA") provides for a sentencing enhancement for individuals convicted of three previous "serious drug offenses." ACCA defines a "serious drug offense" as one that carries a maximum sentence of ten years' imprisonment or more. The Court held that the only reasonable way to answer this retrospective question was to look at the law that applied at the time of conviction. Because ACCA is concerned with convictions that have already occurred, it makes no sense to interpret the statute to require looking to current law. The Court noted that the statute's use of the present tense does not change this result; the ACCA uses the present tense throughout to refer to past offenses. The Court also explained that that this reading of ACCA avoids absurdity. If ACCA referred to current sentences, then a conviction could "disappear" from sentencing

consideration if a State reformulated the offense between the state conviction and federal sentencing. Similarly, such an interpretation would make the sentencing enhancement's applicability contingent on whether the federal proceeding came before or after a State reformulated the offense.

11. ***Erica P. John Fund, Inc. v. Halliburton Co.*, 09-1403 (5th Cir., 597 F.3d 330; CVSG Oct. 4, 2010; cert. supported Dec. 3, 2010; cert. granted Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Apr. 25, 2011). (1) Whether the Fifth Circuit correctly held that plaintiffs in securities fraud actions must satisfy not only the requirements set forth in *Basic v. Levinson*, 485 U.S. 224 (1988), to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation at class certification by a preponderance of admissible evidence without merits discovery. (2) Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption even though reliance and loss causation are separate and distinct elements of securities fraud actions and even though proof of loss causation is common to all class members.**

Decided June 6, 2011 (563 U.S. ___). Fifth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court. The Court held that securities fraud plaintiffs need not prove loss causation to obtain class certification under Federal Rule of Civil Procedure 23. The Court observed that, to certify a class under Rule 23(b)(3), a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that whether common questions of law or fact predominate in a securities fraud action frequently turns on the element of reliance. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court permitted plaintiffs to invoke a rebuttable presumption of reliance using the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information" and, accordingly, that an investor relies on public misstatements whenever he or she "buys or sells stock at the price set by the market." To invoke this rebuttable presumption of reliance, the lower court additionally required the plaintiffs to establish loss causation—*i.e.*, that the correction to a prior misleading statement caused the decline in price and that the loss could not otherwise be explained by additional factors. The Court disagreed, reasoning that "[s]uch a rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." "The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation," the Court reasoned, "has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory." Rejecting Halliburton's suggestion that the lower court had not actually required the plaintiffs to prove "loss causation" but instead had considered whether the plaintiffs demonstrated that the alleged misrepresentations had affected the market price, the Court explained that "loss causation is a familiar and distinct concept in securities law" and that the lower court repeatedly referenced "loss causation" in its opinion.

12. ***Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc*., No. 09-1159 (Fed. Cir., 583 F.3d 832; CVSG June 28, 2010; cert.**

supported Sept. 28, 2010; cert. granted Nov. 1, 2010; SG as amicus, supporting Petitioner; argued on Feb. 28, 2011). Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U.S.C. §§ 200–212, in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.

Decided June 6, 2011 (563 U.S. ___). Federal Circuit/Affirmed. Chief Justice Roberts for a 7-2 Court (Sotomayor, J., concurring; Breyer, J., dissenting, joined by Ginsburg, J.). The Court held that the University and Small Business Patent Procedures Act of 1980—commonly referred to as the Bayh-Dole Act—does not automatically vest title to federally funded inventions in federal contractors. The Court began by noting that "patent law has operated on the premise that rights in an invention belong to the inventor." Under the Bayh-Dole Act, federal contractors may "elect to retain title to any subject invention," 35 U.S.C. § 202(a), which is defined as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement," *id.* § 201(e). The Court interpreted the word "retain" to permit a federal contractor to "keep title to whatever it is they already have," but did not "confer title to federally funded inventions on contractors or authorize contractors to unilaterally take title to those inventions." Thus, the Bayh-Dole Act does not displace the historical patent rule that the rights to an invention vest in the inventor. Rather, the Act merely establishes that the contractor may retain rights it already has in the invention.

13. ***Global-Tech Appliances, Inc., v. SEB S.A.*, No. 10-6 (Fed Cir., 594 F.3d 1360; cert. granted Oct. 12, 2010; argued on Feb. 23, 2011). Whether the legal standard for the state-of-mind element of a claim for actively inducing a patent infringement under 35 U.S.C. § 271(b) is "deliberate indifference of a known risk" that an infringement may occur, as the Federal Circuit held, or "purposeful, culpable expression and conduct" to encourage an infringement, as the Supreme Court taught in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005).**

Decided May 31, 2011 (563 U.S. ___). Federal Circuit/Affirmed. Justice Alito for an 8-1 Court (Kennedy, J., dissenting). A Hong Kong-based subsidiary of Global-Tech copied all but the cosmetic features of an innovative deep fryer patented by SEB, then retained an attorney to conduct a right-to-use study on the fryer without telling the attorney that it had copied the design. The attorney issued an opinion letter stating that the fryer did not infringe any patents, and the subsidiary starting selling the fryers to a distributor in the United States. SEB sued pursuant to § 271(b), which makes it unlawful to induce infringement of a patent. In the opinion below, the Federal Circuit applied a "deliberate indifference" standard, which permits liability to be established by proof that the defendant induced acts that—unknown to the defendant—constitute infringement. Importing the standard from *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1984), the Court held that liability under § 271(b) requires proof of the defendant's knowledge that the induced acts constitute patent infringement. The Court then held that this "actual knowledge" standard could be satisfied by a defendant's "willful blindness" in cases where there was a high probability that a product or feature is protected by a patent, and the defendant takes deliberate actions to avoid learning of that fact. Since there was substantial evidence that Global-Tech was willfully blind to the high

probability of the fryer being patented, the Court affirmed the Federal Circuit's judgment on this ground.

14. ***Ashcroft v. Al-Kidd*, No. 10-98 (9th Cir., 580 F.3d 949; cert. granted Oct. 18, 2010, limited to Questions 1 and 2; argued on Mar. 2, 2011). Respondent was arrested on a material witness warrant issued by a federal magistrate judge under 18 U.S.C. § 3144 in connection with a pending prosecution. He later filed a *Bivens* action against Petitioner John Ashcroft, the former Attorney General of the United States, seeking damages for his arrest. Respondent alleged that his arrest resulted from a policy implemented by the former Attorney General of using the material witness statute as a "pretext" to investigate and preventively detain terrorism suspects. In addition, Respondent alleged that the affidavit submitted in support of the warrant for his arrest contained false statements. The Questions Presented are as follows: (1) Whether the court of appeals erred in denying Petitioner *absolute* immunity from the pretext claim. (2) Whether the court of appeals erred in denying Petitioner *qualified* immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject and (b) this Fourth Amendment rule was clearly established at the time of Respondent's arrest.**

Decided May 31, 2011 (563 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Scalia for an 8-0 Court (Kennedy, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, JJ., as to Part I; Ginsburg, J., concurring in the judgment, joined by Breyer and Sotomayor, JJ.; Sotomayor, J., concurring in the judgment, joined by Ginsburg and Breyer, JJ.; Kagan, J., took no part in the consideration or decision of the case). The Court held that "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive." Al-Kidd brought a *Bivens* action challenging the constitutionality of the former Attorney General's alleged policy of authorizing federal officials to detain terrorism suspects using the federal material witness statute even when there was no intention of calling the detainee as a witness. The Court concluded that the allegations did not constitute a violation of clearly established law, and thus the former Attorney General was shielded by qualified immunity. The Court refused to consider the subjective intent behind Al-Kidd's detention, finding that "Fourth Amendment reasonableness 'is predominately an objective inquiry.'" (Citation omitted.)

15. ***Camreta v. Greene*, No. 09-1454; *Alford v. Greene*, No. 09-1478 (9th Cir., 588 F.3d 1011; cert. granted and cases consolidated Oct. 12, 2010; SG as amicus, supporting Petitioners; argued on Mar. 1, 2011). (1) The State received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth**

Circuit, as other circuits have done, instead have applied the balancing standard that the Supreme Court has identified as the appropriate standard when a witness is temporarily detained? (2) The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment," and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit's constitutional ruling reviewable, notwithstanding that it ruled in Petitioner's favor on qualified immunity grounds?

Decided May 26, 2011 (563 U.S. ___). Ninth Circuit/Vacated in part and remanded. Justice Kagan for a 7-2 Court (Scalia, J., concurring; Sotomayor, J., concurring in the judgment, joined by Breyer, J.; Kennedy, J., dissenting, joined by Thomas, J.). The Court held that although it generally may review a lower court's constitutional ruling at the behest of governmental officials who have won final judgment on qualified immunity grounds, here the case is moot because the Respondent can no longer claim a stake in preserving the court's holding because she no longer needs protection from the challenged practice. Almost a decade ago, Petitioners—a state child protective services worker and a county deputy sheriff—interviewed a girl at her elementary school about allegations that her father had sexually abused her. The girl's mother, Respondent here, subsequently sued Petitioners on the child's behalf for damages under 42 U.S.C. § 1983, claiming that the interview violated the Fourth Amendment. The Ninth Circuit concluded that the officials had violated the Constitution by failing to obtain a warrant to conduct the interview, but that qualified immunity shielded the officials from monetary liability because the constitutional right at issue was not clearly established under existing law. Although judgment was entered in their favor, Petitioners asked the Supreme Court to review the ruling that their conduct violated the Fourth Amendment. The Court held that it may review a lower court's constitutional ruling even when the government officials seeking review prevailed on qualified immunity grounds. It reasoned that the relevant statute confers unqualified power on the Court to grant certiorari "upon the petition of any party," that an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement, and that the Court's prudential practice of declining to hear appeals by prevailing parties does not bar consideration of immunized officials' petitions. While rejecting Respondent's arguments for dismissing the case at the threshold, the Court determined that the case was moot. The Court concluded that because the child has moved to another State and is only months away from her eighteenth birthday—and, presumably, her high school graduation—she has no ongoing stake in the litigation, as she has no need for protection from the allegedly unconstitutional behavior.

16. ***Fowler v. United States*, No. 10-5443 (11th Cir., 603 F.3d 883; cert. granted Nov. 15, 2010; argued on Mar. 29, 2011). Under 8 U.S.C. § 1512(a)(1)(C), it is a federal crime to kill or attempt to kill a person with the intent to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings." The Question Presented is whether a defendant may be convicted of murder under 8 U.S.C. § 1512(a)(1)(C) without proof that information regarding a possible federal crime would have been transferred from the murder victim to federal law enforcement officers or judges.**

Decided May 26, 2011 (563 U.S. ___). Eleventh Circuit/Vacated and remanded. Justice Breyer for a 7-2 Court (Scalia, J., concurring in the judgment; Alito, J., dissenting, joined by Ginsburg, J.). The Court addressed the federal witness tampering statute, 18 U.S.C. § 1512(a)(1)(C), which makes it a crime to kill another person with the "intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to commission or possible commission of a Federal offense." The Court held that, in instances where a defendant kills a person to prevent that person from communicating with law enforcement officers, but where the defendant did think specifically about whether the communication would have been made to a *federal* officer, "the Government must show that there was a *reasonable likelihood* that a relevant communication would have been made to a federal officer." (Emphasis in original.) Put another way, "where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer." (Emphasis in original.) In adopting the "reasonable likelihood" standard, the Court made clear that "[t]he Government need not show that such a communication, had it occurred, would have been [made to a] federal [officer] beyond a reasonable doubt, nor even that it is more likely than not." But, the Court emphasized, the Government must show more than merely that a communication with a federal law enforcement officer was "possible," since such a "possibility" standard would transform § 1512(a)(1)(C) into a statute that covers purely state crimes.

17. ***United States v. Tinklenberg*, No. 09-1498 (6th Cir., 579 F.3d 589; cert. granted Sept. 28, 2010; argued on Feb. 22, 2011). Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(D) (Supp. II 2008), or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.**

Decided May 26, 2011(563 U.S. ___). Sixth Circuit/Affirmed. Justice Breyer for an 8-0 Court (Scalia, J., concurring in part and concurring in the judgment, joined by Roberts, C.J., and Thomas, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that a pretrial motion need not actually postpone the trial date to fall within the Speedy Trial Act's exclusion for "delay resulting from any pretrial motion." The Speedy Trial Act required Tinklenberg's trial to begin within 70 days of his initial appearance. However, the Act excludes certain days from the count, including "delay resulting from any pretrial motion." The Court held that this provision does not require that a motion actually delay the trial. The Court noted that the statute refers to "periods of delay" rather than delays in the trial date. The Court also reasoned that (1) the exclusion makes no reference to the trial date; (2) it would be impractical to decide on a motion-by-motion basis whether each motion would delay the trial; and (3) a causation requirement would not be limited to the pretrial motions exclusion. The Court also considered the Act's exclusion of "unreasonable" transportation days and held that the Act requires counting weekends and holidays in determining how many transportation days are reasonable. Because counting unreasonable transportation days placed Tinklenberg's trial more than 70 days after his initial appearance, the Court affirmed the dismissal of the indictment.

18. *Chamber of Commerce of the United States v. Whiting*,[1] No. 09-115 (9th Cir., 544 F.3d 976, amended at 558 F.3d 856; CVSG Nov. 2, 2009; cert. supported but limited to the first Question Presented May 28, 2010; cert. granted June 28, 2010; SG as amicus, supporting Petitioners; argued on Dec. 8, 2010). (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note. (3) Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Decided May 26, 2011 (563 U.S. ___). Ninth Circuit/Affirmed. Chief Justice Roberts delivered the opinion of the Court, except as to Parts II-B and III-B; Scalia, Kennedy, and Alito, JJ., joining the Chief Justice's opinion in full; Thomas, J., joining the Chief Justice's opinion as to Parts I, II-A, and III-A, and concurring in the judgment; Breyer, J., dissenting, joined by Ginsburg, J.; Sotomayor, J., dissenting; Kagan, J. took no part in the consideration or decision of the case). The Court held that an Arizona law providing for the suspension and revocation of an employer's right to do business if it employed an unauthorized alien was not preempted by federal immigration laws. The Court also held that States may require employers to verify an employee's work authorization status using a federal electronic employment verification system. Federal law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Under the Arizona law at issue, state courts are required to suspend (after the first violation) or permanently revoke (after the second violation) all licenses necessary to do business in the State when an employer is found to have employed an unauthorized alien. The state courts may consider only the federal government's determination as to whether an employee is an unauthorized alien. The law also requires that employers verify the employment eligibility of an employee by using E-Verify, a federally-operated, internet-based system. The Court concluded that the Arizona law constituted a "licensing law" and therefore was not expressly preempted by federal law. The Arizona law defined the term "license" similarly to other federal statutes, including the Administrative Procedure Act. The fact that the Arizona law also included other documents such as articles of incorporation and certificates of partnership did not place the scheme outside of the licensing context, because the regulation of such documents is "at the very least 'similar' to a licensing law." Moreover, the fact that the Arizona law required employers to use E-Verify was not expressly preempted by federal

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1 This case was previously captioned *Chamber of Commerce of the United States v. Candelaria*.

law, because no federal statute contained an express preemption clause related to E-Verify. That federal law expressly provides that "the Secretary of Homeland Security may not require any person or other entity to participate in" E-Verify does not constrain States from making the system mandatory for their own employers. A plurality of the Court also concluded that the Arizona law was not impliedly preempted by federal immigration law. Congress could not have intended federal law to be exclusive, because it expressly allowed States to implement licensing sanctions for immigration violations. In addition, there could be no possibility that Arizona and the federal government would reach inconsistent results regarding any individual worker because Arizona required its courts to consider only the federal determination as to whether an employee was authorized to work.

19. ***Brown v. Plata,***[2] **No. 09-1233 (E.D. Cal. and N.D. Cal., 2010 WL 99000; on June 14, 2010, the Court ordered that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits; argued on Nov. 30, 2010). A three-judge district court issued a "prisoner release order" requiring California officials to cap the prison population at 137.5% of the institutions' combined design capacity as a remedy for alleged Eighth Amendment violations. The Questions Presented are the following: (1) Whether the three-judge district court had jurisdiction to issue a "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. (2) Whether the court below properly interpreted and applied § 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order." (3) Whether the three-judge court's "prisoner release order"—which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates—satisfies the PLRA's nexus and narrow-tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.**

Decided May 23, 2011 (563 U.S. ___). United States District Courts for the Eastern and Northern Districts of California/Affirmed. Justice Kennedy for a 5-4 Court (Scalia, J., dissenting, joined by Thomas, J.; Alito, J., dissenting, joined by Roberts, C.J.). The Court held that the Prison Litigation Reform Act of 1995 ("PLRA"), 18 U.S.C. § 3626, authorized a court-mandated limit on California's total state prison population to no more than 137.5% of design capacity within two years to remedy systemic Eighth Amendment violations arising from the prisons' medical and mental health care services. A three-judge district court was properly convened to consolidate two lawsuits under § 3626(a)(3)(A)(i-ii) of PLRA because previous, less intrusive orders in the two cases—a consent decree and appointment of a special master—had failed to remedy the violations.

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2 This case was previously captioned *Schwarzenegger v. Plata*.

The three-judge court did not err in finding that overcrowding was the primary cause of substandard medical and mental health care, thus satisfying the requirements of § 3626(a)(3)(E)(i). The district court also properly found that no alternative relief would provide an adequate remedy because California was unlikely to improve prison services or hire enough additional staff within a reasonable time. *See id.* § 3626(a)(3)(E)(ii). Moreover, the population limit was narrowly drawn, extended no further than necessary to correct the violations, and was the least intrusive means necessary. *See id.* § 3626(a)(1)(A). Although the order may result in the release of offenders who have not been subjected to substandard care, this collateral effect does not suggest a less invasive means was available. To release prisoners actually subject to deficient treatment, some of whom are mentally ill, would be a more intrusive, and ineffective, remedy. The three-judge court also gave "substantial weight" to potential adverse impacts on public safety caused by a release of as many as 46,000 prisoners, but concluded that the state could mitigate any harm through measures such as expanded use of "good-time credits" or diverting low-risk parole violators to community centers. Finally, the district court did not err in providing a two-year deadline to reduce overcrowding; however, the Court noted that the three-judge court had the responsibility to consider extending the deadline to five years and further modifying its order in the exercise of its discretion as circumstances change.

20. ***General Dynamics Corp. v. United States,* No. 09-1298 (Fed. Cir., 182 F.3d 1319, 323 F.3d 1006, and 567 F.3d 134; cert. granted Sept. 28, 2010, limited to Question 1; case consolidated with No. 09-1302 on Sept. 28, 2010; argued on Jan. 18, 2011); *Boeing Co. v. United States,* No. 09-1302 (Fed. Cir., 182 F.3d 1319, 323 F.3d 1006, and 567 F.3d 134; cert. granted Sept. 28, 2010, limited to Question 2; case consolidated with No. 09-1298 on Sept. 28, 2010; argued on Jan. 18, 2011). In *General Dynamics* and *Boeing*, the Federal Circuit held that the government can, consistent with due process, assert a claim for default termination against a federal contractor (the functional equivalent of a breach of contract claim) while invoking the state secrets privilege to foreclose the contractors' primary defense to that claim. (1) Can the government maintain its claim against a party when it invokes the state secrets privilege to completely deny that party a defense to the claim? (2) Does the Due Process Clause of the Fifth Amendment permit the government to maintain a claim while simultaneously asserting the state secrets privilege to bar presentation of a *prima facie* valid defense to that claim?**

Decided May 23, 2011 (563 U.S. ___). Federal Circuit/Vacated and remanded. Justice Scalia for a unanimous Court. The Court held that "when, to protect state secrets, a court dismisses a Government contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach," the proper remedy is that "neither party can obtain judicial relief." Petitioner had defaulted on a government contract to develop a stealth aircraft when the project fell significantly behind schedule. Petitioner attempted to assert an affirmative defense under Federal Circuit precedent, which holds that the government may not withhold from a contractor its "superior knowledge" of information that is "vital" to contractual performance and difficult to discover. The Federal Circuit held that the state-secrets privilege prevented it from adjudicating whether the Government's superior knowledge excused the default; however, it affirmed the determination that Petitioner had defaulted on the contract. The Court vacated the

judgment, explaining that "[i]t is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well." As such, when the states-secrets privileged rendered the contractor's affirmative defense nonjusticiable, the proper course was "to leave the parties where they stood when they knocked on the courthouse door."

21. ***Kentucky v. King*, No. 09-1272 (Ky., 302 S.W.3d 649; cert. granted Sept. 28, 2010, limited to Question 1; argued on Jan. 12, 2011). When does lawful police action impermissibly "create" exigent circumstances that preclude warrantless entry?**

Decided May 16, 2011 (563 U.S. ___). Supreme Court of Kentucky/Reversed and remanded. Justice Alito for an 8-1 Court (Ginsburg, J., dissenting). The Court held that the exigent circumstances rule applies where the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. After following a suspected drug dealer into an apartment complex, police officers smelled marijuana outside an apartment door, knocked on the door loudly, and announced their presence. Upon knocking, the officers heard noises from the apartment that they believed to be consistent with the destruction of evidence. They entered the apartment without a warrant and found the Respondent, along with drugs and drug paraphernalia. The Respondent moved to suppress the evidence. It is well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. The Kentucky Supreme Court, however, held that the exigent circumstances rule does not apply in this case because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. The Court rejected this interpretation and several other tests adopted by lower courts, holding that because the conduct of the police prior to their entry into the apartment was entirely lawful, the warrantless entry based on exigent circumstances was permissible.

Gibson Dunn – Counsel for CIGNA Corporation, et al.

22. ***Cigna Corp. v. Amara*, No. 09-804 (2d Cir., 348 F. App'x 627; CVSG Mar. 8, 2010; cert. opposed May 27, 2010; cert. granted June 28, 2010; SG as amicus, supporting Respondents; argued on Nov. 30, 2010). Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.**

Decided May 16, 2011 (563 U.S. ___). Second Circuit/Vacated and remanded. Justice Breyer for an 8-0 Court (Scalia, J., concurring in the judgment, joined by Thomas, J.; Sotomayor, J., took no part in the consideration or decision of the case). The Court held that § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), which authorizes a plan participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan," did not authorize the district court to reform Petitioner CIGNA Corporation's pension plan for allegedly misleading statements made in its summary plan description ("SPD"). The case arose after CIGNA converted its pension plan from a traditional defined benefit plan to a "cash balance" plan. In describing the conversion in its SPD, CIGNA allegedly made misleading statements about the effects of the conversion on participants' retirement benefits. A class of CIGNA employees challenged the sufficiency of the SPD, and the district court ruled in the class's

favor. Relying on § 502(a)(1)(B), the district court determined that the employees were entitled to recover additional benefits as described in the SPD. The Court held that the district court awarded relief under the wrong ERISA provision because an SPD is not part of an ERISA plan; relief for a flawed SPD therefore is not available under § 502(a)(1)(B), which authorizes recovery of "benefits due . . . under the . . . plan." In reaching this conclusion, the Court rejected the Solicitor General's argument that the terms of the SPD are part of the plan, holding instead that SPDs "provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B)." The Court suggested that relief might be available under § 502(a)(3) of ERISA, which allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress ERISA violations, but made clear that, to recover under that provision, "a plan participant or beneficiary must show that the violation injured him or her." "[A]ctual harm," the Court emphasized, "must be shown." The Court vacated the judgment and remanded the case for the district court to determine in the first instance whether the class members could make this showing.

23. ***Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188 (2d Cir., 601 F.3d 94; cert. granted Sept. 28, 2010; SG as amicus, supporting Respondent; argued on Mar. 1, 2011). Whether a federal agency's response to a Freedom of Information Act request is a "report . . . or investigation" within the meaning of the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4).**

Decided May 16, 2011 (563 U.S. ___). Second Circuit/Reversed and remanded. Justice Thomas for a 5-3 Court (Ginsburg, J., dissenting, joined by Breyer and Sotomayor, JJ.; Kagan, J., took no part in the consideration or decision of the case). The False Claims Act's ("FCA") public disclosure bar, 31 U.S.C. § 3730(e)(4), generally prohibits private parties from bringing qui tam actions to recover fraudulently obtained federal payments if the suits are based on information obtained from a government report or from the news media. Kirk brought a qui tam suit based on information obtained through several Freedom of Information Act ("FOIA") requests for government records. Schindler argued that responses to FOIA requests are government reports within the meaning of the public disclosure bar, and the Court agreed. The FCA does not define "report," so the Court looked to the word's ordinary meaning: something that gives information. This broad definition is consistent with the generally broad scope of the public disclosure bar, especially the open-ended statutory reference to "news media." A response to a FOIA request falls within this broad, ordinary meaning of "report." The drafting history of the FCA also supports this interpretation, since the public disclosure bar was designed to forestall "opportunistic" suits where a plaintiff uses public disclosures to fish for technical violations of regulatory and certification requirements. The Court was untroubled by the fact that different qui tam suits based on the same information might be treated differently depending on the source of the relator's information because, by its plain terms, the public disclosure bar applies to some methods of public disclosure and not to others. The case was remanded for a determination as to whether Kirk's suit was based on transactions disclosed in the FOIA response.

24. ***Montana v. Wyoming*, No. 137 Orig. (On Oct. 12, 2010, the Court set the first exception to the Special Master's First Interim Report for oral argument in due course; argued on Jan. 10, 2011). The State of Montana excepted to the Special Master's conclusion that Montana has no claim under the Yellowstone River Compact for Wyoming's depletion of flows on which**

Montana depended at the time of the Compact, where those depletions result from new consumption of irrigation water on lands in Wyoming that were being irrigated at the time of the Compact.

Decided May 2, 2011 (563 U.S. ___). Original Action/Exception to the Report of the Special Master overruled. Justice Thomas for a 7-1 Court (Scalia, J., dissenting; Kagan, J., took no part in the consideration or decision of the case). The Court held that Montana failed to state a claim that Wyoming had breached Article V(A) of the Yellowstone River Compact. In 1951, Montana, Wyoming, and North Dakota ratified the Yellowstone River Compact, which allocates the river system among the three states. Article V(A) provides that appropriative rights to the beneficial uses of water in the Yellowstone River System existing as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing acquisition and use of water under the appropriation doctrine. The issue before the Court was whether Article V(A) allows Wyoming's pre-1950 water users to increase their consumption of water by improving their irrigation systems, even if it reduces the flow of water to Montana's pre-1950 users. Montana argued that appropriation law does not allow an increase in consumption, and, even if it did, the terms of the Compact amended those principles in Montana's favor. The Court rejected both of Montana's arguments, explaining that appropriation law provides that the first person to divert water from a natural stream and apply it to a beneficial use is senior to a later appropriator, and that Montana's pre-1950 water users are similar to junior appropriators. The Court further explained that the issue was whether a switch to a more efficient irrigation with less return flow was an enlargement of Wyoming's rights to the detriment of Montana's pre-1950 water users. Applying the doctrine of recapture, whereby water users have the right to recapture and reuse runoff water from irrigation, the Court concluded that the doctrine of appropriation allows appropriators to improve their irrigation systems, even to the detriment of downstream appropriators. As to Montana's second argument, the Court reasoned that "beneficial use" in Article V(A) did not mean the measure of the amount of water depleted; rather, it referred to a type of use that depletes the water supply. It concluded that Article V(A) of the Compact did not limit Wyoming's water rights to any specific amount.

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

Decided Apr. 27, 2011 (563 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Scalia for a 5-4 Court (Thomas, J. concurring; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court held that California's judicially imposed rule classifying most collective-arbitration waivers in consumer contracts as unconscionable was preempted by the Federal Arbitration Act ("FAA"). Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision preempts state rules that disproportionately hinder agreements to arbitrate, even if the rules nominally apply to other types of contracts as well. The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." California's rule, in effect, mandates that class-wide procedures be available if either party to the contract demands it. The Court found that

class arbitration under these circumstances is inconsistent with the FAA. Class arbitration is "slower, more costly, and more likely to generate procedural morass" than bilateral arbitration. Class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." As such, California's rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

26. ***United States v. Tohono O'odham Nation*, No. 09-846 (Fed. Cir., 559 F.3d 1284; cert. granted Apr. 19, 2010; argued on Nov. 1, 2010). Under 28 U.S.C. § 1500, the Court of Federal Claims ("CFC") does not have jurisdiction over "any claim for or in respect to which the plaintiff . . . has . . . any suit or process against the United States" or its agents "pending in any other court." The Question Presented is whether 28 U.S.C. § 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.**

Decided Apr. 26, 2011 (563 U.S. ___). Federal Circuit/Reversed and remanded. Justice Kennedy for a 7-1 Court (Sotomayor, J., concurring in the judgment, joined by Breyer, J.; Ginsburg, J., dissenting; Kagan, J., took no part in the consideration or decision of the case). The Court held that 28 U.S.C. § 1500 precludes the Court of Federal Claims from exercising jurisdiction over a suit if the plaintiffs have a second action against the United States already pending before another court that is "based on substantially the same operative facts," even if the two claims seek different relief. The Court explained that, under Section 1500's jurisdictional bar, "[t]he CFC has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." The statutory phrase "for or in respect to" is broadly worded and suggests that the jurisdictional bar prohibits a wider range of cases than those presenting both identical facts and overlapping remedies. Because the actions of an individual defendant relate to the facts of a claim, not the remedy later sought by the plaintiff, the Court reasoned that Section 1500's jurisdictional bar requires only a shared basis of operative fact. Moreover, because the CFC "is the only judicial forum for most non-tort requests for significant monetary relief against the United States," its cases often involve unique requests for relief. Thus, if Section 1500's jurisdictional bar required overlapping relief, it would effectively be rendered "nugatory." Finally, the Court concluded that a robust interpretation of Section 1500 is more consistent with the principles of claim preclusion and better fulfills the statute's preclusive purpose.

Gibson Dunn Partner James C. Ho Argued on Behalf of Respondents While Serving as Solicitor General of Texas

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

Decided Apr. 20, 2011 (563 U.S. ___). Fifth Circuit/Affirmed. Justice Thomas for a 6-2 Court (Sotomayor, J., dissenting, joined by Breyer, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that a State's acceptance of federal funds did not constitute a waiver of its sovereign immunity from private suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Petitioner Sossamon sued the State of Texas and various prison officials in their official capacities for injunctive and monetary relief under RLUIPA, alleging that two prison policies "impose a substantial burden on the religious exercise" of institutionalized persons. The Supreme Court found that RLUIPA's authorization of "appropriate relief against a government," for violations of the statute under 42 U.S.C. § 2000cc-2(a), did not waive state sovereign immunity against private suits for monetary damages because it was "not the unequivocal expression of state consent that our precedents require." The Court found that the term "appropriate relief" is "open-ended and ambiguous about what types of relief it includes," and the Court further explained that it "will not consider a State to have waived its sovereign immunity" where "a statute is susceptible of multiple plausible interpretations, including one preserving immunity." In reaching its conclusion, the Court rejected Petitioner's argument that "because Congress enacted [RLUIPA] pursuant to the Spending Clause, the States were necessarily on notice that they would be liable for damages." Declining to extend "ordinary contract principles" to Spending Clause legislation, the Court explained that "[i]t would be bizarre to create an 'unequivocal statement' rule and then find that every Spending Clause enactment, no matter what its text, satisfies that rule because it includes unexpressed, implied remedies against the States." Petitioner also argued that damages under RLUIPA were authorized under § 1003 of the Rehabilitation Act Amendments of 1986, which, in relevant part, expressly waive state sovereign immunity for violations of "the provisions of any . . . Federal statute prohibiting discrimination by recipients of Federal financial assistance." The Court held that even if "a residual clause like the one in § 1003 could constitute an unequivocal textual waiver," RLUIPA is "not unequivocally a 'statute prohibiting discrimination' within the meaning of § 1003." Instead, RLUIPA prohibits "'substantial burden[s]' on religious exercise."

28. *Virginia Office for Protection & Advocacy v. Stewart,*[3] No. 09-529 (4th Cir., 568 F.3d 110; CVSG Jan. 19, 2010; cert. supported May 21, 2010; cert. granted June 21, 2010; SG as amicus, supporting Petitioner; argued on Dec. 1, 2010). Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex Parte Young*.

Decided Apr. 19, 2011 (563 U.S. ___). Fourth Circuit/Reversed and remanded. Justice Scalia for a 6-2 Court (Kennedy, J., concurring, joined by Thomas, J.; Roberts, C.J., dissenting, joined by Alito, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that *Ex parte Young*, 209 U.S. 123 (1908), allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same State. The Virginia Office for Protection and Advocacy ("VOPA")

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3 This case was previously captioned *Virginia Office for Protection & Advocacy v. Reinhard.*

sued Respondents—state officials in charge of state mental hospitals—in federal district court in an effort to obtain patient records related to deaths and injuries. Respondents argued that they are immune from suit under the Eleventh Amendment, but the district court held that the suit was permitted by the doctrine of *Ex parte Young*, which allows federal courts to award prospective relief against state officials for violations of federal law. Concluding that *Ex parte Young* did not apply because the suit was brought by a state agency, the Fourth Circuit reversed. The Supreme Court disagreed, holding that entertaining VOPA's action is consistent with precedent and does not offend the distinctive interests protected by sovereign immunity. The Court noted that a State's stature is not diminished to any greater degree when its own agency sues to enforce its officers' compliance with federal law than when a private person does so. Moreover, the Court observed, VOPA's power to sue state officials is a consequence of the State's own decision to establish a public protection and advocacy system.

29. ***Cullen v. Pinholster*, No. 09-1088 (9th Cir., 590 F.3d 651; cert. granted June 14, 2010; argued on Nov. 9, 2010). (1) Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not. (2) Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.**

Decided Apr. 4, 2011 (563 U.S. ___). Ninth Circuit/Reversed. Justice Thomas for the Court (Thomas, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia and Kennedy, JJ., joined in full; in which Alito, J., joined as to all but Part II; in which Breyer, J., joined as to Parts I and II; and in which Ginsburg and Kagan, JJ., joined as to Part II. Alito, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed an opinion concurring in part and dissenting in part. Sotomayor, J., filed a dissenting opinion, in which Ginsburg and Kagan, JJ., joined as to Part II.). Pinholster was convicted in state court on two counts of felony murder. At the penalty phase, his trial counsel sought to exclude testimony about Pinholster's history of violent and threatening behavior. His motion was denied, and counsel called only Pinholster's mother and no psychiatric experts, despite having consulted with a psychiatrist who had diagnosed Pinholster with antisocial personality disorder. Sentenced to death, Pinholster twice sought state habeas relief alleging, *inter alia*, ineffective assistance of counsel. He supported his petitions with new evidence, including medical, legal, and school records and psychiatric diagnoses suggesting that he suffered from organic brain damage and had a violent and traumatic childhood. The California Supreme Court rejected his petitions. A federal district court held an evidentiary hearing under 28 U.S.C. § 2254, received this new evidence, and granted habeas relief. The Ninth Circuit affirmed, holding that Pinholster's counsel failed to satisfy his "duty to investigate" his client's background. The Court reversed on grounds that, in cases where there has been a full adjudication of claims on the merits in state court, the record under review in § 2254(d)(1) petitions is limited to the record that was before the state court. Accordingly, the Ninth Circuit committed error when it considered evidence that was introduced for the first time in federal court. The Court also declined to remand for consideration of the limited record. The Court held that the Ninth Circuit had misapplied the "reasonable duty to investigate" standard and the

presumption of competence found in *Strickland v. Washington*, 466 U.S. 668 (1984). In addition, the Court held that the California Supreme Court was correct in concluding that Pinholster was not prejudiced by his counsel's tactical decision to limit mitigation testimony to his mother, as evidence of Pinholster's violent temperament was extensive and psychiatric testimony might have opened the door to damaging rebuttal witnesses.

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

Decided Apr. 4, 2011 (563 U.S. ___). Ninth Circuit/Reversed. Justice Kennedy for a 5-4 Court (Scalia, J., concurring, joined by Thomas, J.; Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). The Court held that the taxpayers lacked standing to bring their Establishment Clause challenge to an Arizona Tax Code provision allowing tax credits for contributions to school tuition organizations ("STOs"). Because STOs use these contributions to provide scholarships to students attending private schools, many of which are religious, a group of Arizona taxpayers challenged the STO tax credit as a violation of the Establishment Clause. Citing the general rule that standing cannot be based on a plaintiff's "mere status as a taxpayer," the Court explained that the taxpayers would instead have to rely on an exception to the general rule set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). *Flast* establishes that taxpayers have standing when (1) there is a "logical link" between the plaintiff's taxpayer status and "the type of legislative enactment attacked," and (2) there is a "nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." As an initial matter, the Court explained that the taxpayers could not show injury in fact because any alleged injury was speculative: By helping students obtain scholarships to private schools, the STO program could relieve the burden placed on Arizona's public schools, which could mean cost savings for the State, and even if the STO tax credit had an adverse effect on Arizona's budget, it would not necessarily mean that taxpayers' tax liability would increase. The Court then turned to the exception in *Flast*, explaining that taxpayers suffer particular injury for standing purposes when, in violation of the Establishment Clause, their property is transferred through the government to a sectarian entity. The Court reasoned that in this case, tax credits differ from governmental expenditures because tax credits do not implicate individual taxpayers in sectarian activities. It explained that the STO tax credit is not a religious tax or tithe and thus did not establish the injury seen in *Flast*. Finally, the Court concluded that the taxpayers could not establish causation or redressability. When the government collects and spends taxpayer money, the resulting subsidy of religious activity is traceable to the government's expenditures, but here, the STO tax credit system is implemented by private action (private taxpayers deciding to contribute to STOs) with no state intervention. The Court also reasoned that because an injunction against application of the tax credit would reduce contributions to STOs, it would not affect noncontributing taxpayers or their tax payments; therefore, any injury suffered by taxpayers would not be remedied by such an injunction.

31. *Tolentino v. New York*, No. 09-11556 (N.Y., 14 N.Y.3d 382; cert. granted Nov. 15, 2010; SG as amicus, supporting Respondent; argued on Mar. 21, 2011). Petitioner pleaded guilty to the aggravated unlicensed operation of a motor vehicle. On appeal, Petitioner contended that his state driving record should have been suppressed as the fruit of a Fourth Amendment violation, on the theory that police obtained his name and driver's license number in the course of an unlawful stop. The New York Court of Appeals held that the exclusionary rule did not apply to Petitioner's driving record under *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), which held that the "'body' or identity of a defendant . . . in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." The Question Presented is whether preexisting identity-related governmental documents such as state motor vehicle records, obtained as the direct result of police action that violates the Fourth Amendment, are subject to the exclusionary rule.

Decided Mar. 29, 2011 (563 U.S. ___). Writ of certiorari dismissed as improvidently granted.

32. *Astra USA, Inc. v. Santa Clara County*, No. 09-1273 (9th Cir., 588 F.3d 1237; cert. granted Sept. 28, 2010; SG as amicus, supporting Petitioner; argued on Jan. 19, 2011). Whether, in the absence of a private right of action to enforce a statute, federal courts have the federal common law authority to confer a private right of action simply because the statutory requirement sought to be enforced is embodied in a contract.

Decided Mar. 29, 2011 (563 U.S. ___). Ninth Circuit/Reversed. Justice Ginsburg for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that § 340B of the Public Health Services Act, 42 U.S.C. § 256b (Oct. 2010 Supp.), which caps sale prices of drugs to certain health care facilities, does not permit those facilities to sue as third-party beneficiaries of the pricing agreements. Drug companies seeking to sell pharmaceuticals to 340B facilities must sign a form agreement known as a Pharmaceutical Pricing Agreement ("PPA"). PPAs cap the price that drug companies may charge when selling to 340B facilities. Santa Clara County, an operator of several 340B facilities, sued nine pharmaceutical companies, alleging that the companies were overcharging in violation of their PPAs. The Court held that the County could not bring suit. The County conceded that the statute did not create a private right of action, but contended that it could sue as a third-party beneficiary of the PPAs. The Court rejected that argument based on three observations. First, the PPAs were not negotiated contracts, but were simply form statements that the pharmaceutical companies would abide by the statute. Thus, suing as a third-party beneficiary would be the same as suing under the law itself, which would circumvent the statute's lack of a private right of action. Second, Congress centralized enforcement of § 340B in the U.S. Department of Health and Human Services, and permitting suits by covered facilities would be antithetical to that purpose. Indeed, the statutory scheme prohibits revealing the prices a manufacturer charges for the drugs it produces, a crucial fact for any PPA-violation suit. Finally, in response to criticisms of § 340B's oversight mechanisms, Congress strengthened central enforcement rather than permitting private suits.

33. *Connick v. Thompson*, No. 09-571 (5th Cir., 578 F.3d 293; cert. granted Mar. 22, 2010, limited to Question 1; argued on Oct. 6, 2010). Whether a

single *Brady* violation by a prosecutor can give rise to a failure-to-train claim sufficient to satisfy the causation and culpability standards for imposing Section 1983 liability on a municipal entity.

Decided Mar. 29, 2011 (563 U.S. ___). Fifth Circuit/Reversed. Justice Thomas for a 5-4 Court (Scalia, J., concurring, joined by Alito, J.; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.). The Court held that a district attorney's office may not be held liable under 42 U.S.C. § 1983 for failing to train its prosecutors based on a single violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court noted that a local government's decision not to train employees about their duties to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983, but that the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton v. Harris*, 489 U.S. 378, 388 (1989). A pattern of similar constitutional violations by untrained employees ordinarily is necessary to demonstrate deliberate indifference. Although, in the ten years before Respondent's trial, Louisiana courts overturned four convictions because of *Brady* violations in Petitioner's office, the Court concluded that those reversals could not have put Petitioner on notice because of their dissimilarity to the *Brady* violation at issue (withholding a crime lab report). Nor was the Court persuaded that the violation fit within the "single-incident" liability hypothesized in *Canton v. Harris*, in which the Court left open the possibility that a pattern of similar violations might not always be necessary to show deliberate indifference. Unlike the *Canton* hypothetical, which involved deploying armed police into the public to capture fleeing felons without training the officers in the constitutional limits on the use of deadly force, *Canton*, 489 U.S. at 390 n.10, the Court concluded that the "obvious need for specific legal training that was present in the *Canton* scenario is absent here." The Court observed that "[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." Lawyers receive training before entering the profession, must satisfy licensing requirements, usually must satisfy continuing education requirements, and often receive on-the-job training from experienced attorneys. In addition, "[p]rosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain." Thus, the Court concluded, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training, and the single-incident liability mentioned in *Canton* does not apply.

34. ***Matrixx Initiatives, Inc. v. Siracusano,* No. 09-1156 (9th Cir., 585 F.3d 1167; cert. granted June 14, 2010; SG as amicus, supporting Respondents; argued on Jan. 10, 2011). Respondents filed suit under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, alleging that Petitioners committed securities fraud by failing to disclose "adverse event" reports—*i.e.*, reports by users of a drug that they experienced an adverse event after using the drug. The Question Presented is the following: Whether a plaintiff can state a claim under § 10(b) of the Securities Exchange Act and Rule 10b-5 based on a pharmaceutical company's nondisclosure of adverse event reports even though the reports are not alleged to be statistically significant.**

Decided Mar. 22, 2011 (563 U.S. ___). Ninth Circuit/Affirmed. Justice Sotomayor for a unanimous Court. The Court held that the materiality analysis in securities fraud suits is a

"fact-specific inquiry" and could not be governed by a bright-line rule. Under § 10(b) of the Securities Exchange Act and Securities and Exchange Commission Rule 10b-5, it is unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5(b). The materiality requirement is satisfied if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988). In this case, Petitioners allegedly received reports that individuals who used their over-the-counter intranasal cold remedy lost their sense of smell. The Court rejected a bright-line rule that the failure to disclose these reports was immaterial because the reports did not achieve a level of statistical significance. Rather, the Court explained, materiality is a "fact-specific inquiry that requires consideration of the source, content, and context of the reports." (Internal quotation marks and citation omitted.) Petitioners adequately alleged that the adverse reports at issue would plausibly have been viewed by a reasonable investor as altering the total mix of information, and that the failure to disclose the reports was done with scienter. Therefore, the complaint contained adequate allegations to survive a motion to dismiss.

35. *Kasten v. Saint-Gobain Performance Plastic*, No. 09-834 (7th Cir., 585 F.3d 310; cert. granted Mar. 22, 2010; SG as amicus, supporting Petitioner; argued on Oct. 13, 2010). The Fair Labor Standards Act ("FLSA") prohibits, *inter alia*, retaliation against any employee who has "filed any complaint" or "instituted or caused to be instituted any proceeding" under or related to FLSA. *See* 29 U.S.C. § 215(a)(3). The Question Presented is whether an oral complaint of a violation of FLSA is protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3).

Decided Mar. 22, 2011 (563 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Breyer for a 6-2 Court (Scalia, J., dissenting, joined by Thomas, J., except as to footnote 6; Kagan, J., took no part in the consideration or decision of the case). The Court held that the phrase "filed any complaint" in the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3), includes oral, as well as written, complaints. In ordinary usage, the term "filed" may refer to both oral or written declarations. Moreover, several statutes, regulations, and judicial opinions at both the state and federal level employ the term to include oral complaints. Although certain provisions of the FLSA use "filed" in the context of certificates and other written instruments, that usage does not preclude the word from referring to oral communication in other contexts. In the absence of a definitive textual interpretation, the Court turned to the FLSA's basic objectives and concluded that removing oral complaints from the statute's coverage would frustrate its purpose of alleviating substandard working conditions, especially among employees ill-equipped to file a written complaint. Both the Secretary of Labor and the Equal Employment Opportunity Commission have consistently interpreted § 215(a)(3) to cover oral complaints, and the Department of Labor has developed a "hotline" to uncover possible unfair labor practices. The Court recognized the persuasive authority of these carefully considered administrative judgments. Because employers might struggle to distinguish between employees who lodge protected oral complaints and those simply "letting off steam," the Court announced that any covered complaint, whether oral or written, "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Finally, the Court declined to reach Saint-Gobain's argument that § 215(a)(3) does not apply to complaints

to private employers, because Respondent did not raise the point in opposition to Kasten's petition for certiorari.

36. *Milner v. Department of the Navy*, No. 09-1163 (9th Cir., 575 F.3d 959; cert. granted June 28, 2010; argued on Dec. 1, 2010). Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion, which applies to materials that are not related solely to internal employee relations but are "predominantly internal" and for which disclosure "would present a risk of circumvention of agency regulation."

Decided Mar. 7, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kagan for an 8-1 Court (Alito, J., concurring; Breyer, J., dissenting). The Court held that the requested data and maps do not qualify for withholding under Exemption 2 of the Freedom of Information Act ("FOIA"), which encompasses only records relating to employee relations and human resources. Exemption 2 protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981), the D.C. Circuit held that Exemption 2 covers not only records relating to employee relations and human resources, but also records whose disclosure would significantly risk circumvention of the law. Relying on this interpretation, the Navy argued that it could withhold data and maps that aid in the storage and transport of explosives because disclosure would risk circumvention of the law by pointing out the best targets to potential attackers. The Court rejected the D.C. Circuit's interpretation of Exemption 2, stating that it has no basis in the text, context, or purpose of FOIA. Because Exemption 2 only shields records relating to employee relations and human resources, the Court held, the explosives data and maps do not qualify for withholding under that exemption. The Court emphasized that the government has other tools at hand—including Exemptions 1, 3, and 7—to shield national security information and other sensitive materials.

37. *Skinner v. Switzer*, No. 09-9000 (5th Cir., 2010 WL 338018; cert. granted May 24, 2010; argued on Oct. 13, 2010). Whether a convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action under 42 U.S.C. § 1983, or whether such a claim may be asserted only in a habeas petition.

Decided Mar. 7, 2011 (562 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Ginsburg for a 6-3 Court (Thomas, J., dissenting, joined by Kennedy and Alito, JJ.). The Court held that a postconviction claim for DNA testing is properly pursued in an action brought pursuant to 42 U.S.C. § 1983, because success in the suit gains the prisoner only access to the DNA evidence. Skinner was sentenced to death in 1995 by a Texas jury for murdering his live-in girlfriend and her two sons. Certain evidence from the crime scene implicated Skinner, but other evidence was left untested. In 2001, Texas enacted a statute allowing prisoners to obtain postconviction DNA testing in certain circumstances. Skinner moved for DNA testing under this statute twice and was denied both times. He then filed a § 1983 action, naming as defendant Switzer, the district attorney whose office has custody of the evidence Skinner would like to have DNA tested, and asserting that her refusal to provide the DNA testing violated his right to due process. His complaint was dismissed. The Court rejected Switzer's argument that Skinner's claims were barred by

the *Rooker-Feldman* doctrine, reasoning that Skinner did not target the state court's judgment, but rather the Texas statute that the state court applied. Reasoning that Skinner properly brought suit under § 1983, the Court applied *Heck v. Humphrey*, 512 U.S. 477 (1994), to conclude that success in his suit for DNA testing would not "necessarily imply" the invalidity of his conviction. Rather, the DNA testing could prove exculpatory, inconclusive, or inculpatory. The Court rejected the notion that its rule would lead to a proliferation of § 1983 actions seeking postconviction discovery of evidence, explaining that such suits will be limited by *District Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009), which precludes the use of substantive due process as a basis for claims like Skinner's, and the Prison Litigation Reform Act of 1995, which imposes procedural constraints on prisoner suits.

38. ***Wall v. Kholi*, No. 09-868 (1st Cir., 582 F.3d 147; cert. granted May 17, 2010; argued on Nov. 29, 2010). Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Antiterrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas petition?**

Decided Mar. 7, 2011 (562 U.S. ___). First Circuit/Affirmed. Justice Alito for a 9-0 Court (Scalia, J., concurring in part). The Court held that a motion to reduce a sentence under Rhode Island law qualifies as an application for "collateral review" that triggers the tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA establishes a one-year limitations period for filing a federal habeas petition but tolls this limitations period during the pendency of "a properly filed application for State post-conviction or other *collateral review* with respect to the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2) (emphasis added). The Court first concluded that "collateral review" of a judgment or claim means judicial reexamination of a judgment or claim in a proceeding outside of the direct review process. The Court next determined that a motion to reduce a sentence under Rhode Island Superior Court Rule of Criminal Procedure 35 satisfies this definition. In so doing, the Court observed that a Rule 35 sentence-reduction proceeding is "collateral" inasmuch as the parties agreed that it is not part of the direct review process and judicial decisions have referred to sentence-reduction motions under former Federal Rule 35 as invoking a "collateral" remedy. In addition, the Court reasoned that a Rule 35 motion "undoubtedly calls for 'review' of the sentence," because it "involves judicial reexamination of the sentence to determine whether a more lenient sentence is proper." In reaching its conclusion, the Court was not persuaded by Rhode Island's arguments (1) that "collateral review" includes only legal challenges to a prior judgment, and thus excludes motions for discretionary sentence reduction, or (2) that the meaning of "collateral review" turns on whether the motion or application that triggers the review is captioned as part of the same criminal case or as a separate proceeding.

39. ***Pepper v. United States*, No. 09-6822 (8th Cir., 570 F.3d 958; cert. granted June 28, 2010; argued on Dec. 6, 2010). There is a conflict among the federal courts of appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a). The Questions Presented are as follows: (1) Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a)**

after *Gall v. United States*. (2) Whether, as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation. (3) Whether, when a district judge is removed from resentencing a defendant after remand and a new judge is assigned, the new judge is obligated under the doctrine of the "law of the case" to follow sentencing findings.

Decided Mar. 2, 2011 (562 U.S. ___). Eighth Circuit/Vacated in part, affirmed in part, and remanded. Justice Sotomayor for a 6-1-1 Court (Breyer, J., concurring in part and concurring in the judgment; Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part; Thomas, J., dissenting; Kagan, J., took no part in the consideration or decision of the case). The Court held that when a defendant's sentence has been set aside on appeal, the resentencing judge may consider evidence of the defendant's post-sentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory Guidelines range. Petitioner had been sentenced to 24 months of imprisonment on drug charges, which included a 75 percent downward departure from the applicable Guidelines range. The Eighth Circuit reversed and remanded in light of *United States v. Booker*, 543 U.S. 220 (2005). On remand, the district judge applied a 40 percent downward departure for substantial assistance and, after considering evidence of Petitioner's post-sentencing rehabilitation, a further 59 percent downward variance, which resulted in another 24-month sentence. The Eighth Circuit reversed and remanded again, and also assigned the case to a different district judge, on grounds that a sentencing court may not consider post-sentencing rehabilitation evidence on remand. The Court held that the plain language of 18 U.S.C. § 3661, which places "[n]o limitation" on the information about a defendant's background and conduct that a sentencing court can consider, permits that court to consider post-sentencing rehabilitation evidence in support of a downward variance after remand. The Court also invalidated 18 U.S.C. § 3742(g)(2), which prohibits the sentencing court on remand from imposing a sentence outside the Guidelines range except on grounds considered by the previous sentencing court. The Court held that the provision ran afoul of *Booker* because it made the Guidelines mandatory in some cases. The Court also held that because the Eighth Circuit vacated Petitioner's sentence and remanded for *de novo* resentencing, under *Greenlaw v. United States*, 554 U.S. 237 (2008), the district judge on remand was not bound by the original sentencing findings, including the 40 percent downward departure.

40. ***Snyder v. Phelps*, No. 09-751 (4th Cir., 580 F.3d 206; cert. granted Mar. 8, 2010; argued on Oct. 6, 2010). After Respondents—a church and several individuals—protested the funeral of a United States Marine, the deceased Marine's father brought an action for defamation, intentional infliction of emotional distress, and invasion of privacy. The jury returned a verdict in favor of the father, after which the Fourth Circuit set aside the jury's verdict on First Amendment grounds. The Questions Presented are the following: (1) Does the prohibition of awarding damages to public figures to compensate for intentional infliction of emotional distress apply to a case involving two private persons and a private matter? (2) Does the First Amendment's freedom of speech trump the First Amendment's freedoms of religion and peaceful assembly? (3) Does an individual attending a family member's funeral constitute a "captive audience" who is entitled to state protection from unwanted communication?**

Decided Mar. 2, 2011 (562 U.S. ___). Fourth Circuit/Affirmed. Chief Justice Roberts for an 8-1 Court (Breyer, J., concurring; Alito, J., dissenting). The Court held that the First Amendment shields members of the Westboro Baptist Church from tort liability for their speech in picketing near a soldier's funeral service, because the speech was primarily a commentary on broader public issues rather than a private act of harassment targeted at the fallen soldier and his family. To broadcast its view that God punishes the United States for its tolerance of homosexuality, especially in the military, the Westboro Baptist Church picketed on public land approximately 1,000 feet from the military funeral of the Petitioner's son. The picketers carried anti-American signs and anti-military signs with messages like "God Hates the USA/Thank God for 9/11" and "You're Going to Hell." Based on the picket, a jury found the church liable for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The Court, after independently reviewing the "content, form, and context" of the speech, concluded that the speech was entitled to "'special protection' under the First Amendment," because it "was at a public place on a matter of public concern." The Court explained that the "overall thrust and dominant theme [of the statements] . . . spoke to broader public issues," such as "the political and moral conduct of the United States and its citizens." Although the speech is subject to reasonable time, place, and manner restrictions, the picket occurred on public land next to a public street, was nonviolent, complied with local police guidance regarding picketing, and was not unruly. The "special protection" afforded the speech, the Court concluded, could not be overcome by a jury finding that the picketing was "outrageous." With regard to the state-law claim for intrusion upon seclusion, the Court declined to extend the "captive audience doctrine," which protects unwilling listeners from protected speech, when the Church stayed well away from the service and there was no indication that the picketing in any way interfered with the funeral itself.

41. ***FCC v. AT&T Inc.*, No. 09-1279 (3d Cir., 582 F.3d 490; cert. granted Sept. 28, 2010; argued on Jan. 19, 2011). Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The Question Presented is the following: Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.**

Decided Mar. 1, 2011 (562 U.S. ___). Third Circuit/Reversed. Chief Justice Roberts for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that corporations lack "personal privacy" interests for the purposes of Exemption 7(C) of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C). The Administrative Procedure Act, *see* 5 U.S.C. § 551(2), which governs FOIA's terminology, defines "person" to include corporations. However, the term "personal" is left undefined, and an adjective need not convey the same meaning as an associated noun. Therefore, the ordinary meaning of "personal" controls. Its most basic definition is simply "[o]f or pertaining to a particular person," but more thorough definitions and the word's ordinary usage reveal that the term applies specifically to individuals. Moreover, the context provided by FOIA confirms that it does not award corporations "personal" interests. The statute protects "personal privacy," a nuanced phrase that connotes "human concerns." Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6), regulates disclosures of "personnel and medical files" that amount to an "invasion of personal privacy," and the Court has consistently regarded that provision as protecting an individual's privacy right. *See Department of State v. Ray*, 502 U.S. 164, 175 (1991). By contrast, Exemption 4 of

FOIA, 5 U.S.C. § 552(b)(4), protects corporate information by referring not to "personal privacy," but to "privileged or confidential" documents. Ascribing the same meaning to the identical words in Exemptions 6 and 7(C), the Court concluded that the latter cannot apply to corporations.

42. *Staub v. Proctor Hospital*, No. 09-400 (7th Cir., 560 F.3d 647; CVSG Nov. 9, 2009; cert. supported Mar. 16, 2010; cert. granted Apr. 19, 2010; SG as amicus, supporting Petitioner; argued on Nov. 2, 2010). In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced, but did not make, the ultimate employment decision?

Decided Mar. 1, 2011 (562 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Scalia for an 8-0 Court (Alito, J., concurring in the judgment, joined by Thomas, J.; Kagan, J. took no part in the consideration or decision of the case). The Court held that, under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), an employer is liable if "a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action," even if the supervisor is not the ultimate decisionmaker behind the adverse action. (Emphasis in the Court's opinion.) USERRA, which the Court noted is "very similar to Title VII," bars an employer from taking an adverse employment action against an employee on the ground that the employee "is a member of . . . or has an obligation to perform service in a uniformed service." 38 U.S.C. § 4311(a). An employer is deemed to have engaged in a prohibited action if the employee's membership in a uniformed service is "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." *Id.* § 4311(c). Staub was terminated after a human resources officer reviewed his file, which contained a disciplinary warning that Staub contended was given under false pretenses because of his supervisor's hostility to his obligations as an Army Reservist. The supervisor who issued the warning was not the person who made the decision to terminate Staub's employment. Relying on "the background of general tort law," the Court noted that the later exercise of judgment by the decisionmaker does not prevent an earlier action "from being the proximate cause of the harm." Thus, so long as no later event constitutes a superseding cause of the adverse employment action, the employer can be held liable for the supervisor's action.

43. *Henderson v. Shinseki*, 09-1036 (Fed. Cir., 589 F.3d 1201; cert. granted June 28, 2010; argued on Dec. 6, 2010). Whether the time limit in 38 U.S.C. § 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.

Decided Mar. 1, 2011 (562 U.S. ___). Federal Circuit/Reversed and remanded. Justice Alito for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that a statutory 120-day filing deadline for appeals to the Veterans Court was not "jurisdictional." A veteran must file an appeal from the Department of Veterans Affairs ("VA") to the Veterans Court within 120 days of the VA mailing its final decision. Petitioner Henderson appealed his VA claim denial to the Veterans Court, but he missed the filing deadline. The Veterans Court equitably tolled the 120-day limit and docketed his appeal. While Henderson's appeal was pending, however, the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that a statutory limit on the length

of an extension of the time to file an appeal in a civil case is "jurisdictional." Relying on *Bowles*, the Veterans Court determined that the 120-day filing deadline was "jurisdictional" and therefore could not be equitably tolled. The Veterans Court dismissed Henderson's appeal for lack of jurisdiction, and the Federal Circuit affirmed. The Supreme Court reversed. The Court first held that *Bowles* did not apply to all statutory deadlines for taking appeals in civil cases, but only appeals from one court to another court. Next, the Court concluded that none of the existing cases on appeals from agency decisions controlled because none of them involved appeals to an Article I tribunal like the Veterans Court. Finally, the Court concluded that Congress did not intend for the deadline to be jurisdictional, noting that (1) the statute's language did not mention jurisdiction; (2) the provision resided in the subchapter titled "Procedure" and not the subchapter titled "Organization and Jurisdiction"; and (3) the veterans' benefits claims process is designed to favor veterans.

44. *Michigan v. Bryant*, No. 09-150 (Mich., 768 N.W.2d 65; cert. granted Mar. 1, 2010; SG as amicus, supporting Petitioner; argued on Oct. 5, 2010). Whether preliminary inquiries of a wounded individual concerning the perpetrator and circumstances of the shooting are nontestimonial for the purpose of the Confrontation Clause because the inquiries were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" (with that "emergency" including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual).

Decided Feb. 28, 2011 (562 U.S. ___). Michigan Supreme Court/Vacated and remanded. Justice Sotomayor for a 6-2 Court (Thomas, J., concurring in the judgment; Scalia, J., dissenting; Ginsburg, J., dissenting; Kagan, J., took no part in the consideration or decision of the case). The Court held that admission of statements of a mortally wounded man with respect to the identity and method of his killer did not violate the Confrontation Clause because the statements were not testimonial. A statement is not testimonial, the Court observed, if it is obtained by police under circumstances objectively indicating that the primary purpose of interrogation is to enable police to meet an ongoing emergency. Petitioner argued that there was no such ongoing emergency because there was no ongoing criminal conduct. The Court ruled, however, that there was an ongoing emergency because an armed shooter whose motive and location were unknown was within a few blocks of a mortally wounded victim. In addition, the Court ruled that the officers' questions, which were directed at assessing the situation, and the circumstances of the interrogation, which were informal, indicated that the primary purpose of interrogation was to enable police to meet that emergency. Because the statements were not testimonial, their admission did not violate the Confrontation Clause.

45. *Williamson v. Mazda Motor of America, Inc*., No. 08-1314 (Cal. Ct. App., 84 Cal. Rptr. 3d 545; CVSG Oct. 5, 2009; cert. supported but limited to the first Question Presented Apr. 23, 2010; cert. granted May 24, 2010, limited to Question 1; SG as amicus, supporting Petitioners; argued on Nov. 3, 2010). Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in

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

Decided Feb. 23, 2011 (562 U.S. ___). Court of Appeal of California, Fourth Appellate District, Division Three/Reversed. Justice Breyer for an 8-0 Court (Sotomayor, J., concurring; Thomas, J., concurring in the judgment; Kagan, J., took no part in the consideration or decision of the case). The Court held that Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") does not preempt state tort suits claiming that manufacturers should have installed lap-and-shoulder belts, instead of lap belts, on rear inner seats. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court found that an earlier version of FMVSS 208, which required installation of passive restraint devices, preempted a state tort suit that sought to hold an auto manufacturer liable for failure to install a particular kind of passive restraint: airbags. Like the regulation in *Geier*, the instant regulation leaves the manufacturer with a choice—which type of seatbelt to install on rear inner seats—and the tort suit here would restrict that choice. But unlike in *Geier*, the Court held, the preservation of that choice is not a significant objective of the federal scheme. In *Geier*, the regulation's history, the agency's contemporaneous explanation, and the agency's consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives, whereas here, the Court concluded, these same considerations indicate the contrary.

46. ***Walker v. Martin*, No. 09-996 (9th Cir., 2009 WL 4884581; cert. granted June 21, 2010; argued on Nov. 29, 2010). Whether, in federal habeas corpus proceedings, a state law under which a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition is "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the State failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases.**

Decided Feb. 23, 2011 (562 U.S. ___). Ninth Circuit/Reversed. Justice Ginsburg for a unanimous Court. The Court held that California's time limitation on applications for habeas corpus relief qualifies as an independent state ground that is adequate to bar habeas relief in federal court. Unlike the majority of States, California does not provide a fixed numerical statutory deadline for determining the timeliness of a state prisoner's habeas petition. Instead, California courts must apply a "reasonableness standard" to assess whether the petition was "filed as promptly as the circumstances allow." Under this standard, prisoners must seek habeas relief "without 'substantial delay.'" Martin filed his habeas petition directly to the California Supreme Court nearly five years after he was sentenced to life in prison for robbery and murder. He did not explain the delay, and the state court summarily denied his petition. Martin argued that California's rule was not an adequate procedural ground barring federal relief because California's rule was "too vague to be regarded as 'firmly established'" and was "not regularly followed." Rejecting that argument, the Court held that California's rule was "firmly established" despite being discretionary, because application of the rule by the California courts supplied the "the requisite clarity" and made it "altogether plain" that a five-year delay was "substantial." The Court also held that the rule was regularly followed, despite sometimes yielding inconsistent outcomes, because "[d]iscretion enables a court to home in on case-specific considerations and to avoid harsh results that sometimes attend consistent application of

an unyielding rule." In reaching its holding, the Court noted that "there [was] no basis for concluding that California's timeliness rule operates to the particular disadvantage of petitioners asserting federal rights."

47. ***Bruesewitz v. Wyeth, Inc.*, No. 09-152 (3d Cir., 561 F.3d 233; cert. granted Mar. 8, 2010; SG as amicus, supporting Respondents; argued on Oct. 12, 2010). Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 expressly preempts certain design-defect claims against vaccine manufacturers "if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The Question Presented is whether Section 22(b)(1) preempts all vaccine design-defect claims, regardless of whether the vaccine's side effects were unavoidable.**

Decided Feb. 22, 2011 (562 U.S. ___). Third Circuit/Affirmed. Justice Scalia for a 6-2 Court (Breyer, J., concurring; Sotomayor, J., dissenting, joined by Ginsburg, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that the National Childhood Vaccine Injury Act of 1986 ("NCVIA") preempts all design-defect claims against vaccine manufacturers that seek compensation for injury or death caused by vaccine side effects. The NCVIA provides that "[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death," "if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." Hannah Bruesewitz was given doses of DTP vaccine according to the Center for Disease Control's recommended childhood immunization schedule; within 24 hours of the vaccination, Hannah began having seizures and she was later diagnosed with a seizure disorder. Her parents followed proper procedures under the NCVIA and ultimately sued the manufacturer under state law for defective design. The Court reasoned that the statutory phrase "even though" draws the line between what is and is not considered "unavoidable" under the statute. If the vaccine was properly manufactured and accompanied by proper warnings (both of which are regulated by the FDA), then side effects resulting from other factors are deemed unavoidable—and that includes side effects from defective design. The Court further explained that if a manufacturer could be held liable for defective design, then "unavoidable" would have no meaning because side effects could always be avoided by a different design. This means, the Court reasoned, that the design of the vaccine is a given and thus not subject to question in the tort action allowable under the NCVIA. The Court found further support for its statutory construction in the fact that there are three bases for product liability—defective manufacture, inadequate directions or warnings, and defective design—and only two of the three were expressly preserved by the provision, which suggests the third was not meant to be left to implication.

48. ***CSX Transportation, Inc. v. Alabama Department of Revenue*, No. 09-520 (11th Cir., 350 F. App'x 318; CVSG Feb. 22, 2010; cert. supported May 14, 2010; cert. granted June 14, 2010; SG as amicus, supporting Petitioner; argued on Nov. 10, 2010). When a State exempts the competitors of rail carriers—but not rail carriers themselves—from generally applicable sales and use taxes on fuel, does that make such taxes subject to challenge under 49 U.S.C. § 11501(b)(4) as a tax that discriminates against a rail carrier?**

Decided Feb. 22, 2011 (562 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Kagan for a 7-2 Court (Thomas, J., dissenting, joined by Ginsburg, J.). The Court held that an interstate rail carrier may invoke the Railroad Revitalization and Regulatory Reform Act's so-called catch-all provision, which prohibits state and local governments from imposing a "tax that discriminates against a rail carrier," to challenge Alabama's sales and use taxes. Rail carriers pay these taxes when they purchase and use diesel fuel, while interstate motor and water carriers generally are exempt from these taxes. The Court concluded that an excise tax, like Alabama's sales and use taxes, qualifies as a "tax" under the catch-all provision and that a tax "discriminates against a rail carrier" when a State exempts other entities from it. Rejecting Alabama's position that the distinction drawn in the Act is between rail carriers and local entities, the Court concluded that the Act's prohibition of discrimination applies whether the discrimination benefits local or interstate entities. Thus, a state excise tax that applies to railroads but exempts interstate entities is subject to challenge under the Act's catch-all provision. The Court rejected the notion that its holding in this case will convert railroads into "most-favored-taxpayers." Instead, whether the railroad ultimately prevails will depend upon the adequacy of the State's justification for declining to extend the exemption to rail carriers. The Court also distinguished its decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), which holds that a railroad cannot invoke the Act's catch-all provision to challenge a generally applicable property tax on the grounds that non-railroad property is exempted. The Court in *ACF Industries* concluded that the Act's provisions that specifically address property taxes permit States to impose property taxes on railroads while exempting other entities; thus, allowing challenges to such taxes under the catch-all provision would "subvert the statutory plan." *Id.* at 340. This structural analysis, the Court noted, is inapplicable to Alabama's sales-and-use-tax exemptions because, unlike in *ACF Industries*, no other provisions in the Act reveal an intent to permit such exemptions.

49. ***Ortiz v. Jordan*, No. 09-737 (6th Cir., 316 F. App'x 449; cert. granted Apr. 26, 2010; argued on Nov. 1, 2010). Plaintiff Ortiz brought a 42 U.S.C. § 1983 suit after an alleged sexual assault by a state corrections officer. Defendants filed a pretrial motion for summary judgment on qualified-immunity grounds, among others. The district court denied the motion, and the Defendants did not immediately appeal that ruling. After the jury found Defendants liable, they did not renew their motion for judgment as a matter of law. The court of appeals overturned the judgment, holding that Defendants were entitled to qualified immunity. The Question Presented is whether a party may appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial.**

Decided Jan. 24, 2011 (562 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Ginsburg for a 9-0 Court (Thomas, J., concurring in the judgment, joined by Scalia and Kennedy, JJ.). The Court held that a denial of summary judgment was not appealable after a trial on the merits. Ordinarily, a trial court's denial of a motion for summary judgment is not immediately appealable as a final order. When the summary judgment motion is based on a plea of qualified immunity, the denial is appealable because the order is a final decision that denies the defendant the right not to stand trial. If the defendant chooses not to appeal the decision denying the qualified immunity plea immediately, however, any subsequent appeal may not challenge the summary judgment ruling. "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." After trial, the defendant may reassert his qualified immunity defense only by challenging the sufficiency of the plaintiff's evidence

under Federal Rule of Civil Procedure 50(a) and (b). Although the Defendants in this case made such a motion after the Plaintiff's case-in-chief, and again at the close of all evidence, they failed to renew the motion post-verdict as required by the Rule. As a result, the Court of Appeals could not consider the sufficiency of the evidence as it pertained to the qualified immunity defense, and the Defendants could not challenge the judge's earlier denial of the qualified immunity summary judgment motion.

50. *Thompson v. North American Stainless, LP*, No. 09-291 (6th Cir., 567 F.3d 804; CVSG Dec. 14, 2009; cert. opposed May 25, 2010; cert. granted June 29, 2010; SG as amicus, supporting Petitioner; argued on Dec. 7, 2010). Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The Questions Presented are as follows: (1) Does § 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party—such as a spouse, family member, or fiancé—who is closely associated with the employee who engaged in such protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?

Decided Jan. 24, 2011 (562 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Scalia for an 8-0 Court (Ginsburg, J., concurring, joined by Breyer, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that (1) Title VII prohibits employers from retaliating against an employee who filed a Title VII charge by firing that employee's fiancé or other close family member and (2) Title VII grants the terminated family member a cause of action. Firing an employee's close relative violates Title VII's anti-retaliation provision because it is "obvious that a reasonable worker might be dissuaded" from filing a discrimination charge if she knew her fiancé might be fired. The Court thereby extended the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), to some instances of third-party reprisal. In light of the anti-retaliation provision's broad wording, the Court declined to delimit the category of "close family member[s]," but it did require that the standards for judging harm to relatives be objective. Title VII grants close relatives a cause of action because they fall within the "zone of interests" protected by the statute. The anti-retaliation provision protects employees, and a terminated close relative would have been, by definition, an employee of the retaliating defendant. Although the zone-of-interests standard presents a more stringent bar to potential plaintiffs than mere Article III standing, a "person aggrieved" under the anti-retaliation provision need not be the same employee who had previously alleged discrimination.

51. *Chase Bank USA, N.A. v. McCoy*, No. 09-329 (9th Cir., 559 F.3d 963; CVSG Jan. 25, 2010; GVR recommended May 19, 2010; cert. granted June 21, 2010; SG as amicus, supporting Petitioner; argued on Dec. 8, 2010). When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does "Regulation Z," 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

Decided Jan. 24, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that at the time of the transaction at issue, Regulation Z, 12 C.F.R. § 226.9(c), did not require a change-in-terms notice before

implementing an agreement term raising a cardholder's rate after delinquency or default. The meaning of a change to a "term required to be disclosed under § 226.9(c)(1)" as per Regulation Z was ambiguous. Under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Court defers to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the rule. In an amicus brief, the promulgating agency, the Federal Reserve Board, clarified that it interpreted Regulation Z as not requiring a creditor to give notice before it raises a cardholder's rate after default. There was no reason to suspect that the interpretation was a post-hoc litigation position, since the Board was not a party to the case. Nor did the amended version of Regulation Z now in force shed light on the reasonableness of the Board's interpretation of the then-current rule. Finally, McCoy erred in his attempt to use an Official Staff Commentary to show that the Board interpreted Regulation Z differently at the time of the transaction, since the Commentary simply replicated the ambiguity inherent in the rule.

52. ***Harrington v. Richter*, No. 09-587 (9th Cir., 578 F.3d 944; cert. granted and additional Question Presented added by the Court Feb. 22, 2010; argued on Oct. 12, 2010). (1) In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state-court judgment the deference mandated by 28 U.S.C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt? (2) Does the Antiterrorism and Effective Death Penalty Act of 1996's deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?**

Decided Jan. 19, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for an 8-0 Court (Ginsburg, J., concurring; Kagan, J., took no part in the consideration or decision of the case). The Court held that 28 U.S.C. § 2254(d)'s limits on the availability of federal habeas relief apply to Respondent Richter's petition and that Richter is not entitled to the habeas relief ordered by the Ninth Circuit. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 2254(d) bars relitigation of a claim "adjudicated on the merits" in state court unless the state court decision involved an "unreasonable application" of "clearly established Federal law." The Court rejected the argument that § 2254(d) does not apply to Richter's petition because the California Supreme Court issued only a summary ruling, asserting that nothing in the statute's text requires a statement of reasons. Moreover, because federal habeas relief is unavailable as long as "fair-minded jurists could disagree" on the correctness of the state court decision, the Ninth Circuit failed to accord the required deference to the decision of the California Supreme Court. Finally, the Court concluded that the Ninth Circuit erred in holding that Richter demonstrated an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), by the state court. According to the Court, the state court could have reasonably concluded that counsel provided adequate representation and that Richter did not establish a reasonable likelihood that the verdict would have been different had counsel acted differently.

53. ***National Aeronautics & Space Administration v. Nelson*, No. 09-530 (9th Cir., 530 F.3d 865; 568 F.3d 1028; cert. granted Mar. 8, 2010; argued on Oct. 5, 2010). (1) Whether the government violates a federal contract employee's**

constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. § 552a. (2) Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the references' responses are used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. § 552a.

Decided Jan. 19, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Alito for an 8-0 Court (Scalia, J., concurring in the judgment, joined by Thomas, J.; Thomas, J., concurring in the judgment; Kagan, J., took no part in the consideration or decision of the case). The Court held that a common government background check of federal contract employees does not violate the Constitution. Assuming without deciding that the Constitution protects a privacy interest in avoiding disclosure of personal matters, the Court concluded that, whatever the scope of that interest, it does not prevent the government from asking reasonable questions of the sort included on the challenged government forms in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure. Judicial review of the government's background check, the Court stated, must take account of the fact that the government is in this context acting as a proprietor and not as a sovereign. Here, the government's background check—including its questions on treatment for recent illegal-drug use and its open-ended questions to landlords—constituted a reasonable investigation that is common in the private sector. Moreover, the results of the background investigation are subject to substantial protections against public disclosure under the Privacy Act. Because the Privacy Act protects against disclosure and the challenged portions of the investigation were reasonable inquiries in an employment background check, the government background check did not violate a constitutional right.

54. *Premo v. Moore*,[4] No. 09-658 (9th Cir., 574 F.3d 1092; cert. granted Mar. 22, 2010; argued on Oct. 12, 2010). (1) Whether the *Fulminante* standard—that the erroneous admission of a coerced confession at trial is not harmless—applies when a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no-contest plea, even though no record of a trial is available for review. (2) Whether, if the *Fulminante* standard applies, it is "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1).

Decided Jan. 19, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Kennedy for an 8-0 Court (Ginsburg, J., concurring in the judgment; Kagan, J., took no part in the consideration or decision of the case). The Court held that Moore was not

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4 This case was previously captioned *Belleque v. Moore*.

entitled to habeas relief because his counsel did not provide ineffective assistance and Moore suffered no prejudice. Moore pleaded no contest to a felony murder charge on the advice of counsel, receiving the minimum sentence allowed by law. Later, he filed for postconviction relief, and ultimately habeas relief, claiming he had been denied effective assistance of counsel because his lawyer failed to seek suppression of his confession before advising him regarding the plea. The Court stated that the "relevant clearly established law derives from *Strickland v. Washington*, 466 U.S. 668 (1984)" and that the Ninth Circuit incorrectly relied on *Arizona v. Fulminante*, 499 U.S. 279 (1991), which "says nothing about the *Strickland* standard[s] of effectiveness" and prejudice. The Court held that the state court was reasonable in finding that Moore had not established ineffective assistance of counsel "in light of Moore's other full and admissible confession" to two witnesses willing to testify. With respect to the prejudice requirement, the Court found that Moore failed to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" under *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Finally, the Court stressed that "strict adherence to the *Strickland* standard [was] all the more essential" because this case arose in the context of a plea bargain.

55. ***Ransom v. FIA Card Services, N.A., f/k/a MBNA, American Bank, N.A.*, No. 09-907 (9th Cir., 577 F.3d 1026; cert. granted Apr. 19, 2010; SG as amicus, supporting Respondent; argued on Oct. 4, 2010). The trustee objected to confirmation of Petitioner Ransom's Chapter 13 plan on the ground that Ransom's transportation ownership cost should be disallowed. Ransom sought the ownership cost deduction—which would reduce Ransom's disposable income used to pay creditors—even though he owns his car free and clear. The Question Presented is the following: In calculating a debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B), may a bankruptcy court allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles?**

Decided Jan. 11, 2011 (562 U.S. ___). Ninth Circuit/Affirmed. Justice Kagan for an 8-1 Court (Scalia, J., dissenting). The Court held that a debtor who owns his or her vehicle outright—and therefore does not make loan or lease payments—may not deduct "vehicle ownership" costs when calculating his or her Chapter 13 payment plan. 11 U.S.C. § 707(b)(2)(A)(ii)(I) permits certain debtors to deduct "applicable monthly expense amounts specified under the National Standards and Local Standards," which refer to IRS tables that list standardized expense amounts for basic necessities. The Local Standards, in turn, include an allowance for vehicle ownership and operating expenses. The Court concluded that, in this context, the statutory term "applicable" means that the expenses must have "correspondence to an individual debtor's financial circumstances." Specifically, the debtor must have had "costs corresponding to the category covered by the [National or Local Standards] table." The Court concluded that the amount listed in the Local Standards for vehicle ownership costs represents "the average monthly payment for loans and leases nationwide [and] is not intended to estimate other conceivable expenses associated with maintaining a car." Thus, the Court held, a person who owns a car free and clear is entitled to claim a deduction for operating costs, but not for ownership costs. The Court found that supplemental IRS guidelines, which instruct that "[i]f a taxpayer has no car payment, . . . only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense," reinforced its conclusion.

Gibson Dunn – Counsel for Mayo Foundation for Medical Education and Research, et al.

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

Decided Jan. 11, 2011 (562 U.S. ___). Eighth Circuit/Affirmed. Chief Justice Roberts for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court considered whether doctors who serve as medical residents are "students" exempt from Federal Insurance Contributions Act ("FICA") taxes. Mayo and the other petitioners offer medical residency programs that provide doctors who have graduated from medical school the opportunity to pursue additional education in a specialty to become board certified to practice in that field. These residency programs train doctors through hands-on experience. Residents take part in a formal education program, but also spend 50 to 80 hours per week caring for patients. Pursuant to FICA, services performed by students who are employed by a university or other school at which they are enrolled are exempt from FICA taxes. After years of litigation regarding the applicability of this exemption to medical residents, the Treasury Department promulgated a rule excluding all full-time employees from the exemption (the "full-time employee rule"). Applying *Chevron*, the Court concluded that FICA is silent as to whether medical residents qualify for the exemption. Rejecting Mayo's argument for applying the multi-factor standard for judicial review of tax regulations from *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472 (1979), the Court proceeded to the second step of the *Chevron* analysis, reasoning that *Chevron* and *United States v. Mead Corp.*, 533 U.S. 218 (2001), provide the appropriate framework for evaluating the full-time employee rule. The Court then held that the full-time employee rule was a reasonable construction of the statute, which the Treasury Department reasonably found would improve administrability and further the purposes of the Social Security Act.

Gibson Dunn – Counsel for Intel Corporation as *Amicus Curiae* in Support of Petitioner

57. *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (9th Cir., 541 F.3d 982; CVSG Oct. 5, 2009; cert. opposed Mar. 17, 2010; cert. granted Apr. 19, 2010; SG as amicus, supporting Respondent; argued on Nov. 8, 2010). Under the Copyright Act's first sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135, 138 (1998), the Court posed the Question Presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The Question Presented in this case is the following: Whether the Ninth Circuit correctly held that the first sale doctrine does not apply to imported goods manufactured abroad.

Decided Dec. 13, 2010 (562 U.S. ___). Ninth Circuit/Affirmed by an equally divided Court. Per Curiam (Kagan, J., took no part in the consideration or decision of the case). The judgment was affirmed by an equally divided Court.

58. *Los Angeles County v. Humphries*, No. 09-350 (9th Cir., unreported decision below; cert. granted Feb. 22, 2010, limited to Question 1; argued on Oct. 5, 2010). Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom, or practice attributable to the local public entity, or are such claims exempt from *Monell*'s requirement?

Decided Nov. 30, 2010 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Breyer for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that the "policy or custom" requirement from *Monell v. Department of Social Services*, 436 U.S. 658 (1978), applies to all § 1983 claims regardless of the nature of the relief sought. Respondents, after being exonerated from suspected child abuse, filed a § 1983 suit to have their names removed from a California state registry listing incidents of suspected child abuse. *Monell* limits municipal liability under § 1983 to violations of rights resulting from a municipal "policy or custom." Los Angeles County argued that because state law—not a municipal "policy or custom"—created the registry, *Monell* barred the Humphries' suit. The Ninth Circuit rejected the County's argument, holding that *Monell* applied only to claims for monetary relief and not to claims for prospective relief. The Supreme Court reversed, applying *Monell*'s "policy or custom" requirement to all § 1983 claims against municipalities and rejecting any distinction between prospective and monetary relief. The Court noted that § 1983 itself is not limited to prospective relief, but authorizes an "action at law, suit in equity, or other proper proceeding." Moreover, *Monell* by its own terms applies to "declaratory or injunctive relief." Finally, although *Monell* involved only a claim for damages, the Court held that *Monell*'s logic applies equally to prospective relief.

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

59. *Abbott v. United States*, No. 09-479 (3d Cir., 574 F.3d 203; cert. granted and case consolidated with No. 09-7073 on Jan. 25, 2010; argued on Oct. 4, 2010); *Gould v. United States*, No. 09-7073 (5th Cir., 329 F. App'x 569; cert. granted and case consolidated with No. 09-479 on Jan. 25, 2010; argued on Oct. 4, 2010). 18 U.S.C. § 924(c)(1)(A) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or . . . in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is . . . provided . . . by any other provision of law." The Questions Presented are: (1) Does the term "any other provision of law" include the underlying drug-trafficking offense or crime of violence? (2) If not, does it include another offense for possessing the same firearm in the same transaction? (3) Does the mandatory minimum sentence provided by § 924(c)(1)(A) apply to a count when another count already carries a greater mandatory minimum sentence?

Decided Nov. 15, 2010 (562 U.S. ___). Third Circuit and Fifth Circuit/Affirmed. Justice Ginsburg for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the cases). "Congress made it a discrete offense to use, carry, or possess a deadly weapon in connection with 'any crime of violence or drug trafficking crime.'" Slip op. at 1 (quoting 18 U.S.C. § 924(c)(1)). The "minimum prison term for the offense described in § 924(c) is five years, § 924(c)(1)(A)(i), in addition to 'any other term of imprisonment imposed on the [offender],' § 924(c)(1)(D)(ii)." Slip op. at 1. In this case, Defendants argued that

they should not have received five-year consecutive sentences under § 924(c) because they also received longer mandatory minimum prison terms for convictions on different counts. They grounded this argument in § 924(c)(1)(A)'s so-called "except" clause, under which a minimum, consecutive five-year term is imposed "[e]xcept to the extent that a greater minimum sentence is otherwise provided by [§ 924(c)] or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). Defendants maintained that Congress intended the "except" clause to ensure that any person violating § 924(c) would serve at least five years in prison; in their view, § 924(c)'s penalty is inoperative if a conviction on a different count leads to a greater mandatory sentence. The Court rejected Defendants' argument, holding "that a defendant is subject to a mandatory, consecutive sentence for a § 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." According to the Court, the "except" clause means that if another federal statute mandates a punishment *for using, carrying, or possessing a firearm in connection with a drug trafficking crime or a crime of violence*, and that minimum prison term is longer than the punishment that would be applicable under § 924(c), the longer sentence applies. The Court explained that, because the "except" clause is a proviso attached to § 924(c), it is sensibly interpreted as referring to the conduct that § 924(c) prohibits. Moreover, Defendants' argument—under which § 924(c) would frequently impose no penalty whatsoever for conduct independently criminalized by that provision—was inconsistent with § 924(c)'s purpose of insisting "that sentencing judges impose *additional* punishment for § 924(c) violations."

Pending Cases

Gibson Dunn – Counsel for Microsoft Corporation as *Amicus Curiae* in Support of Respondents

1. ***Brown v. Entertainment Merchants Association*,**[5] **No. 08-1448 (9th Cir., 556 F.3d 950; cert. granted Apr. 26, 2010; argued on Nov. 2, 2010). California Civil Code §§ 1746–1746.5 prohibit the sale of violent video games to minors under the age of 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The Questions Presented are: (1) Does the First Amendment bar a State from restricting the sale of violent video games to minors? (2) If the First Amendment applies to violent video games that are sold to minors and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?**

2. ***J. McIntyre Machinery, Ltd. v. Nicastro*, No. 09-1343 (N.J., 987 A.2d 575; cert. granted Sept. 28, 2010; case argued in tandem with No. 10-76, *Goodyear Luxembourg Tires, S.A. v. Brown*; argued on Jan. 11, 2011). Does a "new**

5 This case was previously captioned *Schwarzenegger v. Entertainment Merchants Association*.

reality" of "a contemporary international economy" permit a State to exercise, consonant with due process under the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream-of-commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

3. ***Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76 (N.C., 364 N.C. 12; cert. granted Sept. 28, 2010; case argued in tandem with No. 09-1343, *J. McIntyre Machinery, Ltd. v. Nicastro*; SG as amicus, supporting Petitioner; argued on Jan. 11, 2011). Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products placed in the stream of commerce by the defendant.**

4. ***Smith v. Bayer Corp*., No. 09-1205 (8th Cir., 593 F.3d 716; cert. granted Sept. 28, 2010; argued on Jan. 18, 2011). (1) Although the Anti-Injunction Act (the "Act") generally bars federal courts from interfering in state proceedings, the relitigation exception to the Act permits injunctions necessary to "protect or effectuate its judgments." 28 U.S.C. § 2283. The exception applies only when the traditional elements of collateral estoppel are met, including the requirements that the state parties sought to be estopped are the same parties or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the two proceedings are identical. The Question Presented is whether the Anti-Injunction Act permits a federal district court to enjoin absent class members from relitigating in state court a final judgment denying class certification that is enmeshed with a substantive ruling of law. (2) To enjoin a state court proceeding under the relitigation exception to the Anti-Injunction Act, a district court must have personal jurisdiction over the enjoined state-court parties. The Question Presented is whether a federal district court has personal jurisdiction over absent class members for purposes of enjoining them from seeking class certification in state court, when a properly conducted class action never existed before the district court because it denied class certification and due process protections were not afforded to the absent class members.**

5. ***Stern v. Marshall*, No. 10-179 (9th Cir., 600 F.3d 103; cert. granted Sept. 28, 2010, limited to Questions 1, 2, and 3; SG as amicus, supporting Petitioner; argued on Jan. 18, 2011). In the 1984 Bankruptcy Act, Congress divided bankruptcy court jurisdiction into "core" proceedings, in which bankruptcy judges can enter final orders, and "non-core" proceedings that are subject to district court *de novo* review. *See* 28 U.S.C. § 157(b). Congress expressly identified certain core proceedings, including "counterclaims by the estate against persons filing claims against the estate." *Id.* § 157(b)(2)(C). The Ninth Circuit opinion in this case held that core jurisdiction constitutionally exists under § 157(b)(2)(C) only for compulsory counterclaims entirely encompassed within the allowance or disallowance of the creditor's claim against the estate and that raise no issue beyond that claim. The Questions**

Presented are the following: (1) Whether the Ninth Circuit's opinion—which renders 28 U.S.C. § 157(b)(2)(C) surplusage in light of § 157(b)(2)(B), which provides that core proceedings include the allowance or disallowance of claims against the estate—contravenes Congress's intent in enacting § 157(b)(2)(C). (2) Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim. (3) Whether the Ninth Circuit misapplied *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Katchen v. Landy*, 382 U.S. 323 (1966), and contravened the Court's post-*Marathon* precedent, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim.

6. ***Bond v. United States*, No. 09-1227 (3d Cir., 581 F.3d 128; cert. granted Oct. 12, 2010; argued on Feb. 22, 2011). Petitioner admitted that she tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. She was prosecuted and convicted under a federal law, 18 U.S.C. § 229(a), enacted by Congress to implement the United States' obligations under a 1993 treaty addressing the proliferation of chemical and biological weapons. Petitioner challenged the federal criminal statute under which she was convicted on the grounds that it exceeded the federal government's enumerated powers and violated the Tenth Amendment. Declining to reach Petitioner's constitutional arguments, and in acknowledged conflict with decisions from other courts of appeals, the Third Circuit held that, when the state and its officers are not party to the proceedings, a private party has no standing to challenge the federal statute under which she is convicted as in excess of Congress's enumerated powers and in violation of the Tenth Amendment. The Question Presented is whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and is inconsistent with the Tenth Amendment.**

7. ***Freeman v. United States*, No. 09-10245 (6th Cir., 355 F. App'x 1; cert. granted Sept. 28, 2010; argued on Feb. 23, 2011). 18 U.S.C. § 3582(c)(2) provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Under Federal Rule of Criminal Procedure 11(c)(1)(C), the government and the defendant may enter into a plea agreement in which they "agree that a specific sentence or sentencing range is the appropriate disposition of the case" and "such a recommendation or request binds the court once the court accepts the plea agreement." The Question Presented is whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) solely because the district court accepted a Rule 11(c)(1)(C) plea agreement.**

8. ***Bullcoming v. New Mexico*, No. 09-10876 (N.M., 147 N.M. 487; cert. granted Sept. 28, 2010; argued on Mar. 2, 2011). Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.**

9. ***Davis v. United States*, No. 09-11328 (11th Cir., 598 F.3d 1259; cert. granted Nov. 1, 2010; argued on Mar. 21, 2011). In *United States v. Leon*, 468 U.S. 897 (1984), the Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in *Herring v. United States*, 129 S. Ct. 695 (2009). There is a deepening split in the lower courts over whether the good-faith exception applies to changing interpretations of law. The Question Presented is whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search but which is subsequently held to be unconstitutional.**

10. ***Borough of Duryea v. Guarnieri*, No. 09-1476 (3d Cir., 364 F. App'x 749; cert. granted Oct. 12, 2010; SG as amicus, supporting Petitioners; argued on Mar. 22, 2011). Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private concern.**

11. ***Turner v. Rogers*, No. 10-10 (S.C., 691 S.E.2d 470; cert. granted Nov. 1, 2010; SG as amicus, supporting reversal; argued on Mar. 23, 2011). The Question Presented by the petition is whether the Supreme Court of South Carolina erred in holding that an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration. In addition to the Question Presented that is set forth in the petition, the Court directed the parties to brief and argue the question whether the Court has jurisdiction to review the decision of the Supreme Court of South Carolina.**

12. ***J.D.B. v. North Carolina*, No. 09-11121 (N.C., 686 S.E. 2d 135; cert. granted Nov. 1, 2010; SG as amicus, supporting Respondent; argued on Mar. 23, 2011). Whether a court may consider a juvenile's age in a *Miranda* custody analysis when evaluating the totality of the circumstances and determining whether a reasonable person in the juvenile's position would have felt that he or she was not free to terminate police questioning and leave.**

13. ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, No. 10-238; *McComish v. Bennett*, No. 10-239 (9th Cir., 611 F.3d 510; cert. granted and cases consolidated on Nov. 29, 2010; SG as amicus, supporting Respondents; argued on Mar. 28, 2011). In *Davis v. FEC*, 554 U.S. 724 (2008), the Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates**

who are outspent by self-financed candidates. Arizona's Citizens Clean Elections Act provides extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The Questions Presented are the following: (1) Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates. (2) Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by such candidates' privately financed opponents.

14. ***CSX Transportation, Inc. v. McBride*, No. 10-235 (7th Cir., 598 F.3d 388; cert. granted Nov. 29, 2010; argued on Mar. 28, 2011). Whether the Federal Employers Liability Act, 45 U.S.C. §§ 51–60, requires proof of proximate causation.**

Gibson Dunn – Counsel for Wal-Mart Stores, Inc.

15. ***Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (9th Cir., 603 F.3d 571; cert. granted Dec. 6, 2010, limited to Question 1 presented by the petition and to the Question added by the Court; argued on Mar. 29, 2011). In a sharply divided 6-5 decision that conflicts with many decisions of the Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy. The Questions Presented are as follows: (1) Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances. (2) Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).**

16. ***PLIVA, Inc. v. Mensing*, No. 09-993 (8th Cir., 588 F.3d 603; CVSG May 24, 2010; cert. opposed Nov. 2, 2010; cert. granted and case consolidated with No. 09-1039 and No. 09-1501 on Dec. 10, 2010; SG as amicus, supporting Respondents; argued on Mar. 30, 2011); *Actavis Elizabeth, LLC v. Mensing*, No. 09-1039 (8th Cir., 588 F.3d 603; CVSG May 24, 2010; cert. opposed Nov. 2, 2010; cert. granted and case consolidated with No. 09-993 and No. 09-1501 on Dec. 10, 2010; SG as amicus, supporting Respondents; argued on Mar. 30, 2011); *Actavis, Inc. v. Demahy*, No. 09-1501 (5th Cir., 593 F.3d 428; cert. granted and case consolidated with No. 09-993 and No. 09-1039 on Dec. 10, 2010; SG as amicus, supporting Respondents; argued on Mar. 30, 2011). The**

Gibson Dunn – Counsel for Association of International Automobile Manufacturers, et al. as *Amici Curiae* in Support of Petitioners

Drug Price Competition and Patent Term Restoration Act (the "Act") and its implementing regulations require the labeling for a generic drug to be "the same as the labeling approved for" the brand drug that is its bioequivalent. *See* 21 U.S.C. § 355(j)(2)(A)(iv-v); 21 C.F.R. § 314.94(a)(8). The Question Presented is whether the Act preempts state-law tort claims alleging that a generic drug was inadequately labeled even though the drug's labeling was identical to the brand drug that is its bioequivalent.

17. ***Tapia v. United States*, 10-5400 (9th Cir., 376 F. App'x 70; cert. granted Dec. 10, 2010; argued on Apr. 18, 2011). May a district court give a defendant a longer prison sentence to promote rehabilitation, or is such a sentencing factor prohibited?**

18. ***American Electric Power Company Inc. v. Connecticut*, No. 10-174 (2d Cir., 582 F.3d 309; cert. granted Dec. 6, 2010; argued on Apr. 19, 2011). The Second Circuit held that States and private plaintiffs may maintain actions under federal common law alleging that defendants—in this case, five electric utilities—have created a "public nuisance" by contributing to global warming, and may seek injunctive relief capping defendants' carbon dioxide emissions at judicially determined levels. The Questions Presented are as follows: (1) Whether States and private parties have standing to seek judicially fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources. (2) Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action and where the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency. (3) Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." *See Baker v. Carr*, 369 U.S. 186, 217 (1962).**

19. ***Sorrell v. IMS Health Inc*., No. 10-779 (2d Cir., 2010 WL 4723183; cert. granted Jan. 7, 2011; argued on Apr. 26, 2011; SG as amicus, supporting Petitioners). Prescription drug records, which contain information about patients, doctors, and medical treatment, exist because of federal and state regulation in this highly regulated field. This case is about information from prescription records known as "prescriber-identifiable data." Such data identifies the doctor or other prescriber, links the doctor to a particular prescription, and reveals other details about that prescription. Pharmacies sell this information to data-mining companies, and the data miners aggregate and package the data for use as a marketing tool by pharmaceutical manufacturers. The law at issue in this case, Vermont's Prescription Confidentiality Law, affords prescribers the right to consent**

before information linking them to prescriptions for particular drugs can be sold or used for marketing. The Second Circuit held that Vermont's law violates the First Amendment, a holding that conflicts with two recent decisions of the First Circuit upholding similar laws. The Question Presented is whether a law that restricts access to information in nonpublic prescription drug records and affords prescribers the right to consent before their identifying information in prescription drug records is sold or used in marketing runs afoul of the First Amendment.

October Term 2011

1. ***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). (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?**

2. ***Lafler v. Cooper*, No. 10-209 (6th Cir., 376 F. App'x 563; cert. granted Jan. 7, 2011; SG as amicus, supporting Petitioner). 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?**

3. ***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). 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.

4. ***Howes v. Fields*, No. 10-680 (6th Cir., 617 F.3d 813; cert. granted Jan. 24, 2010; SG as amicus, supporting Petitioner). 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.**

5. ***Reynolds v. United States*, No. 10-6549 (3d Cir., 380 F. App'x 125; cert. granted Jan. 24, 2010). 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.**

6. ***Pacific Operators Offshore, LLP v. Valladolid*, No. 10-507 (9th Cir., 604 F.3d 112; cert. granted Feb. 22, 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?

7. ***Stok & Associates, P.A., v. Citibank, N.A.*, No. 10-514 (11th Cir., 387 F. App'x 921; cert. granted Feb. 22, 2011). Despite the prevalence of arbitration provisions, parties very frequently elect to waive their contractual right to arbitrate and instead seek to resolve their disputes in a court of law. Because the Court has yet to rule upon when such a waiver becomes binding, a conflict has arisen in the courts of appeals as to whether a showing of prejudice is required to render such a waiver irrevocable. The Question Presented is: Under the Federal Arbitration Act ("FAA"), should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable?**

   Dismissed June 2, 2010. The petition was dismissed pursuant to Rule 46.

8. ***Golan v. Holder*, No. 10-545 (10th Cir., 609 F.3d 1076; cert. granted Mar. 7, 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?**

9. ***Maples v. Thomas*, No. 10-63 (11th Cir., 586 F.3d 879; cert. granted Mar. 21, 2011, limited to Question 2). 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.**

10. ***Rehberg v. Paulk*, No. 10-788 (11th Cir., 611 F.3d 828; cert. granted Mar. 21, 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.

11. ***Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, No. 10-553 (6th Cir., 597 F.3d 769; cert. granted Mar. 28, 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.**

12. ***Greene v. Fisher*, No. 10-637 (3d Cir., 606 F.3d 85; cert. granted Apr. 4, 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?**

13. ***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). Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense.**

14. ***Judulang v. Holder*, No. 10-694 (9th Cir., 249 F. App'x 499; cert. granted Apr. 18, 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.

15. ***M.B.Z. 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). 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.**

16. ***CompuCredit Corp. v. Greenwood*, No. 10-948 (9th Cir., 615 F.3d 1204; cert. granted May 2, 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.**

17. ***Minneci v. Pollard*, No. 10-1104 (9th Cir., 629 F.3d 843; cert. granted May 16, 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.**

18. ***Kawashima v. Holder*, No. 10-577 (9th Cir., 615 F.3d 1043; cert. granted May 23, 2011, limited to the first Question Presented). 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 Petitioners were therefore removable.**

19. ***Perry v. New Hampshire*, No. 10-8974 (N.H., unpublished; cert. granted May 31, 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.**

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

21. ***Martinez v. Ryan*, No. 10-1001 (9th Cir., 623 F.3d 731; cert. granted June 6, 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.**

22. ***Hall v. United States*, No. 10-875 (9th Cir., 617 F.3d 1161; cert. granted June 13, 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.**

23. ***Gonzalez v. Thaler*, No. 10-895 (5th Cir., 623 F.3d 222; cert. granted June 13, 2011, limited to the following two questions). 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"?**

24. ***Setser v. United States*, No. 10-7387 (5th Cir., 607 F.3d 128; cert. granted June 13, 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.**

25. ***Smith v. Louisiana*, No. 10-8145 (La., 45 So. 3d 1065; cert. granted June 13, 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.**

Cases Determined Without Argument

1. ***Wilson v. Corcoran*, No. 10-91 (7th Cir.; cert. granted Nov. 8, 2010; vacated and remanded Nov. 8, 2010).** Per Curiam. The Court underscored that "[f]ederal courts may not issue writs of habeas corpus to state prisoners whose confinement

does not violate federal law." In this case, the Seventh Circuit had required the state court "to reconsider its sentencing determination in order to 'prevent non-compliance with Indiana law.'" But this was improper because "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (Emphasis in original.)

2. ***Madison County v. Oneida Indian Nation of New York*, No. 10-72 (2d Cir., 605 F.3d 149; cert. granted Oct. 12, 2010; vacated and remanded Jan. 10, 2011).** Per Curiam (Sotomayor, J., took no part in the consideration or decision of the case). After the Court granted certiorari, Respondent Oneida Indian Nation passed a tribal declaration and ordinance waiving "its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." Petitioners Madison and Oneida Counties then questioned the validity, scope, and permanence of the Nation's waiver. The Court vacated the judgment and remanded the case to the Second Circuit, explaining that the Second Circuit "should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and—if necessary—proceed to address other questions in the case consistent with its sovereign immunity ruling."

3. ***Swarthout v. Cooke*, No. 10-333 (9th Cir.; cert. granted Jan. 24, 2011; reversed Jan. 24, 2011).** Per Curiam (Ginsburg, J., concurring). The Court held that the U.S. Constitution's Due Process Clause does not require correct application of state-law parole standards. California's parole statute requires that denials of parole be supported by "some evidence." Respondents were convicted criminals who had been denied parole in California. In reviewing the prisoners' federal habeas petitions, the Ninth Circuit held that both Respondents had been denied parole without "some evidence," in violation of their liberty interests under the Constitution. The Court reversed, noting that the Ninth Circuit's decision assumed either (1) the federal courts could issue federal habeas to a state prisoner for errors of state law or (2) the federal Due Process Clause required correct application of California's "some evidence" standard. The Court rejected the first potential assumption, writing that it had "stated many times that federal habeas corpus relief does not lie for errors of state law." The Court rejected the second possible assumption as well, for California's parole statute created a state liberty interest, not a federal one. The Constitution requires only "fair procedures," which the Court's parole cases have held to be some minimal right to speak. The prisoners received the constitutionally required minimum process, and the Constitution's Due Process Clause included no further substantive requirement. The "some evidence" standard was a question of state law, not federal law. Having rejected both possible grounds for the Ninth Circuit's holding, the Court reversed the Ninth Circuit's decision.

4. ***Felkner v. Jackson*, No. 10-797 (9th Cir., 389 F. App'x 640; cert. granted Mar. 21, 2011; reversed and remanded Mar. 21, 2011).** Per Curiam. The Court held that there was no support for the Ninth Circuit's determination that Respondent was entitled to habeas relief on the basis of his *Batson* claims. Respondent was convicted of numerous sexual offenses in California state court.

Following his conviction, Respondent raised a *Batson* claim alleging that the prosecutor exercised peremptory challenges to exclude two of the three potential black jurors on the basis of their race. The California Court of Appeal upheld the trial court's denial of the *Batson* motion and affirmed the conviction. After the California Supreme Court denied Respondent's petition for review, he sought federal habeas relief. The district court denied Respondent's petition. In a "three-paragraph unpublished memorandum opinion," the Ninth Circuit reversed. The "Court of Appeals offered a one-sentence conclusory explanation for its decision," finding that the "prosecutor's proffered race-neutral bases" for his peremptory strikes were insufficient "to counter the evidence of purposeful discrimination." The Court reversed, holding that the Ninth Circuit's decision was "as inexplicable as it [was] unexplained." Under the proper standard, the trial court was "entitled to 'great deference,'" and its decision "must be sustained unless it is clearly erroneous." Here, "[t]he state appellate court's decision was plainly not unreasonable," and, thus, "[t]here was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner."

5. ***Bobby v. Mitts*, No. 10-1000 (6th Cir., 620 F.3d 650; cert. granted May 2, 2011; reversed May 2, 2011).** Per Curiam. The Court held constitutional a penalty-phase instruction requiring the jury to impose a death sentence if it found the defendant "guilty" of aggravating factors. The Court rejected the argument, based on *Beck v. Alabama*, 447 U.S. 625 (1980), that such an instruction led to a false choice by demanding that the jury "acquit" Mitts of the death penalty before considering other punishments. The Court explained that, while *Beck* concerned the guilt phase, this case concerned the penalty phase. Unlike jurors in a guilt-phase trial, jurors in a penalty-phase trial are not choosing between finding guilt for a greater crime or letting the defendant go free. Moreover, the Court held that *Smith v. Spisak*, 558 U.S. ___ (2010), had already settled the question. In *Spisak*, the Court rejected the contention that penalty-phase instructions were unconstitutional because they required the jury to reject the death penalty before considering other sentences.

Pending Cases Calling For The Views Of The Solicitor General

1. ***Compton Unified School District v. Addison*, No. 10-886 (9th Cir., 598 F.3d 1181; CVSG Apr. 18, 2011). 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.**

2. ***Republica Bolivariana de Venezuela v. DRFP L.L.C.*, No. 10-1144 (6th Cir., 622 F.3d 513; CVSG May 16, 2011). 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.

3. ***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); and (2) whether state-enacted economic sanctions that restrict the use of both public and private funds are preempted by federal law.**

4. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011). 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.**

5. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011). 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 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.**

6. ***Farina v. Nokia, Inc.*, No. 10-1064 (3d Cir., 625 F.3d 9; CVSG May 31, 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; and (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.**

7. ***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.

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (Cal. Ct. App., 84 Cal. Rptr. 3d 545; CVSG Oct. 5, 2009; cert. supported but limited to the first Question Presented Apr. 23, 2010; cert. granted May 24, 2010, limited to Question 1; SG as amicus, supporting Petitioners; argued on Nov. 3, 2010). Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?**

   Decided Feb. 23, 2011 (562 U.S. ___). Court of Appeal of California, Fourth Appellate District, Division Three/Reversed. Justice Breyer for an 8-0 Court (Sotomayor, J., concurring; Thomas, J., concurring in the judgment; Kagan, J., took no part in the consideration or decision of the case). The Court held that Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") does not preempt state tort suits claiming that manufacturers should have installed lap-and-shoulder belts, instead of lap belts, on rear inner seats. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court found that an earlier version of FMVSS 208, which required installation of passive restraint devices, preempted a state tort suit that sought to hold an auto manufacturer liable for failure to install a particular kind of passive restraint: airbags. Like the regulation in *Geier*, the instant regulation leaves the manufacturer with a choice—which type of seatbelt to install on rear inner seats—and the tort suit here would restrict that choice. But unlike in *Geier*, the Court held, the preservation of that choice is not a significant objective of the federal scheme. In *Geier*, the regulation's history, the agency's

contemporaneous explanation, and the agency's consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives, whereas here, the Court concluded, these same considerations indicate the contrary.

2. ***Cardinal v. Metrish*, No. 09-109 (6th Cir., 564 F.3d 794; CVSG Nov. 2, 2009; cert. supported Mar. 18, 2010; cert. denied Apr. 25, 2011). The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. The Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against States and state officials in their official capacities. The Question Presented is whether States and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act.**

3. ***Chamber of Commerce of the United States v. Whiting*, No. 09-115 (9th Cir., 544 F.3d 976, amended at 558 F.3d 856; CVSG Nov. 2, 2009; cert. supported but limited to the first Question Presented May 28, 2010; cert. granted June 28, 2010; SG as amicus, supporting Petitioners; argued on Dec. 8, 2010). (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note. (3) Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).**

Decided May 26, 2011 (563 U.S. ___). Ninth Circuit/Affirmed. Chief Justice Roberts delivered the opinion of the Court, except as to Parts II-B and III-B; Scalia, Kennedy, and Alito, JJ., joining the Chief Justice's opinion in full; Thomas, J., joining the Chief Justice's opinion as to Parts I, II-A, and III-A, and concurring in the judgment; Breyer, J., dissenting, joined by Ginsburg, J.; Sotomayor, J., dissenting; Kagan, J. took no part in the consideration or decision of the case). The Court held that an Arizona law providing for the suspension and revocation of an employer's right to do business if it employed an unauthorized alien was not preempted by federal immigration laws. The Court also held that States may require employers to verify an employee's work authorization status using a federal electronic employment verification system. Federal law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Under the Arizona law at issue, state courts are required to suspend (after the first violation) or permanently revoke (after the second violation) all licenses necessary to do business in the State when an employer is found to have employed an unauthorized alien. The state courts may consider only the

federal government's determination as to whether an employee is an unauthorized alien. The law also requires that employers verify the employment eligibility of an employee by using E-Verify, a federally-operated, internet-based system. The Court concluded that the Arizona law constituted a "licensing law" and therefore was not expressly preempted by federal law. The Arizona law defined the term "license" similarly to other federal statutes, including the Administrative Procedure Act. The fact that the Arizona law also included other documents such as articles of incorporation and certificates of partnership did not place the scheme outside of the licensing context, because the regulation of such documents is "at the very least 'similar' to a licensing law." Moreover, the fact that the Arizona law required employers to use E-Verify was not expressly preempted by federal law, because no federal statute contained an express preemption clause related to E-Verify. That federal law expressly provides that "the Secretary of Homeland Security may not require any person or other entity to participate in" E-Verify does not constrain States from making the system mandatory for their own employers. A plurality of the Court also concluded that the Arizona law was not impliedly preempted by federal immigration law. Congress could not have intended federal law to be exclusive, because it expressly allowed States to implement licensing sanctions for immigration violations. In addition, there could be no possibility that Arizona and the federal government would reach inconsistent results regarding any individual worker because Arizona required its courts to consider only the federal determination as to whether an employee was authorized to work.

4. ***Staub v. Proctor Hospital*, No. 09-400 (7th Cir., 560 F.3d 647; CVSG Nov. 9, 2009; cert. supported Mar. 16, 2010; cert. granted Apr. 19, 2010; SG as amicus, supporting Petitioner; argued on Nov. 2, 2010). In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced, but did not make, the ultimate employment decision?**

Decided Mar. 1, 2011 (562 U.S. ___). Seventh Circuit/Reversed and remanded. Justice Scalia for an 8-0 Court (Alito, J., concurring in the judgment, joined by Thomas, J.; Kagan, J. took no part in the consideration or decision of the case). The Court held that, under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), an employer is liable if "a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action," even if the supervisor is not the ultimate decisionmaker behind the adverse action. (Emphasis in the Court's opinion.) USERRA, which the Court noted is "very similar to Title VII," bars an employer from taking an adverse employment action against an employee on the ground that the employee "is a member of . . . or has an obligation to perform service in a uniformed service," 38 U.S.C. § 4311(a). An employer is deemed to have engaged in a prohibited action if the employee's membership in a uniformed service is "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." *Id.* § 4311(c). Staub was terminated after a human resources officer reviewed his file, which contained a disciplinary warning that Staub contended was given under false pretenses because of his supervisor's hostility to his obligations as an Army Reservist. The supervisor who issued the warning was not the person who made the decision to terminate Staub's employment. Relying on "the background of general tort law," the Court noted that the later exercise of judgment by the decisionmaker does not prevent an earlier action "from being the proximate cause of the

harm." Thus, so long as no later event constitutes a superseding cause of the adverse employment action, the employer can be held liable for the supervisor's action.

5. ***Virginia Office for Protection & Advocacy v. Stewart*, No. 09-529 (4th Cir., 568 F.3d 110; CVSG Jan. 19, 2010; cert. supported May 21, 2010; cert. granted June 21, 2010; SG as amicus, supporting Petitioner; argued on Dec. 1, 2010). Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex Parte Young*.**

Decided Apr. 19, 2011 (563 U.S. ___). Fourth Circuit/Reversed and remanded. Justice Scalia for a 6-2 Court (Kennedy, J., concurring, joined by Thomas, J.; Roberts, C.J., dissenting, joined by Alito, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that *Ex parte Young*, 209 U.S. 123 (1908), allows a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same State. The Virginia Office for Protection and Advocacy ("VOPA") sued Respondents—state officials in charge of state mental hospitals—in federal district court in an effort to obtain patient records related to deaths and injuries. Respondents argued that they are immune from suit under the Eleventh Amendment, but the district court held that the suit was permitted by the doctrine of *Ex parte Young*, which allows federal courts to award prospective relief against state officials for violations of federal law. Concluding that *Ex parte Young* did not apply because the suit was brought by a state agency, the Fourth Circuit reversed. The Supreme Court disagreed, holding that entertaining VOPA's action is consistent with precedent and does not offend the distinctive interests protected by sovereign immunity. The Court noted that a State's stature is not diminished to any greater degree when its own agency sues to enforce its officers' compliance with federal law than when a private person does so. Moreover, the Court observed, VOPA's power to sue state officials is a consequence of the State's own decision to establish a public protection and advocacy system.

6. ***Chase Bank USA, N.A. v. McCoy*, No. 09-329 (9th Cir., 559 F.3d 963; CVSG Jan. 25, 2010; GVR recommended May 19, 2010; cert. granted June 21, 2010; SG as amicus, supporting Petitioner; argued on Dec. 8, 2010). When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does "Regulation Z," 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?**

Decided Jan. 24, 2011 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that at the time of the transaction at issue, Regulation Z, 12 C.F.R. § 226.9(c), did not require a change-in-terms notice before implementing an agreement term raising a cardholder's rate after delinquency or default. The meaning of a change to a "term required to be disclosed under § 226.9(c)(1)" as per Regulation Z was ambiguous. Under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Court defers to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the rule. In an amicus brief, the promulgating agency, the Federal Reserve Board, clarified that it interpreted Regulation Z as not

requiring a creditor to give notice before it raises a cardholder's rate after default. There was no reason to suspect that the interpretation was a post-hoc litigation position, since the Board was not a party to the case. Nor did the amended version of Regulation Z now in force shed light on the reasonableness of the Board's interpretation of the then-current rule. Finally, McCoy erred in his attempt to use an Official Staff Commentary to show that the Board interpreted Regulation Z differently at the time of the transaction, since the Commentary simply replicated the ambiguity inherent in the rule.

7. ***CSX Transportation, Inc. v. Alabama Department of Revenue*, No. 09-520 (11th Cir.; 350 F. App'x 318; CVSG Feb. 22, 2010; cert. supported May 14, 2010; cert. granted June 14, 2010; SG as amicus, supporting Petitioner; argued on Nov. 10, 2010). When a State exempts the competitors of rail carriers—but not rail carriers themselves—from generally applicable sales and use taxes on fuel, does that make such taxes subject to challenge under 49 U.S.C. § 11501(b)(4) as a tax that discriminates against a rail carrier?**

Decided Feb. 22, 2011 (562 U.S. ___). Eleventh Circuit/Reversed and remanded. Justice Kagan for a 7-2 Court (Thomas, J., dissenting, joined by Ginsburg, J.). The Court held that an interstate rail carrier may invoke the Railroad Revitalization and Regulatory Reform Act's so-called catch-all provision, which prohibits state and local governments from imposing a "tax that discriminates against a rail carrier," to challenge Alabama sales and use taxes. Rail carriers pay these taxes when they purchase and use diesel fuel, while interstate motor and water carriers generally are exempt from these taxes. The Court concluded that an excise tax, like Alabama's sales and use taxes, qualifies as a "tax" under the catch-all provision and that a tax "discriminates against a rail carrier" when a State exempts other entities from it. Rejecting Alabama's position that the distinction drawn in the Act is between rail carriers and local entities, the Court concluded that the Act's prohibition of discrimination applies whether the discrimination benefits local or interstate entities. Thus, a state excise tax that applies to railroads but exempts interstate entities is subject to challenge under the Act's catch-all provision. The Court rejected the notion that its holding in this case will convert railroads into "most-favored-taxpayers." Instead, whether the railroad ultimately prevails will depend upon the adequacy of the State's justification for declining to extend the exemption to rail carriers. The Court also distinguished its decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), which holds that a railroad cannot invoke the Act's catch-all provision to challenge a generally applicable property tax on the grounds that non-railroad property is exempted. The Court in *ACF Industries* concluded that the Act's provisions that specifically address property taxes permit States to impose property taxes on railroads while exempting other entities; thus, allowing challenges to such taxes under the catch-all provision would "subvert the statutory plan." *Id.* at 340. This structural analysis, the Court noted, is inapplicable to Alabama's sales-and-use-tax exemptions because, unlike in *ACF Industries*, no other provisions in the Act reveal an intent to permit such exemptions.

8. ***Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc*., No. 09-1159 (Fed. Cir., 583 F.3d 832; CVSG June 28, 2010; cert. supported Sept. 28, 2010; cert. granted Nov. 1, 2010; SG as amicus, supporting Petitioner; argued on Feb. 28, 2011). Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U.S.C. §§ 200–212, in inventions arising from federally funded research can be**

terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.

Decided June 6, 2011 (563 U.S. ___). Federal Circuit/Affirmed. Chief Justice Roberts for a 7-2 Court (Sotomayor, J., concurring; Breyer, J., dissenting, joined by Ginsburg, J.). The Court held that the University and Small Business Patent Procedures Act of 1980—commonly referred to as the Bayh-Dole Act—does not automatically vest title to federally funded inventions in federal contractors. The Court began by noting that "patent law has operated on the premise that rights in an invention belong to the inventor." Under the Bayh-Dole Act, federal contractors may "elect to retain title to any subject invention," 35 U.S.C. § 202(a), which is defined as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under a funding agreement," *id.* § 201(e). The Court interpreted the word "retain" to permit a federal contractor to "keep title to whatever it is they already have," but did not "confer title to federally funded inventions on contractors or authorize contractors to unilaterally take title to those inventions." Thus, the Bayh-Dole Act does not displace the historical patent rule that the rights to an invention vest in the inventor. Rather, the Act merely establishes that the contractor may retain rights it already has in the invention.

9. ***Erica P. John Fund, Inc. v. Halliburton Co.*, 09-1403 (5th Cir., 597 F.3d 330; CVSG Oct. 4, 2010; cert. supported Dec. 3, 2010; cert. granted Jan. 7, 2011; SG as amicus, supporting Petitioner; argued on Apr. 25, 2011). (1) Whether the Fifth Circuit correctly held, in direct conflict with the Second Circuit and district courts in seven other circuits and in conflict with the principles of *Basic v. Levinson*, 485 U.S. 224 (1988), that plaintiffs in securities fraud actions must satisfy not only the requirements set forth in *Basic* to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation at class certification by a preponderance of admissible evidence without merits discovery. (2) Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption even though reliance and loss causation are separate and distinct elements of securities fraud actions and even though proof of loss causation is common to all class members.**

Decided June 6, 2011 (563 U.S. ___). Fifth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court. The Court held that securities fraud plaintiffs need not prove loss causation to obtain class certification under Federal Rule of Civil Procedure 23. The Court observed that, to certify a class under Rule 23(b)(3), a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that whether common questions of law or fact predominate in a securities fraud action frequently turns on the element of reliance. In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court permitted plaintiffs to invoke a rebuttable presumption of reliance using the "fraud-on-the-market" theory, which holds that "the market price of shares traded on well-developed markets reflects all publicly available information" and, accordingly, that an investor relies on public misstatements whenever he or she "buys or sells stock at the price set by the market." To invoke this rebuttable presumption of reliance, the lower court additionally required the plaintiffs to establish loss causation—*i.e.*, that the correction to a prior misleading statement caused

the decline in price and that the loss could not otherwise be explained by additional factors. The Court disagreed, reasoning that "[s]uch a rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." "The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation," the Court reasoned, "has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory." Rejecting Halliburton's suggestion that the lower court had not actually required the plaintiffs to prove "loss causation" but instead had considered whether the plaintiffs demonstrated that the alleged misrepresentations had affected the market price, the Court explained that "loss causation is a familiar and distinct concept in securities law" and that the lower court repeatedly referenced "loss causation" in its opinion.

10. ***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.**

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

11. ***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). 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]."**

CVSG Cases In Which The Solicitor General Supported A Motion For Leave To File A Petition

1. ***Kansas v. Nebraska*, No. 126 Orig. (CVSG Oct. 4, 2010; Kansas' motion for leave to file petition supported Feb. 28, 2011; motion granted and Special Master appointed Apr. 4, 2011). In this case, Kansas seeks to enforce a decree pertaining to rights under the Republican River Compact of 1943. Kansas**

seeks remedies for Nebraska's alleged violations of the decree, as well as remedies to protect against future violations.

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***American Home Products Corp. v. Ferrari*, No. 08-1120 (Ga., 668 S.E.2d 236; CVSG June 8, 2009; brief of the United States filed Jan. 29, 2010, in which the SG stated that the petition should be held pending the disposition of *Bruesewitz v. Wyeth, Inc.*, No. 09-152 or should be denied; cert. granted, judgment vacated, and case remanded for further consideration on Feb. 28, 2011). Whether the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-22(b)(1), expressly preempts a state-law claim against a vaccine manufacturer based on an allegation that the vaccine-related injury could have been avoided by a vaccine design that was allegedly safer than the one approved by the Food and Drug Administration for use nationwide.**

Gibson Dunn – Counsel for Intel Corporation as *Amicus Curiae* in Support of Petitioner

2. ***Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (9th Cir., 541 F.3d 982; CVSG Oct. 5, 2009; cert. opposed Mar. 17, 2010; cert. granted Apr. 19, 2010; SG as amicus, supporting Respondent; argued on Nov. 8, 2010). Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135, 138 (1998), the Court posed the Question Presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The Question Presented in this case is the following: Whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.**

Decided Dec. 13, 2010 (562 U.S. ___). Ninth Circuit/Affirmed by an equally divided Court. Per Curiam (Kagan, J., took no part in the consideration or decision of the case). The judgment was affirmed by an equally divided Court.

Gibson Dunn Partner James C. Ho Argued on Behalf of Respondents While Serving as Solicitor General of Texas

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

Decided Apr. 20, 2011 (563 U.S. ___). Fifth Circuit/Affirmed. Justice Thomas for a 6-2 Court (Sotomayor, J., dissenting, joined by Breyer, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that a State's acceptance of federal funds did not constitute a waiver of its sovereign immunity from private suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Petitioner Sossamon sued the State of Texas and various prison officials in their official capacities for injunctive and monetary relief under RLUIPA, alleging that two prison policies "impose a substantial burden on the religious exercise" of institutionalized persons. The Supreme Court found that RLUIPA's authorization of "appropriate relief against a government," for violations of the statute under 42 U.S.C. § 2000cc-2(a), did not waive state sovereign immunity against private suits for monetary damages because it was "not the unequivocal expression of state consent that our precedents require." The Court found that the term "appropriate relief" is "open-ended and ambiguous about what types of relief it includes," and the Court further explained that it "will not consider a State to have waived its sovereign immunity" where "a statute is susceptible of multiple plausible interpretations, including one preserving immunity." In reaching its conclusion, the Court rejected Petitioner's argument that "because Congress enacted [RLUIPA] pursuant to the Spending Clause, the States were necessarily on notice that they would be liable for damages." Declining to extend "ordinary contract principles" to Spending Clause legislation, the Court explained that "[i]t would be bizarre to create an 'unequivocal statement' rule and then find that every Spending Clause enactment, no matter what its text, satisfies that rule because it includes unexpressed, implied remedies against the States." Petitioner also argued that damages under RLUIPA were authorized under § 1003 of the Rehabilitation Act Amendments of 1986, which, in relevant part, expressly waive state sovereign immunity for violations of "the provisions of any . . . Federal statute prohibiting discrimination by recipients of Federal financial assistance." The Court held that even if "a residual clause like the one in § 1003 could constitute an unequivocal textual waiver," RLUIPA is "not unequivocally a 'statute prohibiting discrimination' within the meaning of § 1003." Instead, RLUIPA prohibits "'substantial burden[s]' on religious exercise."

4. ***Thompson v. North American Stainless, LP*, No. 09-291 (6th Cir., 567 F.3d 804; CVSG Dec. 14, 2009; cert. opposed May 25, 2010; cert. granted June 29, 2010; SG as amicus, supporting Petitioner; argued on Dec. 7, 2010). Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The Questions Presented are as follows: (1) Does § 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party—such as a spouse, family member, or fiancé—who is closely associated with the employee who engaged in such protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?**

Decided Jan. 24, 2011 (562 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Scalia for an 8-0 Court (Ginsburg, J., concurring, joined by Breyer, J.; Kagan, J., took no part in the consideration or decision of the case). The Court held that (1) Title VII prohibits employers from retaliating against an employee who filed a Title VII charge by firing that employee's fiancée or other close family member and (2) Title VII grants the terminated family member a cause of action. Firing an employee's close relative violates Title VII's anti-retaliation provision because it is "obvious that a reasonable worker might be dissuaded" from filing a discrimination charge if she knew her fiancé might be fired. The Court thereby extended the standard set forth in *Burlington Northern & Santa Fe*

Railway Co. v. White, 548 U.S. 53 (2006), to some instances of third-party reprisal. In light of the anti-retaliation provision's broad wording, the Court declined to delimit the category of "close family member[s]," but it did require that the standards for judging harm to relatives be objective. Title VII grants close relatives a cause of action because they fall within the "zone of interests" protected by the statute. The anti-retaliation provision protects employees, and a terminated close relative would have been, by definition, an employee of the retaliating defendant. Although the zone-of-interests standard presents a more stringent bar to potential plaintiffs than mere Article III standing, a "person aggrieved" under the anti-retaliation provision need not be the same employee who had previously alleged discrimination.

Gibson Dunn – Counsel for Janus Capital Group Inc., et al.

5. ***Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 (4th Cir., 566 F.3d 111; CVSG Jan. 11, 2010; cert. opposed May 19, 2010; cert. granted June 28, 2010; SG as amicus, supporting Respondent; argued on Dec. 7, 2010). (1) Whether a service provider—for instance, a lawyer, accountant, or investment adviser—can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" its client's alleged misstatements. (2) Whether a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.**

Decided June 13, 2011 (564 U.S. ___). Fourth Circuit/Reversed. Justice Thomas for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.). The Court concluded that Janus Capital Management ("JCM") cannot be held liable in a private suit under the Securities and Exchange Commission's Rule 10b-5 for drafting allegedly misleading prospectuses for the mutual funds it advises. In reaching that conclusion, the Court held that the only proper defendant in a private Rule 10b-5 suit is the "maker" of a statement—"the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it"—and that "[t]he statements in the [mutual fund] prospectuses were made by [the mutual funds], not by JCM." JCM is a registered investment adviser that, among other things, advises the Janus family of mutual funds; the Janus Funds are governed by an independent Board of Trustees, and are not owned or controlled by JCM. First Derivative Traders invested in the stock of JCM's parent company, Janus Capital Group Inc. ("JCG"). It alleged that the price of JCG's stock was artificially inflated as a result of misleading statements in the Janus Funds' prospectuses, and that JCM had drafted those statements. The Court held that "the maker of a statement is the person or entity with ultimate authority over the statement." "Without control," the Court explained, "a person or entity can merely suggest what to say, not 'make' a statement in its own right," and therefore "[o]ne who prepares or publishes a statement on behalf of another is not its maker." The Court noted that it had previously distinguished "between those who are primarily liable (and thus may be pursued in private suits) and those who are secondarily liable (and thus may not be pursued in private suits)." To ensure that this distinction "ha[s] any meaning," the Court "dr[e]w a clean line between the two—the maker is the person or entity with ultimate authority over a statement and others are not." Thus, the Court underscored, it "will not expand liability beyond the person or entity that ultimately has authority over a false statement." Applying this test, the Court concluded that "JCM did not 'make' any of the statements in the [Janus Funds] prospectuses" because its alleged "involvement in preparing the prospectuses" was "subject to the ultimate control" of the Janus Funds.

Gibson Dunn – Counsel for CIGNA Corporation, et al.

Gibson Dunn – Counsel for CIGNA Corporation, et al.

6. ***Amara v. Cigna Corp.*, No. 09-784 (2d Cir., 2009 WL 3199061; CVSG Mar. 8, 2010; cert. opposed May 27, 2010; cert. granted May 23, 2011; remanded May 23, 2011). (1) Whether a district court, after finding violations of the advance notice of reduction requirement in ERISA § 204(h), errs in concluding that it lacks the authority to require the prior benefit provisions to be reinstated. (2) Whether a district court, after finding that participants were promised "comparable" or "larger" future retirement benefits in a Summary of Material Modification that ERISA § 102 requires to be accurate and understandable to the average plan participant, errs in concluding that it lacks the authority to require at least "comparable" future benefits to be provided.**

7. ***Cigna Corp. v. Amara*, No. 09-804 (2d Cir., 348 F. App'x 627; CVSG Mar. 8, 2010; cert. opposed May 27, 2010; cert. granted June 28, 2010; SG as amicus, supporting Respondents; argued on Nov. 30, 2010). Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.**

   Decided May 16, 2011 (563 U.S. ___). Second Circuit/Vacated and remanded. Justice Breyer for an 8-0 Court (Scalia, J., concurring in the judgment, joined by Thomas, J.; Sotomayor, J., took no part in the consideration or decision of the case). The Court held that § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), which authorizes a plan participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan," did not authorize the district court to reform Petitioner CIGNA Corporation's pension plan for allegedly misleading statements made in its summary plan description ("SPD"). The case arose after CIGNA converted its pension plan from a traditional defined benefit plan to a "cash balance" plan. In describing the conversion in its SPD, CIGNA allegedly made misleading statements about the effects of the conversion on participants' retirement benefits. A class of CIGNA employees challenged the sufficiency of the SPD, and the district court ruled in the class's favor. Relying on § 502(a)(1)(B), the district court determined that the employees were entitled to recover additional benefits as described in the SPD. The Court held that the district court awarded relief under the wrong ERISA provision because an SPD is not part of an ERISA plan; relief for a flawed SPD therefore is not available under § 502(a)(1)(B), which authorizes recovery of "benefits due . . . under the . . . plan." In reaching this conclusion, the Court rejected the Solicitor General's argument that the terms of the SPD are part of the plan, holding instead that SPDs "provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B)." The Court suggested that relief might be available under § 502(a)(3) of ERISA, which allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress ERISA violations, but made clear that, to recover under that provision, "a plan participant or beneficiary must show that the violation injured him or her." "[A]ctual harm," the Court emphasized, "must be shown." The Court vacated the judgment and remanded the case for the district court to determine in the first instance whether the class members could make this showing.

8. ***Placer Dome, Inc. v. Provincial Government of Marinduque*, No. 09-944 (9th Cir., 582 F.3d 1083; CVSG Apr. 19, 2010; cert. opposed Aug. 27, 2010; cert.**

denied Oct. 4, 2010). (1) Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), and apply an incorrect standard of review? (2) Does federal-question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint?

9. ***Hogan v. Kaltag Tribal Council*, No. 09-960 (9th Cir., 2009 WL 2736172; CVSG Apr. 26, 2010; cert. opposed Aug. 27, 2010; cert. denied Oct. 4, 2010). Whether the Ninth Circuit correctly held that Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a non-member of a tribe and then to compel the State to give full faith and credit to the decrees entered in such proceedings.**

10. ***Simmons v. Galvin*, No. 09-920 (1st Cir., 575 F.3d 24; CVSG May 3, 2010; cert. opposed Sept. 15, 2010; cert. denied Oct. 18, 2010). (1) Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, applies to state felon disenfranchisement laws that result in discrimination on the basis of race. (2) Whether the Massachusetts felon disenfranchisement scheme established in 2000 violates the *Ex Post Facto* Clause as applied to those Massachusetts felons who were incarcerated but had the right to vote prior to 2000.**

11. ***Louisiana Safety Association v. Certain Underwriters at Lloyd's, London*, No. 09-945 (5th Cir., 587 F.3d 714; CVSG May 17, 2010; cert. opposed Aug. 26, 2010; cert. denied Oct. 4, 2010). The McCarran-Ferguson Act provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201–08, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does not specifically relate to the business of insurance. The Question Presented is whether Chapter 2 of the FAA is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.**

12. ***PLIVA, Inc. v. Mensing*, No. 09-993; *Actavis Elizabeth, LLC v. Mensing*, No. 09-1039 (8th Cir., 588 F.3d 603; CVSG May 24, 2010; cert. opposed Nov. 2, 2010; cert. granted and cases consolidated with No. 09-1501 on Dec. 10, 2010; SG as amicus, supporting Respondents; argued on Mar. 30, 2011). The Drug Price Competition and Patent Term Restoration Act (the "Act") and its implementing regulations require the labeling for a generic drug to be "the same as the labeling approved for" the brand drug that is its bioequivalent. *See* 21 U.S.C. § 355(j)(2)(A)(iv-v); 21 C.F.R. § 314.94(a)(8). The Question Presented is whether the Act preempts state-law tort claims alleging that a generic drug was inadequately labeled even though the drug's labeling was identical to the brand drug that is its bioequivalent.**

13. ***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). 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.**

14. ***Thunderhorse v. Pierce*****, No. 09-1353 (5th Cir., 2010 WL 454799; CVSG Oct. 4, 2010; cert. opposed or, in the alternative, summary reversal and remand recommended Dec. 2, 2010; cert. denied Jan. 10, 2011). Did the court of appeals misinterpret the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, to require only a minimal showing that a prison grooming rule that concededly imposes a substantial burden on religious exercise is the "least restrictive means of furthering [a] compelling governmental interest," contrary to the decisions of other circuits and the literal terms of the statute?**

15. ***Norfolk Southern Ry. Co. v. Groves*****, No. 09-1212 (11th Cir., 586 F.3d 1273; CVSG Oct. 4, 2010; cert. opposed Dec. 10, 2010; cert. denied Jan. 18, 2011). "This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars." *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1275 (11th Cir. 2009). Norfolk Southern Railway Company sued Savannah Re-Load for demurrage, but Savannah Re-Load denied liability and, "despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts." *Id.* "Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments." *Id.* The Questions Presented are the following: (1) Whether "consignee" can be properly defined in railroad tariffs as the party named as consignee on a bill of lading that physically accepts delivery of all freight consigned to it, or whether the definition of "consignee" in such tariffs must also require proof that the party so named on the bill of lading explicitly**

consented to being named as consignee before accepting delivery. (2) Whether the Court should resolve the conflicting definitions of "consignee" in the interest of uniformity in interstate commerce and follow the holding of the Third Circuit, which comports with the traditional, commercial, regulatory, and statutory definitions of "consignee." (3) Whether the courts have subject matter jurisdiction to interpret the terms or expand the requirements of a railroad's rail car demurrage tariff.

16. ***Von Saher v. Norton Simon Museum of Art*, No. 09-1254 (9th Cir., 592 F.3d 954, 578 F.3d 1016; CVSG Oct. 4, 2010; cert. opposed May 27, 2011). In this case, the Ninth Circuit held unconstitutional a California statute extending the statute of limitations for claims to recover Nazi-looted artworks. The Questions Presented are as follows: (1) In enacting a state statute extending the statute of limitations applicable to claims against museums and galleries for the recovery of property stolen during the Holocaust, was the State of California addressing an area of "traditional state responsibility" without intruding on the federal foreign affairs power? (2) Is a state statute extending the statute of limitations for the recovery of property stolen during the Holocaust, which does not conflict with any federal statute, treaty or policy, preempted by the federal foreign affairs power to make and resolve war? (3) Is the Ninth Circuit's decision in direct conflict with the Court's prior decisions because it found California Code of Civil Procedure § 354.3 facially unconstitutional when the application to the case at bar poses no constitutional infirmity?**

17. ***Saleh v. Titan Corp.*, No. 09-1313 (D.C. Cir., 580 F.3d 1; CVSG Oct. 4, 2010; cert. opposed May 27, 2011). Petitioners—victims of alleged war crimes at Abu Ghraib prison—sued two government contractors, but Petitioners' claims were dismissed on the ground that the contractors are immune from suit. The Questions Presented are the following: (1) Whether the Court of Appeals erred by finding that Petitioners' claims for torture and other war crimes cannot be brought against private actors under the Alien Tort Statute. (2) Whether the Court of Appeals erred by creating a "battle-field preemption" doctrine that extends derivative sovereign immunity to contractors in conflict with *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).**

18. ***Aquino v. Suiza Dairy, Inc.*, No. 10-74 (1st Cir., 587 F.3d 464; CVSG Oct. 12, 2010; cert. opposed Apr. 7, 2011; cert. denied May 16, 2011). Respondents, milk processors in Puerto Rico, brought suit against Petitioners, officers of the government of Puerto Rico, alleging that Puerto Rico's regulatory scheme deprived them of a reasonable rate of return on their product, in violation of the Takings, Due Process, Equal Protection, and Commerce Clauses of the U.S. Constitution. The district court granted the milk processors' motion for a preliminary injunction and ordered Respondents to impose a surcharge on milk sold in Puerto Rico for the purpose of compensating Respondents for their lost revenue. Petitioners appealed the district court's order, contending *inter alia* that by ordering retrospective monetary relief, the district court had**

violated Puerto Rico's sovereign immunity. The First Circuit affirmed, holding that sovereign immunity does not bar the imposition of retrospective relief against a State (through its officials) unless public funds are directly extracted from the state treasury. The Question Presented is whether a federal court can order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general government treasury.[6]

19. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010; cert. opposed May 20, 2011). The Montana Supreme Court held that the State of Montana owns the riverbeds under more than 500 miles of river, including the riverbeds under multiple hydropower facilities. For more than a century, the riverbeds beneath those facilities have been treated as owned by private parties or the federal government. In reaching this result, the lower court concluded that the rivers were navigable when Montana joined the Union in 1889 and, therefore, that Montana held title to the riverbeds. The court below also held that the State is entitled to collect retroactive back rent and future payments from the owners of the hydropower facilities. The Questions Presented are the following: (1) Does the constitutional test for determining whether a section of a river is navigable for title purposes require 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 as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor? (2) When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?**

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6 In *Laborers District Council Construction Industry Pension Fund v. Omnicare, Inc.* (No. 09-1400), the Court's October 4, 2010 order invited the Acting Solicitor General to file a brief expressing the views of the United States. The brief was never filed, however, because the petition was dismissed on November 5, 2010.

20. ***Brown v. Rincon Band of Luiseno Mission Indians,***[7] **No. 10-330 (9th Cir., 602 F.3d 1019; CVSG Dec. 13, 2010; cert. opposed May 24, 2011). The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with States to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to state taxation, and it provides that a State's demand for direct taxation in compact negotiations is evidence of bad faith. The Questions Presented are the following: (1) Whether a State demands direct taxation of an Indian tribe in compact negotiations under Section 11 of IGRA when it bargains for a share of tribal gaming revenue for the State's general fund. (2) Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of IGRA when it weighed the relative value of concessions offered by the parties in those negotiations.**

21. ***Applera Corp. v. Enzo Biochem, Inc.*, No. 10-426 (Fed. Cir., 599 F.3d 1325; CVSG Dec. 13, 2010; cert. opposed May 17, 2011). For a patent to be valid, its claims must be "definite"— that is, the patent must include "claims *particularly pointing out* and *distinctly claiming* the subject matter which the applicant regards as his invention." 35 U.S.C. § 112 (emphases added). The Federal Circuit holds that this requirement is satisfied so long as claim language is not "insolubly ambiguous" or is capable of being construed. The Question Presented is whether the Federal Circuit's standard for definiteness is consistent with the language of § 112.**

22. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011). The Questions Presented are: (1) Did the Ninth Circuit err 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 this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), that the provision must be given "a broad meaning"? (2) When federal food safety and humane handling regulations specify that animals which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, did the Ninth Circuit err in holding that a state criminal law requiring that such animals not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA? (3) Did the Ninth Circuit err 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**

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7 This case was previously captioned *Schwarzenegger v. Rincon Band of Luiseno Mission Indians*.

not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses?

23. ***Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Company*, No. 10-717 (11th Cir., 607 F.3d 1268; CVSG Jan. 24, 2011; cert. opposed May 20, 2011). Whether an action to obtain recognition of an Indian tribal court judgment presents a federal question under 28 U.S.C. § 1331.**

24. ***Osage Nation v. Irby*, No. 10-537 (10th Cir., 597 F.3d 1117; CVSG Feb. 22, 2011; cert. opposed May 27, 2011). In *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court held that "only Congress can divest a reservation of its land and diminish its boundaries," and Congress's intent to do so must be "explicit[ ]" and "unequivocal," *id.* at 470-71. The Questions Presented are: (1) Whether, in determining whether Congress disestablished an Indian reservation, express statutory text, unequivocal legislative history, and the expert view of the Executive Branch are controlling, or whether, instead, other indicia external to the statutory text and federal government's view, such as modern demographics, can override unambiguous statutory text. (2) Whether the court below properly ruled that the Osage Nation's reservation has been disestablished in the absence of unambiguous statutory direction and without obtaining or considering the position of the United States government.**

25. ***City of New York v. Permanent Mission of India*, No. 10-627 (2d Cir., 618 F.3d 172; CVSG Feb. 22, 2011; cert. opposed May 25, 2011). The Foreign Missions Act, 22 U.S.C. §§ 4301 *et seq.* (the "FMA") authorizes the Secretary of State to regulate foreign missions' access to designated "benefits," and to preempt state and local police powers by denying "benefits" to foreign missions. Relying solely on the FMA, the Secretary "designated," as a "benefit" for foreign missions, over $100 million dollars in preemptive exemptions from state and local property tax laws. (1) In determining whether Congress authorized the Secretary to preempt traditional state taxing powers, did the Court of Appeals err by deferring to the Secretary's expansive interpretation of her own FMA powers, rather than requiring a clear and manifest expression of Congressional intent? (2) Did the Court of Appeals further err by misreading the FMA as authorizing the Secretary's preemption of state and local property tax laws? (3) Did the Court of Appeals depart from this Court's clear precedent by upholding the Secretary's creation and conferral of retroactive tax exemptions under the FMA, even though Congress did not authorize the Secretary, expressly or otherwise, to promulgate retroactive rules?**

26. ***First American Financial v. Edwards*, No. 10-708 (9th Cir., 610 F.3d 514, 2010 WL 2617588; CVSG Feb. 28, 2011; cert. opposed May 19, 2011). Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or 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). The Questions Presented are: (1) Did the Ninth Circuit err in holding that a private purchaser of real estate settlement services has standing under RESPA to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided? (2) Does such a purchaser have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

27. ***United States ex rel. Summers v. LHC Group, Inc.*, No. 10-827 (6th Cir., 623 F.3d 287; CVSG Feb. 28, 2011; cert. opposed May 26, 2011). Whether a *qui tam* Relator's failure to file her complaint under seal in violation of the False Claims Act's filing requirements warrants dismissal, as the Sixth Circuit held.**

28. ***Spain v. Cassirer*, No. 10-786 (9th Cir., 616 F.3d 1019; CVSG Mar. 21, 2011; cert. opposed May 27, 2011). Subject to certain exceptions, Section 1604 of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. 1602 *et seq*., recognizes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." Section 1605(a)(3), however, provides an "expropriation exception"—namely, that "[a] foreign state shall not be immune from the jurisdiction . . . in any case . . . in which rights in property taken in violation of international law are in issue." The Questions Presented are as follows: (1) Whether the FSIA's "expropriation exception" permits United States courts to strip a foreign sovereign of its presumptive sovereign immunity simply because it owns property allegedly taken in violation of international law by another nation. (2) Whether a plaintiff relying on the FSIA's expropriation exception must exhaust available remedies in the relevant country before invoking the jurisdiction of United States courts.**

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