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

1. ***Ransom v. MBNA, American Bank, N.A.*, No. 09-907 (9th Cir., 577 F.3d 1026; cert. granted Apr. 19, 2010; SG as amicus, supporting Respondent; argument scheduled Oct. 4, 2010). In calculating a debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B), may a bankruptcy court allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles?**

2. ***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; argument scheduled 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; argument scheduled 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?**

3. ***National Aeronautics & Space Administration v. Nelson*, No. 09-530 (9th Cir., 530 F.3d 865; 568 F.3d 1028; cert. granted Mar. 8, 2010; argument scheduled 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**

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

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government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. § 552a.

4. ***Michigan v. Bryant*, No. 09-150 (Mich., 768 N.W.2d 65; cert. granted Mar. 1, 2010; SG as amicus, supporting Petitioner; argument scheduled 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).**

5. ***Los Angeles County v. Humphries*, No. 09-350 (9th Cir., unreported decision below; cert. granted Feb. 22, 2010, limited to Question 1; argument scheduled 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?**

6. ***Snyder v. Phelps*, No. 09-751 (4th Cir., 580 F.3d 206; cert. granted Mar. 8, 2010; argument scheduled Oct. 6, 2010). (1) Does the prohibition of awarding damages to public figures to compensate for intentional infliction of emotional distress apply to a case involving two private persons and a private matter? (2) Does the First Amendment's freedom of speech 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?**

7. ***Connick v. Thompson*, No. 09-571 (5th Cir., 578 F.3d 293; cert. granted Mar. 22, 2010, limited to Question 1; argument scheduled 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.**

8. ***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; argument scheduled 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)?

9. ***Premo v. Moore*,**[1] **No. 09-658 (9th Cir., 574 F.3d 1092; cert. granted Mar. 22, 2010; argument scheduled 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).**

10. ***Bruesewitz v. Wyeth, Inc.*, No. 09-152 (3d Cir., 561 F.3d 233; cert. granted Mar. 8, 2010; SG as amicus, supporting Respondents; argument scheduled 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.**

11. ***Skinner v. Switzer*, No. 09-9000 (5th Cir., 2010 WL 338018; cert. granted May 24, 2010; argument scheduled 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.**

12. ***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; argument scheduled Oct. 13, 2010). Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?**

13. ***Ortiz v. Jordan*, No. 09-737 (6th Cir., 316 F. App'x 449; cert. granted Apr. 26, 2010; argument scheduled Nov. 1, 2010). May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?**

14. ***United States v. Tohono O'odham Nation*, No. 09-846 (Fed. Cir., 559 F.3d 1284; cert. granted Apr. 19, 2010; argument scheduled Nov. 1, 2010). Under**

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[1] This case was previously captioned *Belleque v. Moore*.

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.

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

15. ***Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448 (9th Cir., 556 F.3d 950; cert. granted Apr. 26, 2010; argument scheduled 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?**

16. ***Sossamon v. Texas*, No. 08-1438 (5th Cir., 560 F.3d 316; CVSG Nov. 2, 2009; SG's brief filed Mar. 18, 2010, in which the SG recommended that (1) as to Question 1, the petition should be held pending the disposition of *Cardinal v. Metrish* (No. 09-109) and then disposed of accordingly and (2) as to Question 2, the petition should be denied; cert. granted May 24, 2010, limited to Question 1; SG as amicus, supporting Petitioner; argument scheduled 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.).**

17. ***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; argument scheduled 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?**

18. ***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; argument scheduled 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.

19. ***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; argument scheduled 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?**

Gibson Dunn – Counsel for Intel Corporation As *Amicus Curiae* In Support of Petitioner

20. ***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; argument scheduled 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.**

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

21. ***Mayo Foundation for Medical Education & Research v. United States*, No. 09-837 (8th Cir., 568 F.3d 675; cert. granted June 1, 2010; argument scheduled 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."**

22. ***AT&T Mobility LLC v. Concepcion*, No. 09-893 (9th Cir., 584 F.3d 849; cert. granted May 24, 2010; argument scheduled 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.

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

24. ***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; argument scheduled 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?**

25. ***Flores-Villar v. United States*, No. 09-5801 (9th Cir., 536 F.3d 990; cert. granted Mar. 22, 2010; argument scheduled 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.**

26. ***Wall v. Kholi*, No. 09-868 (1st Cir., 582 F.3d 147; cert. granted May 17, 2010; argument scheduled 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?**

27. ***Walker v. Martin*, No. 09-996 (9th Cir., 2009 WL 4884581; cert. granted June 21, 2010; argument scheduled 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.**

28. ***Schwarzenegger v. Plata*, No. 09-1233 (E.D. Cal. and N.D. Cal., 2010 WL 99000; on June 14, 2010, the Court ordered that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits; argument scheduled Nov. 30, 2010). (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.

Gibson Dunn – Counsel for CIGNA Corporation, et al.

29. ***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; argument scheduled 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.**

30. ***Milner v. Department of the Navy*, No. 09-1163 (9th Cir., 575 F.3d 959; cert. granted June 28, 2010; argument scheduled 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."**

31. ***Virginia Office for Protection & Advocacy v. Stewart*,[2] 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; argument scheduled 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*.**

32. ***Henderson v. Shinseki*, 09-1036 (Fed. Cir., 589 F.3d 1201; cert. granted June 28, 2010; argument scheduled 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.**

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

33. ***Pepper v. United States*, No. 09-6822 (8th Cir., 570 F.3d 958; cert. granted June 28, 2010; argument scheduled 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.**

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

34. ***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; argument scheduled 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.**

35. ***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; argument scheduled 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 Section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party—such as a spouse, family member, or fiancé—who is closely associated with the employee who engaged in such protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?**

36. ***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; argument scheduled 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?**

37. *Chamber of Commerce of the United States v. Whiting*,[3] 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; argument scheduled 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).

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

39. *Smith v. Bayer Corp*., No. 09-1205 (8th Cir., 593 F.3d 716; cert. granted Sept. 28, 2010). (1) Among the elements for the doctrine of collateral estoppel to be used in support of the relitigation exception to the Anti-Injunction Act are 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 proceedings are also identical. In determining whether issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court's injunction be affirmed when neither the parties sought to be estopped nor the issues presented are identical? (2) Does a district court have personal jurisdiction over absent members of a class 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

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[3] This case was previously captioned *Chamber of Commerce of the United States v. Candelaria*.

certification and due process protections were not afforded to the absent class members?

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

41. ***Astra USA, Inc. v. Santa Clara County*, No. 09-1273 (9th Cir., 588 F.3d 1237; cert. granted Sept. 28, 2010). 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.**

42. ***FCC v. AT&T Inc.*, No. 09-1279 (3d Cir., 582 F.3d 490; cert. granted Sept. 28, 2010). 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.**

43. ***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); *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). (1) Whether the government can maintain its claim against a party when it invokes the state secrets privilege to completely deny that party a defense to the claim. (2) Whether the Due Process Clause of the Fifth Amendment permits 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.**

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

45. ***United States v. Tinklenberg*, No. 09-1498 (6th Cir., 579 F.3d 589; cert. granted Sept. 28, 2010). 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.

46. ***Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76 (N.C., 364 N.C. 12; cert. granted Sept. 28, 2010; case to be argued in tandem with No. 09-1343, *J. McIntyre Machinery, Ltd. v. Nicastro*). 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.**

47. ***Stern v. Marshall*, No. 10-179 (9th Cir., 600 F.3d 103; cert. granted Sept. 28, 2010, limited to Questions 1, 2, and 3). 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 this 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.**

48. ***Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188 (2d Cir., 601 F.3d 94; cert. granted Sept. 28, 2010). 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 public disclosure bar, 31 U.S.C. § 3730(e)(4).**

49. ***Freeman v. United States*, No. 09-10245 (6th Cir., 355 F. App'x 1; cert. granted Sept. 28, 2010). This case "test[s] whether a federal judge has the authority to reduce a federal criminal sentence after the U.S. Sentencing Commission has reduced the sentence range, even if the judge had already accepted a plea deal involving a longer time in prison."**[4]

50. ***Bullcoming v. New Mexico*, No. 09-10876 (N.M., 147 N.M. 487; cert. granted Sept. 28, 2010). 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.**

51. ***Sykes v. United States*, No. 09-11311 (7th Cir., 598 F.3d 334; cert. granted Sept. 28, 2010). 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).**

Pending Cases Calling For The Views Of The Solicitor General

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

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

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[4] Lyle Denniston, *A Review of "State Secrets,"* SCOTUSBLOG (Sept. 28, 2010), http://www.scotusblog.com/2010/09/a-review-of-state-secrets/?wpmp_switcher=desktop. The petition in this case is not yet readily available.

3. ***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).[5] Whether a federal contractor university's statutory right under the Bayh-Dole Act in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.**

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***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; argument scheduled 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?**

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

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; argument scheduled 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**

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5 The Solicitor General filed a brief on September 28, 2010, but the brief is not yet publicly available.

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).

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; argument scheduled 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?**

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; argument scheduled 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*.**

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; argument scheduled 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?**

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; argument scheduled 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?**

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). 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; argument scheduled 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.**

3. ***Sossamon v. Texas*, No. 08-1438 (5th Cir., 560 F.3d 316; CVSG Nov. 2, 2009; SG's brief filed Mar. 18, 2010, in which the SG recommended that (1) as to Question 1, the petition should be held pending the disposition of *Cardinal v. Metrish* (No. 09-109) and then disposed of accordingly and (2) as to Question 2, the petition should be denied; cert. granted May 24, 2010, limited to Question 1; SG as amicus, supporting Petitioner; argument scheduled 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.).**

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

4. ***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; argument scheduled 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.

5. ***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; argument scheduled 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 Section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party—such as a spouse, family member, or fiancé—who is closely associated with the employee who engaged in such protected activity? (2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?**

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). (1) Whether a district court, after finding violations of the advance notice of reduction requirement in ERISA § 204(h), errs in concluding that it lacks the authority to require the prior benefit provisions to be reinstated. (2) Whether a district court, after finding that participants were promised "comparable" or "larger" future retirement benefits in a Summary of Material Modification that ERISA § 102 requires to be accurate and understandable to the average plan participant, errs in concluding that it lacks the authority to require at least "comparable" future benefits to be provided.**

Gibson Dunn – Counsel for CIGNA Corporation, et al.

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; argument scheduled 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.**

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). (1) Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 425 (2007), and apply an incorrect standard of review? (2) Does federal-question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint?**

9. ***Hogan v. Kaltag Tribal Council*, No. 09-960 (9th Cir., 2009 WL 2736172; CVSG Apr. 26, 2010; cert. opposed Aug. 27, 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). (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). 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.**

Supreme Court Statistics:

Our Supreme Court statistics speak for themselves. In the 2007 Term, Gibson Dunn went 3-0. In the 2008 Term, Gibson Dunn argued six cases -- winning four, including the recent win in a case challenging the constitutionality of the McCain-Feingold campaign finance reform legislation, where the Court took the extraordinary step of ordering re-argument. Gibson Dunn's seven oral arguments in the 2008 Term were more than any other law firm (tied in cases handled, at six). Moreover, while the grant rate for cert petitions is below 1%, Gibson Dunn has persuaded the Court to grant its cert petitions nearly forty percent of the time in the last five years.

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