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 2011

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

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

Theodore B. Olson
202.955.8500
tolson@gibsondunn.com

Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com

Ryan J. Watson
202.955.8295
rwatson@gibsondunn.com

Gibson Dunn was named the 2010 Litigation Department of the Year by *American Lawyer*, with the appellate practice described as "perhaps the firm's greatest asset."

The preeminence of Gibson Dunn's Appellate Group is also underscored by its placement on *The National Law Journal*'s 2008 through 2011 "Appellate Hot List," a survey of top appellate law practices.

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.

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

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

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

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

7. ***Golan v. Holder*, No. 10-545 (10th Cir., 609 F.3d 1076; cert. granted Mar. 7, 2011; argument scheduled Oct. 5, 2011). Section 514 of the Uruguay Round Agreements Act of 1994 "restored" copyright protection in thousands of works that the Copyright Act had placed in the public domain, where they remained for years as the common property of all Americans. Petitioners are orchestra conductors, educators, performers, film archivists, and motion picture distributors, who relied for years on the free availability of these works in the public domain, which they performed, adapted, restored, and distributed without restriction. The enactment of Section 514 therefore had an effect on Petitioners' free speech and expression rights, as well as their**

economic interests. Section 514 eliminated Petitioners' right to perform, share, and build upon works they had once been able to use freely. The Questions Presented are the following: (1) Does the Copyright Clause of the United States Constitution prohibit Congress from taking works out of the public domain? (2) Does Section 514 violate the First Amendment?

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

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

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

11. ***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; argument scheduled Oct. 12, 2011). Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense.**

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

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

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

14. ***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; argument scheduled Oct. 31, 2011). The Questions Presented are as follows: (1) Contrary to *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms? (2) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?**

15. ***Rehberg v. Paulk*, No. 10-788 (11th Cir., 611 F.3d 828; cert. granted Mar. 21, 2011; SG as amicus, supporting Petitioner; argument scheduled Nov. 1, 2011).**

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court held that law enforcement officials enjoy absolute immunity from civil liability under 42 U.S.C. § 1983 for perjured testimony that they provide at trial. But in *Malley v. Briggs*, 475 U.S. 335 (1986), the Court held that law enforcement officials are *not* entitled to absolute immunity when they act as "complaining witnesses" to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as "complaining witnesses" by testifying before a grand jury or at another judicial proceeding. The Question Presented is whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

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

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

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

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

of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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

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

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

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

slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.

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

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

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

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

28. ***Credit Suisse Securities v. Simmonds*, No. 10-1261 (9th Cir., 638 F.3d 1072; cert. granted June 27, 2011; argument scheduled Nov. 29, 2011). Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and,**

if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.

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

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

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

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

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

imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases.

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

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

35. ***Mayo Collaborative Services v. Prometheus Laboratories, Inc*., No. 10-1150 (Fed. Cir., 628 F.3d 1347; cert. granted June 20, 2011; argument scheduled Dec. 7, 2011). Whether 35 U.S.C. § 101 is satisfied by a patent claim that covers observed correlations between blood test results and patient health, so that the claim effectively preempts all uses of the naturally occurring correlations, simply because well-known methods used to administer prescription drugs and test blood may involve "transformations" of body chemistry.**

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

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

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

public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures.

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

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

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

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

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

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

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

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

46. ***Holder v. Gutierrez*, No. 10-1542; *Holder v. Sawyers*, No. 10-1543 (9th Cir., 411 F. App'x 121, 399 F. App'x 313; cert. granted Sept. 27, 2011; cases consolidated Sept. 27, 2011). The Questions Presented are: (1) Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years." (2) Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."**

47. ***Wood v. Milyard*, No. 10-9995 (10th Cir., 403 F. App'x 335; cert. granted and Questions Presented reworded Sept. 27, 2011). The Questions Presented are: (1) Does an appellate court have the authority to raise sua sponte a 28 U.S.C. § 2244(d) statute of limitations defense? (2) Does the State's declaration before the district court that it "will not challenge, but [is] not conceding, the**

timeliness of Wood's habeas petition," amount to a deliberate waiver of any statute of limitations defense the State may have had?

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

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

4. ***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.**

5. ***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.**

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

CVSG Cases In Which The Solicitor General Supported Certiorari

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

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

3. ***Freeman v. Quicken Loans, Inc.*, No. 10-1042 (5th Cir., 626 F.3d 799; CVSG May 16, 2011; cert. supported Aug. 25, 2011). 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.**

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

CVSG Cases In Which The Solicitor General Opposed Certiorari

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

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

3. ***National Meat Association v. Harris*, No. 10-224 (9th Cir., 599 F.3d 1093; CVSG Jan. 18, 2011; cert. opposed May 26, 2011; cert. granted June 27, 2011; argument scheduled Nov. 9, 2011). The Questions Presented are: (1) Whether the Ninth Circuit erred in holding that a "presumption against preemption" requires a "narrow interpretation" of the Federal Meat Inspection Act's express preemption provision, in conflict with the Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), that the provision must be given "a broad meaning." (2) Whether, when federal food safety and humane handling regulations specify that animals (here, swine) which are or become nonambulatory on federally inspected premises are to be separated and held for observation and further disease inspection, the Ninth Circuit erred in holding that a state criminal law which requires that such animals**

not be held for observation and disease inspection, but instead be immediately euthanized, was not preempted by the FMIA. (3) Whether the Ninth Circuit erred in holding more generally that a state criminal law which states that no slaughterhouse may buy, sell, receive, process, butcher, or hold a nonambulatory animal is not a preempted attempt to regulate the "premises, facilities, [or] operations" of federally regulated slaughterhouses.

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

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

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Appellate and Constitutional Law Group Co-Chairs:

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