GIBSON DUNN
Supreme Court Round-Up

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The Supreme Court Round-Up previews upcoming cases, recaps opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case as well as a substantive analysis of the Court's actions that is organized according to the Court's argument schedule.

October Term 2010

Decided Cases

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

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

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

   Decided Nov. 30, 2010 (562 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Breyer for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the case). The Court held that the "policy or custom" requirement from *Monell v. Department of Social Services*, 436 U.S. 658 (1978), applies to all Section 1983 claims regardless of

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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 2010 "Appellate Hot List," a survey of top appellate law practices.

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the nature of the relief sought. Respondents, after being exonerated from suspected child abuse, filed a § 1983 suit to have their names removed from a California state registry listing incidents of suspected child abuse. *Monell* limits municipal liability under § 1983 to violations of rights resulting from a municipal "policy or custom." Los Angeles County argued that because state law—not a municipal "policy or custom"—created the registry, *Monell* barred the Humphries' suit. The Ninth Circuit rejected the County's argument, holding that *Monell* applied only to claims for monetary relief and not to claims for prospective relief. The Supreme Court reversed, applying *Monell*'s "policy or custom" requirement to all § 1983 claims against municipalities and rejecting any distinction in this context between prospective and monetary relief. The Court noted that § 1983 itself is not limited to prospective relief, but authorizes an "action at law, suit in equity, or other proper proceeding." Moreover, *Monell* by its own terms applies to "declaratory or injunctive relief." And although *Monell* involved only a claim for damages, the Court held that *Monell*'s logic applies equally to prospective relief.

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

Decided Nov. 15, 2010 (562 U.S. ___). Third Circuit and Fifth Circuit/Affirmed. Justice Ginsburg for an 8-0 Court (Kagan, J., took no part in the consideration or decision of the cases). "Congress made it a discrete offense to use, carry, or possess a deadly weapon in connection with 'any crime of violence or drug trafficking crime.'" Slip op. at 1 (quoting 18 U.S.C. § 924(c)(1)). The "minimum prison term for the offense described in § 924(c) is five years, § 924(c)(1)(A)(i), in addition to 'any other term of imprisonment imposed on the [offender],' § 924(c)(1)(D)(ii)." Slip op. at 1. In this case, Defendants argued that they should not have received five-year consecutive sentences under § 924(c) because they also received longer mandatory minimum prison terms for convictions on different counts. They grounded this argument in § 924(c)(1)(A)'s so-called "except" clause, under which a minimum, consecutive five-year term is imposed "[e]xcept to the extent that a greater minimum sentence is otherwise provided by [Section 924(c)] or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). Defendants maintained that Congress intended the "except" clause to ensure that any person violating § 924(c) would serve at least five years in prison; in their view, § 924(c)'s penalty is inoperative if a conviction on a different count leads to a greater mandatory sentence. The Court rejected Defendants' argument, holding "that a defendant is subject to a mandatory, consecutive sentence for a § 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." According to the Court, the

"except" clause means that if another federal statute mandates a punishment *for using, carrying, or possessing a firearm in connection with a drug trafficking crime or a crime of violence*, and that minimum prison term is longer than the punishment that would be applicable under § 924(c), the longer sentence applies. The Court explained that, because the "except" clause is a proviso attached to § 924(c), it is sensibly interpreted as referring to the conduct that § 924(c) prohibits. Moreover, Defendants' argument—under which § 924(c) would frequently impose no penalty whatsoever for conduct independently criminalized by that provision—was inconsistent with § 924(c)'s purpose of insisting "that sentencing judges impose *additional* punishment for § 924(c) violations."

Pending Cases

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; argued on Oct. 4, 2010). The trustee objected to confirmation of Petitioner Ransom's Chapter 13 plan on the ground that Ransom's transportation ownership cost should be disallowed. Ransom sought the ownership cost deduction—which would reduce Ransom's disposable income used to pay creditors—even though he owns his car free and clear. The Question Presented is the following: In calculating a debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B), may a bankruptcy court allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles?**

2. ***National Aeronautics & Space Administration v. Nelson*, No. 09-530 (9th Cir., 530 F.3d 865; 568 F.3d 1028; cert. granted Mar. 8, 2010; argued on Oct. 5, 2010). (1) Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. § 552a. (2) Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the references' responses are used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. § 552a.**

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

identification and apprehension of an apparently violent and dangerous individual).

4. ***Snyder v. Phelps*, No. 09-751 (4th Cir., 580 F.3d 206; cert. granted Mar. 8, 2010; argued on Oct. 6, 2010). After Respondents—a church and several individuals—protested the funeral of a United States Marine, the deceased Marine's father brought an action for defamation, intentional infliction of emotional distress, and invasion of privacy. The jury returned a verdict in favor of the father, after which the Fourth Circuit set aside the jury's verdict on First Amendment grounds. The Questions Presented are the following: (1) Does the prohibition on 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?**

5. ***Connick v. Thompson*, No. 09-571 (5th Cir., 578 F.3d 293; cert. granted Mar. 22, 2010, limited to Question 1; argued on Oct. 6, 2010). Whether a single *Brady* violation by a prosecutor can give rise to a failure-to-train claim sufficient to satisfy the causation and culpability standards for imposing Section 1983 liability on a municipal entity.**

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

7. ***Premo v. Moore*,[1] No. 09-658 (9th Cir., 574 F.3d 1092; cert. granted Mar. 22, 2010; argued on Oct. 12, 2010). (1) Whether the *Fulminante* standard—that the erroneous admission of a coerced confession at trial is not harmless—applies when a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no-contest plea, even**

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

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).

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

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

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

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

12. ***United States v. Tohono O'odham Nation*, No. 09-846 (Fed. Cir., 559 F.3d 1284; cert. granted Apr. 19, 2010; argued on Nov. 1, 2010). Under 28 U.S.C. § 1500, the Court of Federal Claims ("CFC") does not have jurisdiction over "any claim for or in respect to which the plaintiff . . . has . . . any suit or process against the United States" or its agents "pending in any other court." The Question Presented is: Whether 28 U.S.C. § 1500 deprives**

the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

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

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

Gibson Dunn – Counsel for The Rutherford Institute as *Amicus Curiae* in Support of Petitioner

14. ***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; argued on Nov. 2, 2010). Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000 ed.).

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

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

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

taxpayers choose to direct more contributions to religious organizations than nonreligious organizations.

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

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

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

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

20. *Cullen v. Pinholster*, No. 09-1088 (9th Cir., 590 F.3d 651; cert. granted June 14, 2010; argued on 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?

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

22. *Flores-Villar v. United States*, No. 09-5801 (9th Cir., 536 F.3d 990; cert. granted Mar. 22, 2010; argued on Nov. 10, 2010). Whether Petitioner's

inability to claim derivative citizenship through his United States citizen father because of residency requirements applicable to unwed citizen fathers but not to unwed citizen mothers, *see* former 8 U.S.C. §§ 1401(a)(7) and 1409 (1970), violated the equal-protection guarantee of the Fifth Amendment's Due Process Clause and afforded Petitioner a defense to criminal prosecution under 8 U.S.C. § 1326.

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

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

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

26. ***Cigna Corp. v. Amara*, No. 09-804 (2d Cir., 348 F. App'x 627; CVSG Mar. 8, 2010; cert. opposed May 27, 2010; cert. granted June 28, 2010; SG as amicus,**

supporting Respondents; argued on Nov. 30, 2010). Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

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

28. ***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; argued on Dec. 1, 2010). Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex Parte Young*.**

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

30. ***Pepper v. United States*, No. 09-6822 (8th Cir., 570 F.3d 958; cert. granted June 28, 2010; argued on Dec. 6, 2010). There is a conflict among the federal courts of appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a). The Questions Presented are as follows: (1) Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*. (2) Whether, as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation. (3) Whether, when a district judge is removed from resentencing a defendant after remand and a new judge is assigned, the new judge is obligated under the doctrine of the "law of the case" to follow sentencing findings.**

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

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

31. ***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; argued on Dec. 7, 2010). (1) Whether a service provider—for instance, a lawyer, accountant, or investment adviser—can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" its client's alleged misstatements. (2) Whether a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.**

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

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

34. ***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; argued on Dec. 8, 2010). (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary.**

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

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).

Cases To Be Argued

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

2. ***Montana v. Wyoming*, No. 137 Orig. (On Oct. 12, 2010, the Court set the first exception to the Special Master's First Interim Report for oral argument in due course; argument scheduled Jan. 10, 2011). The State of Montana excepts to the First Interim Report of the Special Master regarding the conclusion that Montana has no claim under the Yellowstone River Compact for Wyoming's depletion of flows on which Montana depended at the time of the Compact, where those depletions result from new consumption of irrigation water on lands in Wyoming that were being irrigated at the time of the Compact.**

3. ***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*; argument scheduled Jan. 11, 2011). 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?**

4. ***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*; SG as amicus, supporting Petitioner; argument scheduled Jan. 11, 2011). Whether a foreign corporation is subject to general personal jurisdiction, on causes of action not arising out of or related to any contacts between it and the forum state, merely because other entities distribute in the forum state products placed in the stream of commerce by the defendant.**

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

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

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

8. ***Smith v. Bayer Corp*., No. 09-1205 (8th Cir., 593 F.3d 716; cert. granted Sept. 28, 2010; argument scheduled Jan. 18, 2011). (1) Although the Anti-Injunction Act (the "Act") generally bars federal courts from interfering in state proceedings, the relitigation exception to the Act permits injunctions necessary to "protect or effectuate its judgments." 28 U.S.C. § 2283. The exception applies only when the traditional elements of collateral estoppel are met, including the requirements that the state parties sought to be estopped are the same parties or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the two proceedings are identical. The Question Presented is whether the Anti-Injunction Act permits a federal district court to enjoin absent class members from relitigating in state court a final judgment denying class certification that is enmeshed with a substantive ruling of law. (2) To enjoin a state court proceeding under the relitigation exception to the Anti-Injunction Act, a district court must have personal jurisdiction over the enjoined state-court parties. The Question Presented is whether a federal district court has personal jurisdiction over absent class members for purposes of enjoining them from seeking class certification in state court, when a properly conducted class action never**

existed before the district court because it denied class certification and due process protections were not afforded to the absent class members.

9. ***Stern v. Marshall*, No. 10-179 (9th Cir., 600 F.3d 103; cert. granted Sept. 28, 2010, limited to Questions 1, 2, and 3; SG as amicus, supporting Petitioner; argument scheduled Jan. 18, 2011). In the 1984 Bankruptcy Act, Congress divided bankruptcy court jurisdiction into "core" proceedings, in which bankruptcy judges can enter final orders, and "non-core" proceedings that are subject to district court *de novo* review. *See* 28 U.S.C. § 157(b). Congress expressly identified certain core proceedings, including "counterclaims by the estate against persons filing claims against the estate." *Id.* § 157(b)(2)(C). The Ninth Circuit opinion in this case held that core jurisdiction constitutionally exists under § 157(b)(2)(C) only for compulsory counterclaims entirely encompassed within the allowance or disallowance of the creditor's claim against the estate and that raise no issue beyond that claim. The Questions Presented are the following: (1) Whether the Ninth Circuit's opinion—which renders 28 U.S.C. § 157(b)(2)(C) surplusage in light of § 157(b)(2)(B), which provides that core proceedings include the allowance or disallowance of claims against the estate—contravenes Congress's intent in enacting § 157(b)(2)(C). (2) Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim. (3) Whether the Ninth Circuit misapplied *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982), and *Katchen v. Landy*, 382 U.S. 323 (1966), and contravened the Court's post-*Marathon* precedent, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim.**

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

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

12. ***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.

13. ***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).**

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

15. ***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.**

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

17. ***Camreta v. Greene*****, No. 09-1454;** ***Alford v. Greene*****, No. 09-1478 (9th Cir., 588 F.3d 1011; cert. granted and cases consolidated Oct. 12, 2010). (1) The State received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that the Supreme Court has identified as the appropriate standard when a witness is temporarily detained? (2) The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment[,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit's constitutional ruling reviewable, notwithstanding that it ruled in Petitioner's favor on qualified immunity grounds?**

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

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

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

21. ***Madison County v. Oneida Indian Nation of New York*****, No. 10-72 (2d Cir., 605 F.3d 149; cert. granted Oct. 12, 2010). In** ***City of Sherrill v. Oneida Indian Nation of New York*****, 544 U.S. 197, 214 (2005), the Supreme Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York—the same tribe that is party to this case—from unilaterally reviving its ancient sovereignty, in whole or in part, over recently purchased property that had been owned and governed by non-**

Indians for 200 years. In so holding, this Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on Oneida Indian Nation-owned fee parcels for nonpayment of lawfully imposed taxes, the court below held that the remedy of foreclosure is barred by tribal sovereign immunity from suit. The Questions Presented are: (1) Whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes. (2) Whether the ancient Oneida reservation in New York was disestablished or diminished.

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

23. ***Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, No. 09-1159 (Fed. Cir., 583 F.3d 832; CVSG June 28, 2010; cert. supported Sept. 28, 2010; cert. granted Nov. 1, 2010). Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U.S.C. §§ 200–212, in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.**

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

25. ***Davis v. United States*, No. 09-11328 (11th Cir., 598 F.3d 1259; cert. granted Nov. 1, 2010). In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme**

Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in *Herring v. United States*, 129 S. Ct. 695 (2009). There is a deepening split in the lower courts over whether the good-faith exception applies to changing interpretations of law. The Question Presented is whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search but which is subsequently held to be unconstitutional.

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

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

28. ***Tolentino v. New York*, No. 09-11556 (N.Y., 14 N.Y.3d 382; cert. granted Nov. 15, 2010). Petitioner pleaded guilty to the aggravated unlicensed operation of a motor vehicle. On appeal, Petitioner contended that his state driving record should have been suppressed as the fruit of a Fourth Amendment violation, on the theory that police obtained his name and driver's license number in the course of an unlawful stop. The New York Court of Appeals held that the exclusionary rule did not apply to Petitioner's driving record under *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), which held that the "'body' or identity of a defendant . . . in a criminal or civil proceeding is**

never itself suppressible as a fruit of an unlawful arrest." The Question Presented is whether pre-existing identity-related governmental documents such as state motor vehicle records, obtained as the direct result of police action that violates the Fourth Amendment, are subject to the exclusionary rule.

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

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

31. ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, No. 10-238; *McComish v. Bennett*, No. 10-239 (9th Cir., 611 F.3d 510; cert. granted and cases consolidated on Nov. 29, 2010). In *Davis v. FEC*, 128 S. Ct. 2759 (2008), the Court held that the First Amendment forbids the government from attempting to level the playing field in elections by raising contribution limits for candidates who are outspent by self-financed opponents. Arizona's Citizens Clean Elections Act provides extra subsidies in the form of "matching funds" to publicly financed candidates who are outspent by independent expenditure groups and privately financed candidates. The Questions Presented are the following: (1) Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by independent expenditure groups' speech against such candidates. (2) Whether the First Amendment forbids Arizona from providing additional government subsidies to publicly financed candidates that are triggered by the fundraising or expenditures by these candidates' privately financed opponents?**[4]

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[4] The summary in the main text is based on the Questions Presented in No. 10-238. The Questions Presented in No. 10-239 are the following: (1) Whether *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Davis v. FEC* require the Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately financed candidates and their supporters to

Gibson Dunn – Counsel for Microsoft Corporation

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

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

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

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

34. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (9th Cir., 603 F.3d 571; cert. granted Dec. 6, 2010, limited to Question 1 presented by the petition and to the Question added by the Court). In a sharply divided 6-5 decision that

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finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit." (2) Whether *Citizens United* and *Davis* require the Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

conflicts with many decisions of the Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy. The Questions Presented are as follows: (1) Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances. (2) Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).

35. ***PLIVA, Inc. v. Mensing*, No. 09-993 (8th Cir., 588 F.3d 603; CVSG May 24, 2010; cert. opposed Nov. 2, 2010; cert. granted and case consolidated with No. 09-1039 and No. 09-1501 on Dec. 10, 2010); *Actavis Elizabeth, LLC v. Mensing*, No. 09-1039 (8th Cir., 588 F.3d 603; CVSG May 24, 2010; cert. opposed Nov. 2, 2010; cert. granted and case consolidated with No. 09-993 and 09-1501 on Dec. 10, 2010); *Actavis, Inc. v. Demahy*, No. 09-1501 (5th Cir., 593 F.3d 428; cert. granted and case consolidated with No. 09-993 and No. 09-1039 on Dec. 10, 2010). The Drug Price Competition and Patent Term Restoration Act (the "Act") and its implementing regulations require the labeling for a generic drug to be "the same as the labeling approved for" the brand drug that is its bioequivalent. *See* 21 U.S.C. § 355(j)(2)(A)(iv)-(v); 21 C.F.R. § 314.94(a)(8). The Question Presented is whether the Act preempts state-law tort claims alleging that a generic drug was inadequately labeled even though the drug's labeling was identical to the brand drug that is its bioequivalent.**

36. ***Talk America, Inc. v. Michigan Bell Telephone Co.*, 10-313; *Isiogu v. Michigan Bell Telephone Co.*, No. 10-329 (6th Cir., 597 F.3d 370; cert. granted and cases consolidated Dec. 10, 2010). To promote competition for local telephone service, the Telecommunications Act of 1996 (the "Act") requires incumbent telephone companies to make entrance facilities available to competitors (1) for network interconnection at cost-based rates and (2) as unbundled network elements. In the *Triennial Review Remand Order* ("*TRRO*"), the Federal Communications Commission ("FCC") maintained the incumbent local telephone company's obligation to provide entrance facilities, which allow for interconnection, at cost-based rates, but found that competitors could effectively compete without access to entrance facilities as unbundled network elements. The Questions Presented are the following: (1) Whether the Sixth Circuit erred by determining that the Act and *TRRO* permit incumbent local telephone companies to charge competing telephone companies competitive rates—*i.e.*, more than cost-based rates—for entrance facilities used for**

interconnection. (2) Whether the Sixth Circuit erred by disregarding the FCC's interpretation of its regulations, contrary to the deference standard established by the Court in *Auer v. Robbins*, 519 U.S. 452 (1997). (3) Whether a public service commission was barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors entrance facilities at cost-based rates under § 251(c)(2) of the Act as a result of an FCC rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose.

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

Case Determined Without Argument

1. ***Wilson v. Corcoran*, No. 10-91 (7th Cir.; cert. granted Nov. 8, 2010; vacated and remanded Nov. 8, 2010). Per Curiam. The Court underscored that "[f]ederal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law." In this case, the Seventh Circuit had required the state court "to reconsider its sentencing determination in order to 'prevent non-compliance with Indiana law.'" But this was improper because "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (Emphasis in original.)**

Pending Cases Calling For The Views Of The Solicitor General

1. ***Kansas v. Nebraska*, No. 126 Orig. (CVSG Oct. 4, 2010). In this case, Kansas seeks to enforce a decree pertaining to rights under the Republican River Compact of 1943. Kansas seeks remedies for Nebraska's alleged violations of the decree, as well as remedies to protect against future violations.**

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

Civil Procedure § 354.3 facially unconstitutional when the application to the case at bar poses no constitutional infirmity?

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

4. ***Laborers District Council Construction Industry Pension Fund v. Omnicare, Inc.*, No. 09-1400 (6th Cir., 583 F.3d 935; CVSG Oct. 4, 2010). (1) Are claims under Securities Act § 11, 15 U.S.C. § 77k(a), for which proof of fraud or mistake is no element of *prima facie* liability, subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement, that a party alleging claims of fraud or mistake "must state with particularity the circumstances constituting fraud or mistake"? (2) May investors seeking relief under Securities Act § 11, for which neither negligence nor fraud is an element of liability, be required to plead facts showing either fraud or negligence? (3) May the courts reverse the burden that Congress placed on certain defendants, of demonstrating due diligence as an affirmative defense, by requiring plaintiffs to plead facts rebutting it?**

5. ***Aquino v. Suiza Dairy, Inc.*, No. 10-74 (1st Cir., 587 F.3d 464; CVSG Oct. 12, 2010). Respondents, milk processors in Puerto Rico, brought suit against Petitioners, officers of the government of Puerto Rico, alleging that Puerto Rico's regulatory scheme deprived them of a reasonable rate of return on their product, in violation of the Takings, Due Process, Equal Protection, and Commerce Clauses of the U.S. Constitution. The district court granted the milk processors' motion for a preliminary injunction and ordered Respondents to impose a surcharge on milk sold in Puerto Rico for the purpose of compensating Respondents for their lost revenue. Petitioners appealed the district court's order, contending *inter alia* that by ordering retrospective monetary relief, the district court had violated Puerto Rico's sovereign immunity. The First Circuit affirmed, holding that sovereign immunity does not bar the imposition of retrospective relief against a State (through its officials) unless public funds are directly extracted from the state treasury. The Question Presented is whether a federal court can order retrospective monetary relief against a sovereign as long as the necessary funds do not come directly from the general government treasury.**

6. ***PPL Montana, LLC v. Montana*, No. 10-218 (Mont., 229 P.3d 421; CVSG Nov. 1, 2010). The Montana Supreme Court held that the State of Montana owns**

the riverbeds under more than 500 miles of river, including the riverbeds under multiple hydropower facilities. For more than a century, the riverbeds beneath those facilities have been treated as owned by private parties or the federal government. In reaching this result, the lower court concluded that the rivers were navigable when Montana joined the Union in 1889 and, therefore, that Montana held title to the riverbeds. The court below also held that the State is entitled to collect retroactive back rent and future payments from the owners of the hydropower facilities. The Questions Presented are the following: (1) Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor? (2) When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

7. ***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). 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.**

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

9. ***Applera Corp. v. Enzo Biochem, Inc.*, No. 10-426 (Fed. Cir., 599 F.3d 1325; CVSG Dec. 13, 2010). For a patent to be valid, its claims must be "definite"—**

that is, the patent must include "claims *particularly pointing out* and *distinctly claiming* the subject matter which the applicant regards as his invention." 35 U.S.C. § 112 (emphases added). The Federal Circuit holds that this requirement is satisfied so long as the claim language is not "insolubly ambiguous" or is capable of being construed. The Question Presented is whether the Federal Circuit's standard for definiteness is consistent with the language of § 112.

CVSG Cases In Which The Solicitor General Supported Certiorari

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

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; argued on Dec. 8, 2010). (1) Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). (2) Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note. (3) Whether the Arizona statute is impliedly**

preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

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

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

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

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

8. ***Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, No. 09-1159 (Fed. Cir., 583 F.3d 832; CVSG June 28, 2010; cert. supported Sept. 28, 2010; cert. granted Nov. 1, 2010). Whether a federal contractor university's statutory right under the Bayh-Dole Act, 35 U.S.C. §§ 200–212, in inventions arising from federally funded research can be terminated unilaterally by an individual inventor through a separate agreement purporting to assign the inventor's rights to a third party.**

9. ***Erica P. John Fund, Inc. v. Halliburton Co.*, 09-1403 (5th Cir., 597 F.3d 330; CVSG Oct. 4, 2010; cert. supported Dec. 3, 2010). (1) Whether the Fifth Circuit correctly held, in direct conflict with the Second Circuit and district courts in seven other circuits and in conflict with the principles of *Basic v.***

***Levinson*, 485 U.S. 224 (1988), that plaintiffs in securities fraud actions must satisfy not only the requirements set forth in *Basic* to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation at class certification by a preponderance of admissible evidence without merits discovery. (2) Whether the Fifth Circuit improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that a plaintiff must establish loss causation to invoke the fraud-on-the-market presumption even though reliance and loss causation are separate and distinct elements of securities fraud actions and even though proof of loss causation is common to all class members.**

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; argued on Nov. 8, 2010). Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135, 138 (1998), the Court posed the Question Presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The Question Presented in this case is the following: Whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.**

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

Gibson Dunn – Counsel for The Rutherford Institute as *Amicus Curiae* in Support of Petitioner

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; argued on Nov. 2, 2010). Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000 ed.).**

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

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

Gibson Dunn – Counsel for Janus Capital Group Inc., 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; SG as amicus, supporting Respondents; argued on Nov. 30, 2010). Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.**

Gibson Dunn – Counsel for CIGNA Corporation, et al.

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

denied Oct. 4, 2010). (1) Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem International Co. v. Malaysia International Shipping Corp*., 549 U.S. 422, 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; cert. denied Oct. 4, 2010). Whether the Ninth Circuit correctly held that Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a non-member of a tribe and then to compel the State to give full faith and credit to the decrees entered in such proceedings.**

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

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

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

13. ***Maxwell-Jolly 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). (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 § 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute.**

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

15. ***Norfolk Southern Ry. Co. v. Groves*, No. 09-1212 (11th Cir., 586 F.3d 1273; CVSG Oct. 4, 2010; cert. opposed Dec. 10, 2010). "This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars." *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1275 (11th Cir. 2009). Norfolk Southern Railway Company sued Savannah Re-Load for demurrage, but Savannah Re-Load denied liability and, "despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts." *Id.* "Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments." *Id.* The Questions Presented are the following: (1) Whether "consignee" can be properly defined in railroad tariffs as the party named as consignee on a bill of lading that physically accepts delivery of all freight consigned to it, or whether the definition of "consignee" in such tariffs must also require proof that the party so named on the bill of lading explicitly consented to being named as consignee before accepting delivery. (2) Whether the Court should resolve the conflicting definitions of "consignee" in the interest of uniformity in interstate commerce and follow the holding of the Third Circuit, which comports with the traditional, commercial, regulatory, and statutory definitions of "consignee." (3) Whether the courts have subject matter jurisdiction to interpret the terms or expand the requirements of a railroad's rail car demurrage tariff.**

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