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GIBSON DUNN
Supreme Court Round-Up

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.

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October Term 2012

1. ***Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (2d Cir., 621 F.3d 111; cert. granted Oct. 17, 2011, argued in tandem with *Mohamad v. Rajoub*, No. 11-88; SG as amicus, supporting Petitioners; argued on Feb. 28, 2012; restored to calendar on Mar. 5, 2012; SG supplemental brief as amicus, supporting Petitioners; argued on Oct. 1, 2012). The Questions Presented are: (1) Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or an issue of subject matter jurisdiction. (2) Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or whether they may be sued in the same manner as any other private party defendant under the ATS. (3) Whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.**

2. ***Lozman v. Riviera Beach*, No. 11-626 (11th Cir., 649 F.3d 1259; cert. granted Feb. 21, 2012; SG as amicus, supporting Petitioner; supplemental briefing on mootness ordered Aug. 14, 2012; argued on Oct. 1, 2012). Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction.**

3. ***Kloeckner v. Solis*, No. 11-184 (8th Cir., 639 F.3d 834; cert. granted Jan. 13, 2012; argued on Oct. 2, 2012). The Merit Systems Protection Board is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is: If the Board decides a mixed case without determining the merits of the discrimination claim, whether the court with jurisdiction over that claim is the Court of Appeals for the Federal Circuit or a district court.**

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

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

Gibson Dunn – Co-Counsel for University of Texas at Austin

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

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

6. ***Arkansas Game & Fish Commission v. United States*, No. 11-597 (Fed. Cir., 637 F.3d 1366; cert. granted Apr. 2, 2012; argued on Oct. 3, 2012). Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.**

7. ***Tibbals v. Carter*, No. 11-218 (6th Cir., 644 F.3d 329; cert. granted Mar. 19, 2012; argument scheduled Oct. 9, 2012). (1) Whether capital prisoners have a right to competence in habeas proceedings under *Rees v. Peyton*, 384 U.S. 312 (1966). (2) Whether a court can order an indefinite stay of habeas proceedings under *Rees*.**

8. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting Petitioners; argument scheduled Oct. 9, 2012). 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.**

9. ***Moncrieffe v. Holder*, No. 11-702 (5th Cir., 662 F.3d 387; cert. granted Apr. 2, 2012; argument scheduled Oct. 10, 2012). Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.**

10. ***Fisher v. University of Texas at Austin*, No. 11-345 (5th Cir., 631 F.3d 213; cert. granted Feb. 21, 2012; SG as amicus, supporting Respondents; argument scheduled Oct. 10, 2012). Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.**

Gibson Dunn – Counsel for John Wiley & Sons, Inc.

11. ***Clapper v. Amnesty Int'l USA*, No. 11-1025 (2d Cir., 638 F.3d 118; cert. granted May 21, 2012; argument scheduled Oct. 29, 2012). Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance under Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (Supp. II 2008), and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.**

12. ***Supap Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*, No. 11-697 (2d Cir., 654 F.3d 210; cert. granted Apr. 16, 2012; SG as amicus, supporting Respondent; argument scheduled Oct. 29, 2012). How do Section 602(a)(1) of the Copyright Act, which makes it impermissible to import a work "without the authority of the owner" of the copyright, and Section 109(a), which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of the copy without the copyright owner's permission, apply to a copy that was made and legally acquired abroad and then imported into the United States? Can such a foreign-made product never be resold in the United States without the copyright owner's permission; sometimes be resold within the United States without permission, but only after the owner approves an earlier sale in the United States; or always be resold without permission within the United States, so long as the copyright owner authorized the first sale abroad?**

13. ***Roselva Chaidez v. United States*, No. 11-820 (7th Cir., 655 F.3d 684; cert. granted Apr. 30, 2012; argument scheduled Oct. 30, 2012). Whether *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in which the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their attorneys fail to advise them that pleading guilty to an offense will subject them to deportation, apply to persons whose convictions became final before its announcement.**

14. ***Bailey v. United States*, No. 11-770 (2d Cir., 652 F.2d 197; cert. granted June 4, 2012; argument scheduled Oct. 30, 2012). Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.**

15. ***Florida v. Jardines*, No. 11-564 (Fl., 73 So. 3d 34; cert. granted Jan. 6, 2012, limited to Question 1; SG as amicus, supporting Petitioner; argument scheduled Oct. 31, 2012). Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.**

16. ***Florida v. Harris*, No. 11-817 (Supreme Court of Florida, 71 So. 3d 756; cert. granted Mar. 26, 2012; SG as amicus, supporting Petitioner; argument scheduled Oct. 31, 2012). Whether an alert by a well-trained narcotics**

Gibson Dunn – Counsel for Comcast Corp.

detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle.

17. ***Comcast Corp. v. Behrend*, No. 11-864 (3d Cir., 655 F.3d 182; cert. granted June 25, 2012; argument scheduled Nov. 5, 2012). Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.**

18. ***Amgen, Inc. v. Connecticut Retirement Plan*, No. 11-1085 (9th Cir., 660 F.3d 1170; cert. granted June 11, 2012; argument scheduled Nov. 5, 2012). The Questions Presented are: (1) Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory. (2) Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.**

19. ***Smith v. United States*, No. 11-8976 (D.C. Cir., 651 F.3d 30; cert. granted June 21, 2012; limited to Question 2; argument scheduled Nov. 6, 2012). Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period.**

20. ***Evans v. Michigan*, No. 11-1327 (Mich. Sup. Ct., 491 Mich. 1; cert. granted June 11, 2012; argument scheduled Nov. 6, 2012). Whether the Double Jeopardy Clause of the U.S. Constitution bars retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a mistrial directed verdict of acquittal because the prosecution failed to prove that fact.**

21. ***Already, LLC v. Nike, Inc.*, No. 11-982 (2d Cir., 663 F.3d 89; cert. granted June 25, 2012; SG as amicus, supporting Vacatur and Remand; argument scheduled Nov. 7, 2012). Whether a federal district court is divested of Article III jurisdiction over a party's challenge to the validity of a federally registered trademark if the registrant promises not to assert its mark against the party's then-existing commercial activities.**

22. ***Marx v. General Revenue Corp.*, No. 11-1175 (10th Cir., 668 F.3d 1174; cert. granted May 29, 2012; SG as amicus, supporting Petitioner; argument scheduled Nov. 7, 2012). Whether a prevailing defendant in a case under the Fair Debt Collection Practices Act may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).**

23. ***FTC v. Phoebe Putney Health*, No. 11-1160 (11th Cir., 663 F.3d 1369; cert. granted June 25, 2012; argument scheduled Nov. 26, 2012). The Questions Presented are: (1) Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" under the "state action doctrine" in the market for hospital services. (2) Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.**

24. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; cert. granted June 25, 2012; argument scheduled Nov. 26, 2012). Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

25. ***US Airways, Inc. v. McCutchen*, No. 11-1285 (3d Cir., 663 F.3d 671; cert. granted June 25, 2012; SG as amicus, supporting Neither Party; argument scheduled Nov. 27, 2012). Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that Section 502(a)(3) of the Employee Retirement Income Security Act authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement.**

26. ***Henderson v. United States*, No. 11-9307 (5th Cir., 646 F.3d 223; cert. granted June 25, 2012; argument scheduled Nov. 28, 2012). Whether, when the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, an appellate court reviewing for "plain error" should apply the time-of-appeal standard in *Johnson v. United States*, 520 U.S. 461 (1997), as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and the panel below have adopted.**

27. ***Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (3d Cir., 656 F.3d 189; cert. granted June 25, 2012; argument scheduled Dec. 3, 2012). Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.**

28. ***Decker v. Northwest Envtl. Defense Ctr.*, No. 11-338, *Georgia-Pacific West v. Northwest Envtl. Defense Ctr.*, No. 11-347 (9th Cir., 640 F.3d 1063; cert. granted June 25, 2012, cases consolidated; SG as amicus, supporting**

Petitioners; argument scheduled Dec. 3, 2012). The Questions Presented are: (1) Whether the Ninth Circuit erred when, in conflict with other circuits, it held that a citizen may bypass judicial review of a National Pollutant Discharge Elimination System ("NPDES") permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the Clean Water Act. (2) Whether the Ninth Circuit erred when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.

29. ***Sebelius v. Auburn Regional Medical Center*, No. 11-1231 (D.C. Cir., 642 F.3d 1145; cert. granted June 25, 2012; argument scheduled Dec. 4, 2012). Whether the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary, 42 U.S.C. § 139500(a)(3), is subject to equitable tolling.**

30. ***Los Angeles County Flood Control v. Natural Resources*, No. 11-460 (9th Cir., 673 F.3d 880; cert. granted June 25, 2012; limited to Question 2; SG as amicus, supporting Neither Party; argument scheduled Dec. 4, 2012). Whether when water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding the Supreme Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.**

31. ***Chafin v. Chafin*, No. 11-1347 (11th Cir., 2012 BL 231213; cert. granted Aug. 13, 2012; argument scheduled Dec. 5, 2012). Whether an appeal of a District Court's ruling on a Petition for Return of Children pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit's *Bekier v. Bekier*, 248 F.3d 1051 (2001), leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit's *Fawcett v. McRoberts*, 326 F.3d 491 (2003), and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.**

32. ***Standard Fire Insurance Company v. Knowles*, No. 11-1450 (8th Cir., No. 11-8030, unreported; cert. granted Aug. 31, 2012). Whether, after *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the**

damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, *absent* the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

33. ***Descamps v. United States*, No. 11-9540 (9th Cir., 466 Fed. App'x 563; cert. granted Aug. 31, 2012). Whether the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the modified categorical approach, even though most other Circuit Courts of Appeal would not allow it.**

34. ***Gabelli v. SEC*, No. 11-1274 (2d Cir., 653 F.3d 49; cert. granted Sept. 25, 2012). Whether for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 – which provides that "except as otherwise provided by Act of Congress" any penalty action brought by the government must be "commenced within five years from the date when the claims first accrued" – the government's claim first accrues when the government can first bring an action for a penalty, where Congress has not enacted a separate controlling provision.**

35. ***Levin v. United States*, No. 11-1351 (9th Cir., 663 F.3d 1059; cert. granted Sept. 25, 2012). Whether suit may be brought against the United States for battery committed to a civilian by military medical personnel acting within the scope of employment.**

Gibson Dunn – Counsel for Amicus Curiae Mothers Against Drunk Driving

36. ***Missouri v. McNeely*, No. 11-1425 (Supreme Court of Missouri, 358 S.W.3d 65; cert. granted Sept. 25, 2012). Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.**

37. ***Millbrook v. United States*, No. 11-10362 (3d Cir., 2012 WL 1384918; cert. granted Sept. 25, 2012). Whether 28 U.S.C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to "execute searches, to seize evidence, or to make arrests for violations of federal law.**

38. ***Maracich v. Spears*, No. 12-25 (4th Cir., 675 F.3d 281; cert. granted Sept. 25, 2012). The Questions Presented are: (1) Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may seek solace under the litigation exception of the Act. (2) Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that**

effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."

39. ***Delia v. E.M.A.*, No. 12-98 (4th Cir., 674 F.3d 290; cert. granted Sept. 25, 2012). The question presented is whether N.C. Gen. Stat. § 108A-57 is preempted by the Medicaid Act's anti-lien provision as it was construed in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), an issue on which the North Carolina Supreme Court and the United States Court of Appeals for the Fourth Circuit are in conflict.**

Cases Determined Without Argument

1. ***Tennant v. Jefferson County Commission*, No. 11-1184 (S.D. W.Va.; reversed and remanded Sept. 25, 2012).** Per Curiam. On direct appeal from a three-judge district court, the Court held that West Virginia's 2011 congressional redistricting plan does not violate the "one person, one vote" principle embodied in Article I, § 2 of the United States Constitution. Because West Virginia conceded that it could have adopted a redistricting plan with lower population variations between congressional districts, the only question for the Court was whether West Virginia can demonstrate that the "population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The Court held that West Virginia carried its burden. Unlike other proposed plans, the chosen redistricting plan avoided creating contests between incumbents, did not split political subdivisions, and minimized population shifts between districts. Accordingly, the Court reversed the district court's decision that West Virginia had not carried its burden.

Pending Cases Calling For The Views Of The Solicitor General

1. ***Am. Trucking Ass'n, Inc. v. Los Angeles*, No. 11-798 (9th Cir., 660 F.3d 384; CVSG Mar. 26, 2012). The Questions Presented are: (1) Whether 49 U.S.C. § 14501(c)(1), which provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services. (2) Whether a required concession agreement setting out various conditions a motor carrier must meet to serve a particular port imposes any requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1). (3) Whether permitting a municipal governmental**

entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc*., 348 U.S. 61 (1954).

2. ***Tarrant Regional Water District v. Herrmann*, No. 11-889 (10th Cir., 656 F.3d 1222; CVSG Apr. 2, 2012). The Questions Presented are: (1) Whether Congress's approval of an interstate water compact that grants the contracting states "equal rights" to certain surface water and – using language present in almost all such compacts – provides that the compact shall not "be deemed . . . to interfere" with each state's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water. (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.**

3. ***Blue Cross and Blue Shield v. Fossen*, No. 11-1155 (9th Cir., 660 F.3d 1102; CVSG June 18, 2012). Whether a substantive state-law insurance standard saved from preemption under the insurance saving clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), can be enforced through state-law remedies or instead is enforceable exclusively through ERISA's enforcement scheme, 29 U.S.C. § 1132.**

4. ***Hillman v. Maretta*, No. 11-1221 (Va., 722 S.E.2d 32; CVSG June 18, 2012). Whether 5 U.S.C. § 8705(a), any other provision of the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), or any regulation promulgated thereunder preempts a state domestic relations equitable remedy which creates a cause of action against the recipient of FEGLI insurance proceeds after they have been distributed.**

5. ***GlaxoSmithKline v. Classen Immunotherapies, Inc.*, No. 11-1078 (Fed. Cir., 659 F.3d 1057; CVSG June 25, 2012). Whether the Federal Circuit's interpretation of 35 U.S.C. § 271(e)(1)'s safe harbor from patent infringement liability for drugs – an interpretation which arbitrarily restricts the safe harbor to pre-marketing approval of generic counterparts – is faithful to statutory text that contains no such limitation and decisions of this Court rejecting similar efforts to impose extra-textual limitations on the statute.**

6. ***Harris v. Quinn*, No. 11-681 (7th Cir., 656 F.3d 692; CVSG June 28, 2012). The Questions Presented are: (1) Whether a state may, consistent with the First and Fourteenth Amendments to the United States Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs. (2) Whether the lower court erred in holding that the claims of providers in the Home Based Support Services Program are not ripe for judicial review.**

7. ***Retractable Technologies v. Becton, Dickinson & Co.*, No. 11-1154 (Fed. Cir., 653 F.3d 1296; CVSG June 29, 2012). The Questions Presented are: (1) Whether a court may depart from the plain and ordinary meaning of a term in a patent claim based on language in the patent specification, where the patentee has neither expressly disavowed the plain meaning of the claim term nor expressly defined the term in a way that differs from its plain meaning. (2) Whether claim construction, including underlying factual issues that are integral to claim construction, is a purely legal question subject to de novo review on appeal.**

8. ***Young v. Fitzpatrick*, No. 11-1485 (Wash. App., 262 P.3d 527; CVSG Oct. 1, 2012). The Questions Presented are: (1) Whether police officers, employed by the Puyallup Indian Tribe, but trained, certified, and cross-commissioned by the state of Washington, and armed, equipped, and provisioned by the United States, are subject to the Constitution, U.S. civil rights laws, and state tort law. (2) Whether the Shelter or Conceal Clause of the Treaty of Medicine Creek, and additional sources of federal and state law, preempts any claims of qualified immunity by individual Puyallup tribal police officer defendants in a suit for violation of the Constitution, U.S. civil rights laws, and state tort law.**

9. ***Chadbourne & Park LLP v. Troice*, No. 12-79; *Willis of Colorado Inc. v. Troice*, No. 12-86; *Proskauer Rose LLP v. Troice*, No. 12-88 (5th Cir., 675 F.3d 503; CVSG Oct. 1, 2012). The Questions Presented are: (1) Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibits private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. (2) Whether the SLUSA precludes a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***Ryan v. Gonzales*, No. 10-930 (9th Cir., 623 F.3d 1242; CVSG May 31, 2011; cert. opposed Feb. 9, 2012; cert. granted Mar. 19, 2012; SG as amicus, supporting Petitioners). 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.**

2. ***Los Angeles County Flood Control District v. Natural Resources Defense Council*, No. 11-460 (9th Cir., _ F.3d _, 2011 WL 2712963; CVSG Jan. 17, 2012; cert. opposed May 23, 2012; cert. granted June 25, 2012; limited to**

Question 2). The Questions Presented are: (1) Whether "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a "navigable water" under the Clean Water Act. (2) When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system into a lower portion of the same river, whether there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

3. ***Decker v. Northwest Environmental Defense Center*, No. 11-338 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012; cert. granted June 25, 2012, consolidated with No. 11-347). Congress has authorized citizens dissatisfied with the Environmental Protection Agency's ("EPA's") rules implementing the Clean Water Act's ("CWA's") National Pollutant Discharge Elimination System ("NPDES") permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding. In addition, in 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14). The Questions Presented are: (1) Whether the Ninth Circuit erred when it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA. (2) Whether the Ninth Circuit erred when it held that storm-water from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater.**

4. ***Georgia-Pacific West v. Northwest Environmental Defense Center*, No. 11-347 (9th Cir., 640 F.3d 1063; CVSG Dec. 12, 2011; cert. opposed May 24, 2012; cert. granted June 25, 2012, consolidated with No. 11-338). Since passage of the Clean Water Act, the Environmental Protection Agency has considered runoff of rain from forest roads—whether channeled or not—to fall outside the scope of its National Pollutant Discharge Elimination System ("NPDES") and thus not to require a permit as a point source discharge of pollutants.**

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

5. ***Vance v. Ball State University*, No. 11-556 (7th Cir., 646 F.3d 461; CVSG Feb. 21, 2012; cert. opposed May 24, 2012; cert. granted June 25, 2012; SG as amicus, supporting Neither Party). In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim. If the harasser was the victim's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the victim's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The Question Presented is whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim.**

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