

Appendix: Case “Scorecards”

For the three categories other than Obama Party Cases, we have listed the victories first, in alphabetical order, followed by the losses. For Obama party cases, where there were victories and losses in both of them, we listed the issues in each case and show a victory or a loss.

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Obama Party Cases

Issue Victories: 6

Issue Losses: 3

Arizona v. United States

Docket No: 11–182

Citation: 132 S.Ct. 2492 (2012)

SG Represented: Respondent US

Issue Decided: Does federal law preempt Sections 2(B), 3, 5(C), and 6 of the State of Arizona’s S.B. 1070, Support Our Law Enforcement and Safe Neighborhoods Act of 2010?

Position of the Solicitor General: Each of the challenged sections intrudes into a field that is entirely occupied by the federal government either by creating a state-law crime where there is no federal crime, imposing penalties in addition to those created by Congress for federal law violations, or disregarding federal priorities in deciding who can be arrested based on removability under federal law.

Result: The Court held most of the law to be preempted because it either intrudes on the field of alien regulation, which the Court had previously held to be a “single, integrated, and all-embracing system, or creates an obstacle to the federal regulatory regime because it imposes a new crime on (and/or imposes additional penalties for) a class on whom Congress had decided it would be inappropriate to impose penalties. The Court found that Section 2(B) had been improperly enjoined because the Arizona courts had not yet been given an opportunity to construe the provision.

The Court’s decisions came with Justice Kennedy writing for a majority of 5, Justice Alito and Justice Scalia and Justice Thomas concurring on Section 2(B), Justice Alito concurring on Section 3, and Justice Scalia and Justice Thomas and Justice Alito dissenting on Sections 5(C) and 6. Justice Kagan took no part in deciding the case.

Responsibility for SG Position: This case was unambiguously the product of Obama Administration policy. It brought suit immediately after Arizona enacted S.B. 1070. Consequently, the disposition of the case should be seen as a major victory for the Obama Administration by winning on three of the four sections, while the last, 2(B), was found to be premature (hence a loss), but the ultimate outcome of its legality is likely to be largely circumscribed by the majority’s opinion.

Issue 1 (Section 2(B):

US Victory ___ US Loss X Obama Position X Prior Admin Position ___

Issue 2 (Section 3):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

Issue 3 (Section 5(C):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

Issue 4 (Section 6):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

National Federation of Independent Business v. Sebelius

Docket No: 11–393 (also 11–398 and 11–400)

Citation: 132 S.Ct. 2566 (2012)

SG Represented: Secretaries and Departments of Health and Human Services, Treasury, and Labor

Issue Decided: Is the suit brought to challenge the minimum coverage provision, 26 U.S.C. 5000A of the Patient Protection and Affordable Care Act, barred by 26 U.S.C. 7421(a)? Is the minimum coverage provision a valid exercise of Congress’s powers under the Commerce Clause? Is the minimum coverage provision a valid exercise of Congress’s powers under the Taxing and Spending Clause? Is the extension of Medicaid eligibility in 42 U.S.C. 1396 a valid exercise of Congress’s power to set the terms on which it will appropriate federal funds? If any portion of the law is found to be unconstitutional, what is the appropriate (severability) remedy?

Position of the Solicitor General: The suit is not barred by the Anti-Injunction Act. The minimum coverage provision is authorized by Congress’s commerce power under the Commerce Clause and Necessary Proper Clause, because it is both part of a comprehensive scheme of economic regulation and itself a regulatory instrument of interstate commerce. Independently the minimum coverage provision is authorized by Congress’s power to tax because the provision operates as a tax law and the penalty is assessed as a tax penalty. Congress’s authority under the Spending Clause and Appropriations Clause includes the ability to set criteria for the payment of money from the Treasury. The threat to withdraw federal Medicaid money from states that refuse to participate in the Medicaid expansion scheme is not unduly coercive. Finally, both the minimum coverage provision and the Medicaid expansion provision should be considered severable from most of the remainder of the Act.

Result: The Court unanimously held that the suit was not barred by the Anti-Injunction Act. The Court rejected the minimum coverage provision as a legitimate use of Congress’s commerce power, with Chief Justice Roberts writing an opinion, and Justices Scalia, Kennedy, Thomas, and Alito joining an opinion concurring in that conclusion. Justice Ginsburg dissented on that issue joined by Justices Breyer, Sotomayor, and Kagan. The Court nonetheless upheld the minimum coverage provision as a lawful exercise of Congress’s taxing power concluding that Congress had effectively placed a tax on not having health insurance, with Chief Justice Roberts writing for a majority of 5, and Justices Scalia, Kennedy, Thomas, and Alito dissenting.

The Court struck down the provision in the Medicaid expansion allowing the withholding of all Medicaid funds from states refusing to participate in the expansion as unduly coercive, with Chief Justice Roberts writing an opinion joined by Justices Breyer and Kagan, and Justices Scalia, Kennedy, Thomas, and Alito writing an opinion, concurring in that result. Justices Ginsburg and Sotomayor dissented on the coercion issue. Finally, the Court concluded that, because Congress would have chosen to find the expansion severable rather than strike down the entire Act, the Court upheld the law, except for the Medicaid withholding provision,

with Chief Justice Roberts writing for a majority of 5, and Justices Scalia, Kennedy, Thomas, and Alito dissenting.

Responsibility for SG Position: This case was a clear victory for the Obama administration in that the ACA was upheld. However despite the victory, the Solicitor General still lost on the issues of the commerce power of Congress and the ability to withhold Medicaid funds from non-complying states.

Issue 1 (Anti-Injunction Act):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

Issue 2 (Commerce Clause):

US Victory ___ US Loss X Obama Position X Prior Admin Position ___

Issue 3 (Taxing Power):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

Issue 4 (Medicaid Coercion):

US Victory ___ US Loss X Obama Position X Prior Admin Position ___

Issue 5 (Severability):

US Victory X US Loss ___ Obama Position X Prior Admin Position ___

Prior Administration Party Cases

Case (Issue) victories: 8

Case (Issue) losses: 14

Astrue v. Capato

Docket No: 11–159

Citation: 132 S.Ct. 2021 (2012)

SG Represented: Petitioner Commissioner of Social Security

Issue Decided: Is a child born after the death of its father, who cannot inherit personal property from the deceased under state intestacy law, entitled to Social Security survivorship benefits?

Position of the Solicitor General: An applicant is entitled to survivor benefits based on the Social Security Administration’s determination of whether the applicant is a “child” of an insured worker using state intestacy law.

Result: The Court unanimously held that Social Security Act benefits are intended for those supported by the wage earner during his or her lifetime, that the SSA acted properly in applying the state intestacy law to deny the benefits, and that its decision is entitled to deference.

Responsibility for SG Position: The SSA has taken this position since at least 2007, when it rejected the respondent’s application in an administrative proceeding.

US Victory X US Loss Obama Position Prior Admin Position X

Elgin v. Department of the Treasury

Docket No: 11-45

Citation: 132 S.Ct. 2126 (2012)

SG Represented: Respondent Department of the Treasury

Issue Decided: Does the Civil Service Reform Act of 1978 preclude individuals from seeking equitable relief in district court based on allegations that their termination from federal employment based on a federal statute was unconstitutional as applied to them?

Position of the Solicitor General: Federal employees may not bypass judicial review available under the CSRA by filing suit in district court because the specialized statutory review scheme provided by the CSRA precludes such suits.

Result: The Court held that the CSRA's judicial review mechanism was adequate and obligatory for the petitioners, with Justice Thomas writing for a majority of 6, and Justice Alito dissenting joined by Justices Ginsburg and Kagan.

Responsibility for SG Position: The government has taken this position since the case was first filed in 2008.

US Victory X US Loss Obama Position Prior Admin Position X

Federal Aviation Administration v. Cooper

Docket No: 10–1024

Citation: 132 S.Ct. 1441 (2012)

SG Represented: Respondents FAA, Social Security Administration, and Department of Transportation

Issue Decided: Does an individual alleging solely mental and emotional distress satisfy the “actual damages” requirement of the civil remedies provision of the Privacy Act of 1974 (5 U.S.C. 552a(g)(4)(A))?

Position of the Solicitor General: Because Congress did not clearly waive the US’s sovereign immunity for claims of mental or emotional distress, “actual damages” in the Privacy Act refer exclusively to pecuniary losses.

Result: The Court held that the statute does not unequivocally authorize damages for mental or emotional distress and therefore does not waive sovereign immunity, with Justice Alito writing for a majority of 5, and Justice Sotomayor dissenting joined by Justices Ginsburg and Breyer. Justice Kagan took no part in deciding the case.

Responsibility for SG Position: The FAA et al have consistently defended this position since the case was filed in 2007.

US Victory X US Loss Obama Position Prior Admin Position X

Golan v. Holder

Docket No 10–545

Citation: 132 S.Ct. 873 (2012)

SG Represented: Respondent Attorney General Eric Holder

Issue Decided: Is section 514 of the Copyright Act of 1996, which extends copyright protection to works in the public domain as of that date, constitutional under the Copyright Clause and the First Amendment?

Position of the Solicitor General: The statute is constitutional.

Result: The constitutionality of the statute was upheld by a vote of 6 to 2 with Justices Breyer and Alito dissenting. Justice Kagan took no part in deciding the case.

Responsibility for SG Position: The provision was enacted during the Clinton Administration, and no Attorney General has ever contended that it was unconstitutional.

US Victory X US Loss _____ Obama Position _____ Prior Admin Position X

Hall v. United States

Docket No: 10–875

Citation: 132 S.Ct. 1882 (2012)

SG Represented: Respondent Internal Revenue Service

Issue Decided: Are bankruptcy courts in Chapter 12 cases authorized to treat federal income tax debts arising out of a debtor’s post–petition sale of a farm asset as dischargeable nonpriority claims under 11 U.S.C. 1222(a)(2)(A)?

Position of the Solicitor General: Post–petition tax debts do not qualify as dischargeable “administrative expenses” under 11 U.S.C. 507(a)(2) because they are not “incurred by the estate” as required by 11 U.S.C. 503 (b)(1)(B)(i). Therefore the government’s tax claim is not dischargeable and is payable in full.

Result: The Court held that post–petition tax debts are not “incurred by the estate” and therefore are not “administrative expenses,” with Justice Sotomayor writing for a majority of 5, and Justice Breyer dissenting joined by Justices Kennedy, Ginsburg, and Kagan.

Responsibility for SG Position: The IRS has taken this position since at least 2007, when the agency objected in the petitioners’ bankruptcy proceedings. The asset sale in question occurred in 2005.

US Victory X US Loss Obama Position Prior Admin Position X

Holder v. Martinez Gutierrez (combined with Holder v. Sawyers)

Docket No: 10–1542 (also 10–1543)

Citation: 132 S.Ct. 2011 (2012)

SG Represented: Petitioner Attorney General

Issue Decided: May a parent’s years of lawful residence status be imputed to an unemancipated minor who is an alien, in order to satisfy the time requirements for seeking cancellation of removal?

Position of the Solicitor General: Imputing a parent’s years of permanent residency or lawful admission is not permitted since aliens must personally satisfy eligibility requirements.

Result: The Court unanimously held that imputation is not permitted and deference should be given to the interpretation of the BIA, which is under the Attorney General.

Responsibility for SG Position: The BIA had taken this position since at least 2007 when it overturned the Immigration Judge’s decision to allow imputation.

US Victory X US Loss Obama Position Prior Admin Position X

Kawashima v. Holder

Docket No: 10–577

Citation: 132 S.Ct. 1166 (2012)

SG Represented: Respondent Attorney General

Issue Decided: Do resident aliens’ convictions for subscribing to a false statement on a tax return, and for aiding and abetting in the preparation of a false tax return, qualify as “aggravated felonies” under 8 U.S.C. 1101(a)(43)(M)(i) thereby rendering the aliens removable, which is the policy of the BIA, an entity under the Attorney General?

Position of the Solicitor General: The petitioners’ convictions necessarily involved “fraud or deceit,” and the loss sustained exceeded \$10,000. Therefore, they qualify as aggravated felonies under the statute.

Result: The Court held the convictions were aggravated felonies with Justice Thomas writing for a majority of 6, and Justice Ginsburg dissenting joined by Justices Breyer and Kagan.

Responsibility for SG Position: This is a long–standing position of the BIA since at least 2001 when the initial removal notices were delivered to petitioners.

US Victory X US Loss Obama Position Prior Admin Position X

Roberts v. Sea–Land Services, Inc.

Docket No: 10–1399

Citation: 132 S.Ct. 1350 (2012)

SG Represented: Respondent Department of Labor

Issue Decided: For the purposes of 33 U.S.C. 906(b) and (c), is the applicable year for calculating national average wage the year in which an employee suffers a disabling injury, or the year during which a formal compensation order is issued?

Position of the Solicitor General: The applicable national wage is the year during which an employee suffers a disabling injury.

Result: The Court held that the applicable national wage is the year during which an employee suffers a disabling injury, with Justice Sotomayor writing for a majority of 8, and Justice Ginsburg concurring in part and dissenting in part.

Responsibility for SG Position: The provisions were last modified during the Reagan Administration and the Department of Labor has always used the year of disability.

US Victory X US Loss Obama Position Prior Admin Position X

Federal Communications Commission v. Fox Television Stations, Inc.

Docket No: 10–1293

Citation: 132 S.Ct. 2307 (2012)

SG Represented: Petitioner FCC

Issue Decided: Does the FCC’s indecency–enforcement regime embodied by *In re Industry Guidance on Commission’s Case Law Interpreting 18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (2001), give sufficient notice of the FCC’s position on fleeting indecency in broadcasts?

Position of the Solicitor General: The FCC’s indecency enforcement policy is not unconstitutionally vague under the Fifth Amendment and provides fair warning to broadcasters.

Result: The Court held that the FCC’s policy could not be applied to the respondents because the networks lacked notice at the time of the broadcasts of the consequences of fleeting indecency, with Justice Kennedy writing for a majority of 7, and Justice Ginsburg concurring. Justice Sotomayor took no part in deciding the case.

Responsibility for SG Position: The broadcasts at issue occurred in 2002 and 2003, and the FCC brought initial enforcement actions in 2005–2006 during the Bush Administration. The Court previously held in the same case during 2009 that the FCC’s decision to modify its enforcement regime to include fleeting indecency was neither arbitrary nor capricious.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC

Docket No: 10–553

Citation: 132 S.Ct. 694 (2012)

SG Represented: Respondent EEOC

Issue Decided: May the anti–retaliation provision of the Americans with Disabilities Act of 1990 be applied to the firing of a person who was designated a minister by the Church–employer, in light of the Free Exercise Clause and the ministerial exception to the civil rights act of 1964?

Position of the Solicitor General: The statute may be constitutionally applied as a neutral generally applicable law, despite the Church’s designation of the position as a minister, since she was a teacher and did not perform religious functions.

Result: The Court unanimously upheld the firing, rejecting the EEOC position.

Responsibility for SG Position: The EEOC filed this suit in 2007, during the Bush Administration, following a long–standing position that the claimed exceptions were very narrow, based on evidence that Congress intended the challenged provisions of the ADA to apply to religious institutions.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Judulang v. Holder

Docket No: 10–694

Citation: 132 S.Ct. 476 (2011)

SG Represented: Respondent Attorney General

Issue Decided: Is the policy of the Board of Immigration Appeals (BIA), an entity under the Attorney General, that forecloses the exercise of discretionary relief from deportation, arbitrary and capricious when the BIA would allow for the exercise of such discretion if the proceeding were for relief from a decision to exclude a similarly situated alien from entering the United States?

Position of the Solicitor General: The position of the BIA is proper.

Result: The Court unanimously held that the position of the BIA is arbitrary and capricious.

Responsibility for SG Position: This is a long–standing position of the BIA, since at least 2005 when the BIA decided this case.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Kappos v. Hyatt

Docket No: 10–1219

Citation: 132 S.Ct. 1690 (2012)

SG Represented: Petitioner Director of the US Patent and Trademark Office

Issue Decided: May a plaintiff in a 35 U.S.C. 145 civil action suing to obtain a patent introduce new evidence which could have been presented to the PTO in the first instance; and if new evidence is introduced, may the district court decide *de novo* factual questions to which the evidence pertains without giving deference to the prior decision of the PTO?

Position of the Solicitor General: Section 145 action plaintiffs are only permitted to introduce new evidence if the proponent had no reasonable opportunity to present it to the PTO. Moreover, the district court should give deference to the PTO’s decision and only overturn it if the evidence shows the PTO clearly erred.

Result: The Court unanimously held the only limitations on evidence introduced in a Section 145 action were those of the Federal Rules of Evidence and of Civil Procedure. The Court also held that, if the new evidence is presented on a disputed question of fact, the district court must make a *de novo* factual finding that takes into account the new evidence and the administrative record, and that the court is not required to give deference to the PTO’s decisions.

Responsibility for SG Position: The PTO has taken this position since at least 2003 when the case was filed, while Section 145 actions were established by the Patent Act of 1952.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Match–E–Be–Nash–She–Wish Band of Pottawotami v. Patchak (combined with Salazar v. Patchak)

Docket No: 11–246 (also 11–247)

Citation: 132 S.Ct. 2199 (2012)

SG Represented: Petitioner Secretary of the Interior

Issue Decided: May an individual alleging injuries resulting from the operation of a gaming facility on Indian trust land challenge the decision of the Secretary of the Interior to take title to that land on the ground that that decision was not authorized under the Indian Reorganization Act of 1934?

Position of the Solicitor General: The petitioner is barred from suit because the US had not waived sovereign immunity from suits challenging title to Indian trust land.

Result: The Court held the petitioner possesses standing to challenge the Secretary’s decision and his claim is not barred by sovereign immunity, with Justice Kagan writing for a majority of 8, and Justice Sotomayor dissenting.

Responsibility for SG Position: The Interior Department has been defending this position since the petitioner filed suit in 2008 during the Bush Administration.

US Victory ____ US Loss X Obama Position ____ Prior Admin Position X

Reynolds v. United States

Docket No: 10–6549

Citation: 132 S.Ct. 975 (2012)

SG Represented: Respondent US

Issue Decided: May a convicted sex offender be charged with violating the Sex Offender Registration and Notification Act of 2006, when the individual is a pre–Act offender and the Attorney General has not specified that the Act is applicable to pre–Act offenders as permitted by the Act?

Position of the Solicitor General: The requirement for registration of sex offenders arises directly from SORNA, and therefore permissive delegation to the Attorney General to specify the applicability of SORNA’s provisions to pre–enactment and pre–implementation offenders is not required to trigger the Act’s registration requirements.

Result: The Court held that SORNA does not require pre–Act offenders to register in the absence of the Attorney General formally specifying the Act applies to them, with Justice Breyer writing for a majority of 7, and Justice Scalia dissenting joined by Justice Ginsburg.

Responsibility for SG Position: The petitioner was indicted for violating Section 2250(a) in 2007.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Sackett v. Environmental Protection Agency

Docket No: 10–1062

Citation: 132 S.Ct. 1367 (2012)

SG Represented: Respondent EPA

Issue Decided: Is an EPA compliance order issued under 33 U.S.C. 1319(a)(3) a “final agency action” entitling individuals to pre–enforcement judicial review under the Administrative Procedure Act?

Position of the Solicitor General: The compliance order is merely the means of providing regulatory guidance and encouraging voluntary compliance, not a self–executing measure; as a result it is not a final agency action and so judicial review of the order is precluded.

Result: The Court unanimously held the compliance order bore “all the hallmarks of finality” and thus the petitioners were permitted pre–enforcement judicial review.

Responsibility for SG Position: The EPA has defended this position since the petitioners brought suit in 2008, and the orders described in this case have been issued in their present form since 1990.

US Victory ____ US Loss X Obama Position ____ Prior Admin Position X

Salazar v. Ramah Navajo Chapter

Docket No: 11-551

Citation: 132 S.Ct. 2181 (2012)

SG Represented: Petitioner Secretary of the Interior

Issue Decided: Is the federal government required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance of 1975, when Congress has imposed a statutory cap on the appropriations available to pay such costs and the Secretary of the Interior cannot pay for all such costs for all tribal contractors without exceeding the statutory cap?

Position of the Solicitor General: The Secretary has properly refused to pay contract support costs in excess of the fixed amounts appropriated by Congress because the Secretary has no authority to bind the US to spend more than the appropriated funds.

Result: The Court held that Congress had appropriated legally unrestricted funds to pay the contracts and that the government had the obligation to pay the contracts in full. Lack of specifically appropriated funds was not a sufficient basis to overcome the government's obligation to pay in full even if the remaining funds were distributed pro rata, with Justice Sotomayor writing for a majority of 5, and Chief Justice Roberts dissenting joined by Justices Ginsburg, Breyer, and Alito.

Responsibility for SG Position: The case began during in 1991, and the Government opposed the tribe's position from the outset.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Southern Union Co. v. United States

Docket No: 11-94

Citation: 132 S.Ct. 2344 (2012)

SG Represented: Respondent US

Issue Decided: Does the Constitution require a jury rather than a judge to determine the number of days of violation before the court may impose a fine greater than \$50,000 under the Resource Conservation and Recovery Act of 1976?

Position of the Solicitor General: The *Apprendi* rule that any fact, other than a prior conviction, that increases the sentence of imprisonment beyond a statutory maximum must be found by a jury, should not be extended to criminal fines.

Result: The Court held the *Apprendi* rule should be extended to criminal fines, with Justice Sotomayor writing for a majority of 6, and Justice Breyer dissenting joined by Justices Kennedy and Alito.

Responsibility for SG Position: The violations occurred from 2002 to 2004, and the case against the petitioner was originally brought during the Bush Administration. It is not clear from the available documents whether the sentence as imposed was sought under the Bush Administration or the newly inaugurated Obama Administration, but the position that criminal fines are not subject to *Apprendi* is a long-held DOJ view.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

United States v. Alvarez

Docket No: 11-210

Citation: 132 S.Ct. 2537 (2012)

SG Represented: Petitioner US

Issue Decided: Is the Stolen Valor Act of 2005 facially invalid under the Free Speech Clause of the First Amendment?

Position of the Solicitor General: Section 704(b) prohibits only knowingly false statements that can be understood as fact which are entitled at most to limited First Amendment protection, while also serving a compelling interest and still providing breathing space.

Result: The Court held that the Act was unconstitutional, with Justice Kennedy writing for a plurality of 4, Justice Breyer concurring joined by Justice Kagan, and Justice Alito dissenting joined by Justices Scalia and Thomas.

Responsibility for SG Position: The respondent was indicted for violating the Act in 2007.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

United States v. Home Concrete & Supply, LLC

Docket No: 11-94

Citation: 132 S.Ct. 2344 (2012)

SG Represented: Petitioner IRS

Issue Decided: Is an understatement of gross income attributable to an overstatement of basis in sold property an omission from gross income that triggers an extended statute of limitations, in light of a Treasury regulation supporting that position?

Position of the Solicitor General: Section 6501(e)(1)(A) establishes that an overstatement of basis can trigger a six-year assessment period; any statutory ambiguity should be resolved in favor of the IRS under the applicable Treasury regulation which states the current interpretation of the section at issue.

Result: The Court held that its 1958 decision in *Old Colony, Inc. v. Commissioner* controlled the interpretation of the applicable statute and thereby superseded the Treasury regulation, with Justice Breyer writing for a majority of 5, Justice Scalia concurring, and Justice Kennedy dissenting joined by Justices Ginsburg, Sotomayor, and Kagan.

Responsibility for SG Position: The overstatement occurred in the returns for Tax Year 1999, and the IRS began proceedings during the Bush Administration in 2006.

US Victory ____ US Loss X Obama Position ____ Prior Admin Position X

United States v. Jones

Docket No: 10–1259

Citation: 132 S.Ct. 945 (2012)

SG Represented: Petitioner US

Issue Decided: Does the warrantless and unconsented attachment of a GPS tracking device on an individual’s vehicle to monitor its movements on public streets violate the Fourth Amendment prohibition of unreasonable searches and seizures?

Position of the Solicitor General: The use of a GPS tracking device to monitor movement was not a search because the respondent had no reasonable expectation of privacy in information exposed to the public view. Moreover, the respondent had no reasonable expectation of privacy in the exterior of the vehicle, and the device did not meaningfully interfere with the possessory interests of the respondent in the vehicle.

Result: The Court unanimously held that the attachment and subsequent use of the device to monitor the vehicle’s movements was a search under the Fourth Amendment.

Responsibility for SG Position: The government attached and utilized the GPS tracking device in 2005 and defended this in 2006 when the respondent moved to exclude the evidence gathered by the device from trial.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Vartelas v. Holder

Docket No: 10–1211

Citation: 132 S.Ct. 1479 (2012)

SG Represented: Respondent Attorney General

Issue Decided: Does 8 U.S.C. 1101(a)(13)(C)(v) apply to a lawful permanent resident alien who before the effective date of that provision committed and pled guilty to an offense identified in 8 U.S.C. 1182(a)(2), departed from the US, and then returned in 2003, which is the policy of the BIA, an entity under the Attorney General?

Position of the Solicitor General: Section 1101(a)(13) governs the admission of aliens who committed crimes before as well as after enactment.

Result: The Court held that the statute would not be applied retroactively to the petitioner because Congress had not expressly made the statute retroactive, with Justice Ginsburg writing for a majority of 6, and Justice Scalia dissenting joined by Justices Thomas and Alito.

Responsibility for SG Position: The BIA has taken this position since at least 2008, when it affirmed the decision of the Immigration Judge.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Zivotofsky v. Clinton

Docket No: 10–699

Citation: 132 S.Ct. 1421 (2012)

SG Represented: Respondent Secretary of State

Issue Decided: Is a claim under a provision of the Foreign Relations Authorization Act of 2003 seeking to compel the Secretary of State to record a Jerusalem–born individual’s place of birth as “Israel” nonjusticiable under the political question doctrine?

Position of the Solicitor General: The petitioner’s claimed statutory right presents a nonjusticiable political question because the President’s authority to determine passport content as a means to implement foreign policy is textually committed by the Constitution to the Executive Branch.

Result: The Court held that the petitioner’s claim was justiciable and remanded for consideration of the merits, with Chief Justice Roberts writing for a majority of 6, with Justice Sotomayor concurring, Justice Alito concurring, and Justice Breyer dissenting.

Responsibility for SG Position: The petitioner first filed suit against the Secretary of State in 2003, during the Bush Administration, which claimed that the plaintiff lacked standing and that the case presented a political question. In the 2002 signing statement accompanying the Foreign Relations Authorization Act, President Bush announced that the Jerusalem provision was an impermissible interference with the President’s exclusive constitutional authority to conduct foreign affairs, and the Obama Administration has maintained this view and supported the application of the political question doctrine.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Obama Amicus Cases

Case (Issue) victories: 1

Case (Issue) losses: 4

Dorsey v. United States

Docket No: 11–5683 (also 11–5721)

Citation: 132 S. Ct. 2321 (2012)

SG Represented: United States as amicus curiae in support of petitioner.

Issue Decided: Does the Fair Sentencing Act of 2010 apply to initial sentencing proceedings after the date of enactment or only after the effective date of the act?

Position of the Solicitor General: The FSA applies in all initial sentencing proceedings after its enactment.

Result: The Court held that the sentencing provisions of the FSA were given immediate effect from the enactment date, with Justice Breyer writing for a majority of 5, and Justice Scalia dissenting joined by Chief Justice Roberts, and by Justices Thomas and Alito.

Responsibility for SG Position: This was an unusual case. Initially the Obama Administration’s interpretation as a party was to apply the FSA only from the effective date onward. However, the Department of Justice changed its policy and refused to defend its former position; instead the US filed an amicus brief supporting the petitioner. The Court appointed an amicus to represent the previous interpretation. Consequently this case ought to be seen as a victory for the Solicitor General’s office, as an amicus, even though the US technically “lost” the case.

US Victory X US Loss Obama Position X Prior Admin Position

Christopher v. SmithKline Beecham Corp.

Docket No: 11–204

Citation: 132 S. Ct. 2156 (2012)

SG Represented: United States on behalf of the Department of Labor as amicus curiae in support of petitioners–plaintiffs.

Issue Decided: Do pharmaceutical representatives who promote but do not sell their companies drugs fall under the “outside salesman” exemption of 29 U.S.C. 213(a)(1) of the Fair Labor Standards Act?

Position of the Solicitor General: The Department of Labor’s regulations distinguish between direct sales work and promotional work pursuant to its statutory authority to define and delimit the “outside salesman” exemption. The SG sided with the plaintiffs and argued that the Act restricts the exemption to employees who consummate sales of goods and services.

Result: The Court rejected the SG’s position and held that the petitioners fall under the exemption based on a broad reading of the Department’s guidelines, with Justice Alito writing for a majority of 5, and Justice Breyer dissenting joined by Justices Ginsburg, Sotomayor, and Kagan.

Responsibility for SG Position: The Department of Labor filed its brief in the Ninth Circuit in 2010, and the Court argued that because the Department’s interpretation of “sale” was only given in amici during the proceedings below, it was not entitled to deference. It is not clear that the position taken by the SG in this case resulted from an Obama Administration policy. As the petitioners note in their reply brief, the Department of Labor took the position that employees like the petitioners would not qualify for the exemption as early as 2004 (*Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22,122, 22,162 (Apr. 3, 2004)). However, because the Court seemed to adopt the position that the Department of Labor’s current position was an extension of its prior positions, the position is, on balance, an Obama position, not one attributable to prior administrations.

US Victory ____ US Loss X Obama Position X Prior Admin Position ____

Kurns v. Railroad Friction Products Corp

Docket No: 10–879

Citation: 132 S. Ct. 1261 (2012)

SG Represented: United States on behalf of the Department of Transportation as amicus curiae in support of petitioner–plaintiff.

Issue Decided: Does the Locomotive Inspection Act of 1911 (LIA) preempt state tort law claims based on an individual’s exposure to asbestos–containing materials during the repair of locomotives at a railroad’s maintenance facility?

Position of the Solicitor General: The LIA’s preemption extends only to locomotives that were in use, but not to non–operational activities such as those in maintenance facilities.

Result: The Court held that the LIA preempted state law design–defect and failure–to–warn tort claims, with Justice Thomas writing for a majority of 5, Justice Kagan concurring, and Justice Sotomayor concurring in part and dissenting in part joined by Justices Ginsburg and Breyer.

Responsibility for SG Position: There was an earlier case sustaining a claim of preemption involving arguably different facts from 1926 (*Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605), but no cases since then. The position of the Solicitor General appears to have been first taken in this case and hence is an Obama Administration position.

US Victory ____ US Loss X Obama Position X Prior Admin Position ____

Perry v. Perez (also Perry v. Davis, and Perry v. Perez)

Docket No: 11–713 (also 11–714 and 11–715)

Citation: 132 S. Ct. 1670 (2012)

SG Represented: United States as amicus curiae in support of respondents.

Issue Decided: Did the district court properly enjoin the State of Texas’s unprecleared redistricting plans pursuant to Section 5 of the Voting Rights Act (42 U.S.C. 1973c)? Having enjoined the plans, is the district court required to order the plans into effect as “interim” plans? Did the district court adequately justify how its plans modify those plans currently in effect?

Position of the Solicitor General: The district court properly enjoined the Texas redistricting plan because Texas is a covered jurisdiction of the VRA and so may not enforce plans until they received preclearance. As a result the district court acted properly in drawing its own interim plans. The district court was not required to adopt Texas’s unprecleared plans because the State may not enforce its plans on an interim basis, nor does the court owe deference to the State plan. However, allowing it to take effect provisionally would create an incentive to stall Section 5 proceedings. The district court did not adequately explain the addition of new minority ability-to-elect or new coalition districts.

Result: The Court held per curiam that the district court acted properly insofar as its injunction was consistent with Section 5. However, the Court also announced a new rule that a district court should be guided by state plans except to the extent that “legal challenges are shown to have a likelihood of success on the merits.” And finally the Court rejected both the new minority ability-to-elect and new coalition districts.

Responsibility for SG Position: The Obama Administration opposed Texas in this case, and while the injunction was approved, the new rule announced by the Court represents a distinct defeat for the Administration.

US Victory ____ US Loss X Obama Position X Prior Admin Position ____

Setser v. United States

Docket No: 10–7387

Citation: 132 S.Ct. 1463 (2012)

SG Represented: United States in support of petitioner

Issue Decided: May a district court order a federal sentence to run consecutively to a state sentence which the state court has not yet imposed such sentence?

Position of the Solicitor General: Reversing the position taken below, a district court lacks the authority to impose a consecutive sentence on a state sentence that has not yet been imposed.

Result: The Court held that the district court had discretion to order the federal sentence to run consecutively to an anticipated state court sentence, with Justice Scalia writing for a majority of 6, and Justice Breyer dissenting joined by Justices Kennedy and Ginsburg.

Responsibility for SG Position: The decision to support the petitioner did not come until after the decision of the Fifth Circuit in 2010 to affirm the consecutive sentencing, thus making its position a policy of the Obama Administration.

US Victory ____ US Loss X Obama Position X Prior Admin Position ____

Prior Administration Amicus Cases

Case (Issue) victories: 14

Case (Issue) losses: 5

Carraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S

Docket No: 10–844

Citation: 132 S. Ct. 1670 (2012)

SG Represented: United States as amicus curiae in support of petitioners.

Issue Decided: May the filer of an abbreviated new drug application allege that a brand–name manufacturer’s patent information in the form of use codes does not accurately or precisely describe the method of use claimed by the patent, in order to assert a counterclaim under 21 U.S.C. 355(j)(5)(C)(ii)(I) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003?

Position of the Solicitor General: The statute authorizes a challenge to overbroad use codes by way of a counterclaim because a narrow reading of the provision would undermine Congress’s regulatory scheme to balance innovation and competition as originally enacted by the Hatch–Waxman Amendments.

Result: The Court unanimously held that the statute permits a counterclaim to force the correction of an inaccurate use code.

Responsibility for SG Position: While the Solicitor General first filed a brief on the specifics of this case in 2011, the position taken does not appear to be an Obama Administration policy. The statute at issue was originally enacted in response to the Food and Drug Administration’s own explanation in 2003 that it lacked the capability to resolve disputes challenging patent listing, prompting Congress to write such a challenge provision into the Hatch–Waxman Amendments.

US Victory X US Loss Obama Position Prior Admin Position X

Filarsky v. Delia

Docket No: 10–1018

Citation: 132 S. Ct. 1657 (2012)

SG Represented: United States as amicus curiae in support of petitioner–defendant.

Issue Decided: May a private attorney retained by the government to assist with a personnel investigation assert qualified immunity from suit for money damages for constitutional violations allegedly committed in the course of the investigation?

Position of the Solicitor General: A private person retained to work with government officials in the performance of a public function may assert qualified immunity in a constitutional tort lawsuit.

Result: The Court unanimously found qualified immunity for private individuals retained to work temporarily for the government.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but the United States has always supported qualified immunity for government contractors facing *Bivens* liability under the same terms as Section 1983 suits.

US Victory X US Loss Obama Position Prior Admin Position X

Florence v. Board of Chosen Freeholders

Docket No: 10–945

Citation: 132 S. Ct. 1510 (2012)

SG Represented: United States as amicus curiae in support of respondents–defendants.

Issue Decided: Is a policy of conducting strip searches of incoming detainees who have not been charged with a serious crime and for whom there is no reason to believe they are dangerous or carrying contraband, but who will be placed in the general jail population, consistent with the Fourth Amendment?

Position of the Solicitor General: Prison and jail officials need not have individualized suspicion to justify strip searches of incoming detainees who will be placed in the general population because the Fourth Amendment permits corrections officials to conduct reasonable searches to protect inmates and officers and to maintain institutional security.

Result: The Court held that strip searches of incoming detainees placed in the general population was consistent with the Fourth Amendment, with Justice Kennedy writing for a majority of 5, Chief Justice Roberts concurring and Justice Alito concurring, and Justice Breyer dissenting joined by Justices Ginsburg, Sotomayor, and Kagan.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but searches like the one at issue have been standing policy in the Federal Bureau of Prisons (where convicted felons are sent) since at least 1997. Accordingly, the position supported here is not the result of an Obama Administration policy, although arguably the position taken in the brief was more favorable to strip searches than prior policy.

US Victory X US Loss Obama Position Prior Admin Position X

Messerschmidt v. Millender

Docket No: 10–704

Citation: 132 S. Ct. 1235 (2012)

SG Represented: United States as amicus curiae in support of petitioners–defendants.

Issue Decided: Are law enforcement officers entitled to qualified immunity from suit for money damages for executing a facially valid search warrant, where the court concludes that the supporting affidavit provides cause to search for some, but not all, of the listed items?

Position of the Solicitor General: Qualified immunity applies because the officers reasonably relied on the magistrate’s approval of the search warrant.

Result: The Court found qualified immunity, with Chief Justice Roberts writing for the majority of 5, Justice Breyer concurring, Justice Kagan concurring in part and dissenting in part, and Justice Sotomayor dissenting joined by Justice Ginsburg.

Responsibility for SG Position: The United States almost always supports qualified immunity for its law enforcement agencies in its various departments, as it did here. The fact that the Solicitor General first filed a brief on specifics of this case during the Obama Administration does not make this an Obama Administration case.

US Victory X US Loss Obama Position Prior Admin Position X

Minneeci v. Pollard

Docket No: 10–1104

Citation: 132 S. Ct. 617 (2012)

SG Represented: United States as amicus curiae in support of petitioners–defendants.

Issue Decided: May individual employees of government contractors that provide prison services be sued in federal court on the basis of alleged federal constitutional violations when the allegedly injured party has alternative and adequate remedies in state tort law?

Position of the Solicitor General: The respondent should not be permitted to bring an implied damages action under *Bivens v. Six Unknown Fed. Narcotics Agents*, when his injuries are redressable under state tort law.

Result: The Court held that the respondent was barred from making a *Bivens* claim, with Justice Breyer writing for a majority of 8, and Justice Ginsburg dissenting.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but the United States has always taken the position that *Bivens* liability should be narrowly constrained to the circumstances of the trio of cases establishing that cause of action.

US Victory X US Loss Obama Position Prior Admin Position X

Mohamed v. Palestinian Authority

Docket No: 11–88

Citation: 132 S. Ct. 1702 (2012)

SG Represented: United States as amicus curiae on behalf of the Department of State and the Department of Commerce in support of respondent–defendant.

Issue Decided: Does the Torture Victim Protection Act of 1991 establish a right of action against corporate defendants?

Position of the Solicitor General: Congress did not intend to establish liability for corporations and other non–natural persons.

Result: The Court held that the TVPA applies to individuals and therefore excludes corporations and other non–natural persons, with Justice Sotomayor writing for a majority of 8, and Justice Breyer concurring.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration; however the TVPA was enacted in 1992, and there is no evidence that the position taken by the Solicitor General stems from an Obama Administration policy.

US Victory X US Loss Obama Position Prior Admin Position X

National Meat Association v. Harris

Docket No: 10–224

Citation: 132 S. Ct. 1376 (2012)

SG Represented: United States on behalf of the Department of Agriculture as amicus curiae in support of petitioner–plaintiff.

Issue Decided: Is the requirement of California Penal Code Section 599(f), that non-ambulatory swine be immediately euthanized, applicable to slaughterhouses inspected under the Federal Meat Inspection Act?

Position of the Solicitor General: The California requirement is expressly preempted by 21 U.S.C. 678 of the FMIA, which declares that States may not impose requirements in addition to, or different than, those imposed by the Act.

Result: The Court unanimously held that the preemption provision of the FMIA prevents the application of Section 599(f) to federally inspected slaughterhouses.

Responsibility for SG Position: The Department of Agriculture has addressed the same subjects as Section 599(f) in Food Safety and Inspection Service regulations dating to at least 1970.

US Victory X US Loss Obama Position Prior Admin Position X

Perry v. New Hampshire

Docket No: 10–8974

Citation: 132 S. Ct. 716 (2012)

SG Represented: United States as amicus curiae in support of respondent State of New Hampshire.

Issue Decided: Does the Due Process Clause require a judicial inquiry into the reliability of eyewitness identification when such identification was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement?

Position of the Solicitor General: Unreliable eyewitness identification introduced at trial does not violate the Due Process Clause unless there is police suggestion, and the Due Process Clause does not impose a general requirement that the courts must determine the evidentiary reliability of eye-witness identifications in criminal cases.

Result: The Court held that eyewitness identification obtained without police suggestion was consistent with Due Process and that all questions of reliability were for the jury to decide, absent improper conduct by the state, with Justice Ginsburg writing for a majority of 8, and Justice Sotomayor dissenting.

Responsibility for SG Position: While the Solicitor General first filed a brief on the specifics of this case under the Obama Administration, the United States has always supported the admissibility of eyewitness identification at trial, with questions of reliability for the jury.

US Victory X US Loss Obama Position Prior Admin Position X

PPL Montana, LLC v. Montana

Docket No: 10–218

Citation: 132 S. Ct. 1215 (2012)

SG Represented: United States as amicus curiae in support of petitioner–plaintiff.

Issue Decided: Did the Montana Supreme Court err in concluding riverbeds occupied by the petitioner’s hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a state?

Position of the Solicitor General: Montana’s Supreme Court misapplied the relevant test for navigability by ignoring the requirement that rivers be navigable–in–fact at the time of a state’s entrance and by relying on post–statehood evidence of navigability.

Result: The Court unanimously held that Montana Supreme Court had erred.

Responsibility for SG Position: The United States has taken this position on navigability’s effect on riverbed title since *United States v. Utah*, 283 U.S. 64 (1931).

US Victory X US Loss Obama Position Prior Admin Position X

RadLAX Gateway Hotel, LLC v. Amalgamated Bank

Docket No: 11–166

Citation: 132 S. Ct. 2065 (2012)

SG Represented: United States as amicus curiae in support of respondent.

Issue Decided: May a Chapter 11 plan that offers an objecting secured creditor the “indubitable equivalent” of its claim by providing for the sale of collateral free and clear of the creditor’s lien, but does not permit credit bidding at auction, be approved pursuant to 11 U.S.C. 1129(b)(2)(A)?

Position of the Solicitor General: Any cramdown Chapter 11 plan that proposed to sell an unencumbered asset free and clear of liens must permit the lienholder to credit bid at the sale because the Bankruptcy Code’s other protections for secured creditors militate for the view that a secured creditor has a right to do so.

Result: The Court unanimously held that a Chapter 11 plan must permit credit bidding to conform with Section 1129(b)(2)(A). Justice Kennedy took no part in deciding this case.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but the United States has always had a vested interest in protecting the right to credit bid at bankruptcy asset sales because the US is a major creditor but unlike other creditors is constrained by the need to limit disbursements to congressional appropriations.

US Victory X US Loss Obama Position Prior Admin Position X

Rehberg v. Paulk

Docket No: 10–788

Citation: 132 S. Ct. 1497 (2012)

SG Represented: United States as amicus curiae in support of respondent–defendant.

Issue Decided: May a government official be held liable in a Section 1983 action for knowingly false testimony before a grand jury?

Position of the Solicitor General: Grand jury witnesses possess absolute immunity based on their testimony, even if they may be described as “complaining witnesses.”

Result: The Court unanimously held that grand jury witnesses are entitled to the same immunity from § 1983 as trial witnesses.

Responsibility for SG Position: The United States has always maintained the position that law enforcement officers, investigators, and prosecutors possess absolute immunity from § 1983 for testimony at trial, and the extension of this to grand jury testimony should not be called an Obama Administration policy.

US Victory X US Loss Obama Position Prior Admin Position X

Reichle v. Howards

Docket No: 11–262

Citation: 132 S. Ct. 2088 (2012)

SG Represented: United States as amicus curiae in support of petitioners–defendants.

Issue Decided: Are Secret Service agents entitled to qualified immunity from suit for money damages on a claim of retaliatory arrest in violation of the First Amendment when the arrest was support by probable cause?

Position of the Solicitor General: Liability should not be extended to First Amendment claims alleging retaliatory arrest since the Court has never extended such claims to individual federal officers.

Result: The Court found qualified immunity, with Justice Thomas writing for a majority of 6, and Justice Ginsburg concurring joined by Justice Breyer. Justice Kagan took no part in the case.

Responsibility for SG Position: The United States almost always supports qualified immunity for its law enforcement agencies in its various departments, as it did here. The fact that the Solicitor General first filed a brief on specifics of this case during the Obama Administration does not make this an Obama Administration case. Moreover, the suit in question concerned Secret Service agents on the protection detail of then–current Vice President Cheney, and it was filed in 2007.

US Victory X US Loss Obama Position Prior Admin Position X

Williams v. Illinois

Docket No: 10–8505

Citation: 132 S. Ct. 2221 (2012)

SG Represented: United States as amicus curiae in support of respondent State of Illinois.

Issue Decided: Does expert testimony based in part on laboratory data produced by analysts who did not testify at trial, but was not admitted as substantive evidence at trial, violate the Confrontation Clause of the Sixth Amendment?

Position of the Solicitor General: The testimony did not violate the Confrontation Clause because the evidence that the expert offered was not offered for truth of the facts she rendered, but only to explain how she reached her conclusion, and the Sixth Amendment allows an expert to testify based partially on inadmissible testimonial data when those data are not admitted as substantive evidence.

Result: The Court found that the expert testimony did not violate the Confrontation Clause, with Justice Alito writing for a plurality of 4, Justice Thomas concurring, and Justice Kagan dissenting joined by Justices Scalia, Ginsburg, and Sotomayor.

Responsibility for SG Position: While the Solicitor General first filed a brief on the specifics of this case under the Obama Administration, federal prosecutors have a long-standing practice of presenting evidence from experts relying non-testifying analysts, in situations like this.

US Victory X US Loss Obama Position Prior Admin Position X

Wood v. Milyard

Docket No: 10–9995

Citation: 132 S. Ct. 1826 (2012)

SG Represented: United States as amicus curiae in support of respondents–defendants.

Issue Decided: May a court of appeals raise *sua sponte* a statute of limitations defense, when the State has already declared before the district court that it will not challenge the timeliness of a habeas petition, under 28 U.S.C. 2244(d)?

Position of the Solicitor General: The court of appeals has the authority under the statute to dismiss an untimely habeas petition *sua sponte*.

Result: The Court held that courts of appeals may, but are not required to, raise forfeited timeliness defenses on their own accord in exceptional cases, but that in this case the Tenth Circuit abused its discretion by dismissing the petition after the State had deliberately waived its statute of limitations defense, with Justice Ginsburg writing for a majority of 7, and Justice Scalia concurring joined by Justice Thomas.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but the United States previously in *Day v. McDonough*, 547 U.S. 198 (2006), defended and won on the closely similar issue of whether a district court possesses the same authority, and so the position taken here cannot properly be attributed to the Obama Administration.

US Victory X US Loss Obama Position Prior Admin Position X

Freeman v. Quicken Loans, Inc.

Docket No: 10–1042

Citation: 132 S. Ct. 2034 (2012)

SG Represented: United States as amicus curiae on behalf of the Consumer Financial Protection Bureau (the successor to the Department of Housing and Urban Development’s consumer protection functions) in support of petitioners–plaintiffs.

Issue Decided: Must a plaintiff demonstrate that an unearned fee for a real estate settlement service was divided between two or more persons to establish a violation of 12 U.S.C. 2607(b) of the Real Estate Settlement Procedures Act?

Position of the Solicitor General: In the view of HUD, Section 2607(b) prohibits the acceptance of undivided unearned fees, regardless of whether accepted by two or more culpable actors.

Result: The Court unanimously held that a violation of Section 2607(b) required multiple actors while declining to grant deference to HUD’s contrary interpretation.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but HUD’s interpretations on the statutory provision date from 2001.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Gonzalez v. Thaler

Docket No: 10–895

Citation: 132 S. Ct. 641 (2012)

SG Represented: United States as amicus curiae in support of respondent–defendant.

Issue Decided: May a court of appeals certify the appeal of a habeas petition without specifying the issue on which the habeas petitioner has made a substantial showing of the denial of a constitutional right?

Position of the Solicitor General: A certificate of appealability failing to conform to statute consequently does not confer jurisdiction on a court of appeals to review the denial of federal habeas corpus relief.

Result: The Court found that Section 2253(c) is a mandatory but nonjurisdictional and thus that failure to indicate a constitutional issue does not deprive a court of appeals of jurisdiction, with Justice Sotomayor writing for a majority of 8, and Justice Scalia dissenting.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but the United States has previously participated as amicus curiae in cases raising similar issues in 2004 and 2007, and therefore the position supported here is not the result of an Obama Administration policy.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Lafler v. Cooper

Docket No: 10–209

Citation: 132 S. Ct. 1376 (2012)

SG Represented: United States as amicus curiae in support of petitioner–defendant State of Michigan.

Issue Decided: Is a state criminal defendant is entitled to relief as a habeas petitioner when his counsel deficiently advises him to reject a favorable plea bargain but afterwards the defendant is convicted and sentenced pursuant to a fair trial?

Position of the Solicitor General: A defendant who forgoes a guilty plea and is convicted at a fair trial suffers no Sixth Amendment prejudice from counsel’s performance in plea negotiations.

Result: The Court held that the Sixth Amendment requires effective assistance before as well as during trial, with Justice Kennedy writing for a majority of 5, and Justice Scalia dissenting joined by Chief Justice Roberts and Justice Thomas, and Justice Alito also dissenting.

Responsibility for SG Position: Although the United States had never taken the specific position that a criminal defendant suffers Sixth Amendment prejudice in pretrial proceedings, it has consistently opposed efforts to expand habeas relief in analogous situations. 27 States also filed a joint amicus brief in support of Michigan in this case, while no states took the position of the respondent.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Martinez v. Ryan

Docket No: 10–1001

Citation: 132 S. Ct. 1309 (2012)

SG Represented: United States as amicus curiae in support of respondent–defendant.

Issue Decided: Does a prisoner, who has received the assistance of counsel at trial and on direct appeal, have a constitutional right to assistance of counsel on collateral review when such review is the first opportunity for the prisoner to raise a particular claim of error?

Position of the Solicitor General: The Sixth and Fourteenth Amendments do not require the effective assistance of counsel during collateral review.

Result: The Court held that in states where ineffective–assistance–of–trial–counsel claims must be raised in an initial–review collateral proceeding, procedural default will not bar a federal habeas court from hearing those claims if there had been no or ineffective counsel during the initial–review collateral proceeding, with Justice Kennedy writing for a majority of 7, and Justice Scalia dissenting joined by Justice Thomas.

Responsibility for SG Position: The Solicitor General first filed a brief addressing the specifics of this case during the Obama Administration, but federal law has treated the appointment of counsel in post-conviction proceedings as discretionary rather than mandatory since at least 1996 under 18 U.S.C. 3006A(a)(2)(B).

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Missouri v. Frye

Docket No: 10-444

Citation: 132 S. Ct. 1399 (2012)

SG Represented: United States as amicus curiae in support of petitioner State of Missouri.

Issue Decided: Does the failure of counsel to communicate a plea bargain to a defendant, who later enters an open guilty plea to a felony but asserts that he would have accepted the earlier offer to plead guilty to an uncharged misdemeanor had it been communicated to him, constitute a violation of the Sixth Amendment's right to effective counsel?

Position of the Solicitor General: Defense counsel's failure to communicate a plea bargain does not violate the respondent's Sixth Amendment right to counsel.

Result: Along with the *Lafler* decision, the Court held that the Sixth Amendment extends to effective assistance before as well as during trial, with Justice Kennedy writing for a majority of 5, and Justice Scalia dissenting joined by Chief Justice Roberts, Justices Thomas and Alito.

Responsibility for SG Position: Like *Lafler*, this is a case in which the United States had never taken the position on this specific issue, but it has always taken a narrow view of when a criminal defendant suffers Sixth Amendment prejudice. 29 States also filed a joint amicus brief in support of Missouri in this case, while no states took the position of the respondent.

US Victory _____ US Loss X Obama Position _____ Prior Admin Position X

Issues with 2 or fewer dissents (31 of 55)

Victories (16 of 29)

Obama Party Cases:

NFIB v. Sebelius - Anti-Injunction Act

Prior Administration Party Cases:

Astrue v. Capato

Golan v. Holder [6-2; J. Kagan recusal]

Holder v. Martinez-Gutierrez

Roberts v. Sea-Land Services

Prior Administration Amicus Cases:

Carraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S

Filarsky v. Delia

Minneci v. Pollard

Mohamed v. Palestinian Authority

National Meat Association v. Harris

Perry v. New Hampshire

PPL Montana LLC v. Montana

RadLAX Gateway Hotel, LLC v. Amalgamated Bank

Rehberg v. Paulk

Reichle v. Howards [6-2; J. Kagan recusal]

Wood v. Milyard

Losses (15 of 26)

Obama Party Cases:

Arizona v. United States Issue 1 - Section 2(B)

NFIB v. Sebelius Issue 4 - Medicaid Coercion

Prior Administration Party Cases:

FCC v. Fox

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

Judulang v. Holder

Kappos v. Hyatt

Match–E–Be–Nash–She–Wish Band of Pottawotami v. Patchak

Reynolds v. United States

Sackett v. EPA

United States v. Jones

Zivotofsky v. Clinton

Obama Amicus Cases:

Perry v. Perez

Prior Administration Amicus Cases:

Freeman v. Quicken Loans

Gonzalez v. Thaler

Martinez v. Ryan