18. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). In a Virginia civil contempt proceeding, petitioners were assessed $64 million in fines for violating a court-ordered injunction barring them from engaging in unlawful strike-related activities. The question before the Court was whether the fine amounted to a criminal penalty that could be constitutionally levied only after a jury trial. Representing respondents, including the special commissioner appointed to collect the fine, I argued that the fine was a civil penalty because it had been assessed according to a prospective schedule of fines announced with the court's earlier injunction and was therefore coercive, not punitive. The Court disagreed and unanimously ruled that a jury trial was required.

Co-counsel with me on the briefs were David G. Leitch and Kathryn W. Lovill, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and William B. Poff, Clinton S. Morse, Frank K. Friedman, Woods, Rogers & Hazlegrove, Dominion Tower, Suite 1400, 10 South Jefferson Street, Roanoke, VA 24038, (703) 983-7600. Arguing for petitioners was Laurence Gold, 815 16th Street, N.W., Washington, D.C. 20006, (202) 637-5390.

19. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). Digital Equipment Corp. sought to appeal a district court's decision to vacate a settlement agreement Digital had reached with Desktop Direct. The question presented was whether the decision to vacate was appealable as a collateral order even without final resolution of Desktop Direct's cause of action. I argued on behalf of Digital Equipment that the decision was appealable because it met the established criteria of conclusively resolving the issue of Digital's right not to go to trial under the settlement agreement, was separate from the underlying merits, and was effectively unreviewable on appeal from a final judgment. The Court, in a unanimous opinion by Justice Souter, ruled that the decision to vacate was not appealable as a collateral order.

Co-counsel with me on the briefs were Thomas C. Siekman and Andrew C. Holcomb, Digital Equipment Corporation, 111 Powdermill Road, Maynard, MA 01754, (508) 493-3264, David G. Leitch and Denise P. Lindberg, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Laurence R. Hefter and David M. Kelly, Finnegan, Henderson, Farabow, Garrett & Dunner, 1300 I Street, N.W., Washington, D.C. 20005, (202) 408-4000. Arguing for respondent Desktop Direct was the late Rex E. Lee, then of Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000. Mr. Lee was assisted by Carter Phillips, also of Sidley & Austin.

20. *Helling v. McKinney*, 509 U.S. 25 (1993). William McKinney, an inmate in the Nevada prison system, sued state officials claiming that having to share a cell with a smoker violated the Eighth Amendment's proscription of "cruel and unusual punishment." The question before the Court was whether exposure to environmental tobacco smoke could serve as the basis for such a claim. I argued on behalf of the United States as *amicus curiae* that exposure to tobacco smoke did not amount to a "serious deprivation of basic human needs" under the Court's Eighth Amendment decisions. The Court ruled that the claim could go forward, in part because the Court considered it

premature to dismiss respondent's claim as a matter of law on the grounds I had advanced.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, William Kanter, Peter R. Maier, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Starr is now Dean at Pepperdine University School of Law, 24255 Pacific Coast Highway, Malibu, CA 90263. Arguing for petitioner was Frankie Sue Del Papa, Attorney General of the State of Nevada, Capitol Complex, Carson City, NV 89710, (702) 687-4170. Arguing for respondent was Cornish F. Hitchcock, Public Citizen Litigation Group, 2000 P Street, N.W., Suite 700 Washington, D.C. 20036, (202) 833-3000.

21. *Withrow v. Williams*, 507 U.S. 680 (1993). Robert Williams, a Michigan prisoner, filed a federal habeas corpus action challenging his murder convictions on the ground that they were obtained using statements taken in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The question before the Court was whether federal habeas jurisdiction extended to claims of *Miranda* violations, or whether instead such claims should be treated like certain Fourth Amendment claims that are not cognizable in habeas under *Stone v. Powell*, 428 U.S. 465 (1976). As Deputy Solicitor General, I argued on behalf of the United States as *amicus curiae* that the claims were not cognizable in habeas. The Court disagreed, and in a 5-4 decision, ruled that federal habeas jurisdiction extended to claims grounded in *Miranda*.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General and Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jeffrey Caminsky, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine Detroit, MI 48226, (313) 224-5846. Arguing for respondent was Seth P. Waxman, then of Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Washington, D.C., 20037, (202) 833-5125. Mr. Waxman is now at Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800.

22. *United States v. Green*, 507 U.S. 545 (1993). Lowell Green, after being arrested on a drug charge and given his *Miranda* warnings, invoked his right to counsel and later pled guilty to a lesser charge as part of a plea bargain. Three months later, while still in police custody, he was arrested for murder and — after receiving *Miranda* warnings again — waived his *Miranda* rights and confessed to the crime. The question before the court was whether the lower court erred in excluding the confession on the ground that police may not reinitiate interrogation once a suspect has invoked his rights under *Miranda*. I argued on behalf of the United States that the confession should not have been excluded because it concerned a matter wholly unrelated to the original drug charge and because the passage of time and intervening guilty plea dispelled any concern that police had coerced Mr. Green into confessing the murder. Mr. Green died before the case was decided, and the Court dismissed the petition.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Nina Goodman, Roy McLeese, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Joseph R. Conte, Bond, Conte & Norman, P.C., 601 Pennsylvania Avenue, N.W., Suite 900, Washington, D.C. 20001, (202) 638-4100.

23. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). Several abortion clinics sued to enjoin Operation Rescue, an anti-abortion organization, from conducting demonstrations outside their facilities. The question before the Court was whether the clinics had a cause of action under section 2 of the Civil Rights Act of 1871. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that, while the clinics had various state-law remedies, section 2 did not provide a federal cause of action because defendants' conduct did not involve class-based invidiously discriminatory animus, as required by the Court's section 2 precedents. The case was first argued before 8 Justices and reargued when a full court was available. The Court, in an opinion by Justice Scalia, agreed with the government's position.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jay Alan Sekulow, 1000 Thomas Jefferson Street, N.W., Suite 520, Washington, D.C. 20007, (202) 337-2273. Arguing for the respondents was Deborah Ellis, NOW Legal Defense and Education Fund, 99 Hudson Street, New York, N.Y. 10018, (212) 925-6635.

24. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Commonwealth of Massachusetts, having lost a seat in the House of Representatives due to reapportionment, challenged the Commerce Department's method for counting federal employees serving overseas in the 1990 census. The questions before the Court were, first, whether the conduct of the census is subject to judicial review and, second, whether the Commerce Department's allocation of overseas federal employees to their home states was consistent with both the Constitution and the Administrative Procedure Act. I argued on behalf of the United States that the census was not subject to judicial review and that, even if it were, the Commerce Department's method of allocating overseas federal employees was consistent with the Census Clause and not arbitrary or capricious. The opinion for the Court by Justice O'Connor ruled that the census was not reviewable under the Administrative Procedure Act, and that the Commerce Department's method of allocation, while subject to judicial review as to constitutional claims, was nevertheless consistent with the requirements of the Census Clause.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, Michael Jay Singer, Mark B. Stern, Lori M. Beranek, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the

respondent was Dwight Golann, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, (617) 727-2200.

25. *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). The question presented was whether the Interstate Commerce Commission (ICC) had properly approved an exercise of eminent domain authority by Amtrak under the Rail Passenger Service Act. As Acting Solicitor General, I argued that a subsequent congressional amendment to the Act — passed while rehearing was pending before the lower court — made clear that Amtrak's action was permissible. The Supreme Court agreed with our position, 6-3, and in an opinion by Justice Kennedy gave deference to the ICC's construction of the statute it has been charged with administering.

With me on the brief were then Deputy Solicitor General Lawrence G. Wallace and then Assistant to the Solicitor General Michael R. Dreeben (now Deputy Solicitor General), Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the respondent was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

26. *Suter v. Artist M.*, 503 U.S. 347 (1992). Respondents filed a class-action suit alleging that officials at the Illinois Department of Children and Family Services failed to comply with the Adoption Assistance and Child Welfare Act of 1980. The question before the Court was whether the Act contained an implied right of action or conferred rights enforceable through an action under 42 U.S.C. § 1983. I argued on behalf of the United States as *amicus curiae* that the language of the Act demonstrated that Congress contemplated enforcement by the Secretary of Health and Human Services, not through private civil suits. The Court agreed, 7-2, with Chief Justice Rehnquist writing for the majority.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Michael R. Dreeben, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Christina M. Tchen, Skadden, Arps, Slate, Meagher & Flom, 333 West Wacker Drive, Suite 2100, Chicago, IL 60606, (312) 407-0700. Arguing for the respondents was Michael G. Dsida, Cook County Public Guardian, 1112 South Oakley Boulevard, Chicago, IL 60612, (312) 633-2500.

27. *Hudson v. McMillian*, 503 U.S. 1 (1992). Petitioner Keith Hudson, a Louisiana prison inmate, filed suit against several corrections officers alleging that the officers had used excessive force while attempting to restrain him. The question before the Court was whether Hudson was required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment. Representing the United States as *amicus curiae* supporting the inmate, I argued that the "significant injury" test was inappropriate because it lacked any basis in

the Constitution or in the Court's prior Eighth Amendment decisions. The Court agreed, ruling that where the claim is excessive force, a plaintiff need not show a "significant injury," but only that "prison officials maliciously and sadistically use[d] force to cause harm."

Co-counsel with me on our briefs were Kenneth W. Starr, then Solicitor General, John R. Dunne, then Assistant Attorney General, Robert S. Mueller, III, then Assistant Attorney General, Christopher J. Wright, then Acting Deputy Solicitor General, Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Alvin J. Bronstein, National Prison Project of the American Civil Liberties Union Foundation, 1875 Connecticut Ave., N.W., Suite 410, Washington, D.C. 20009, (202) 234-4830. Arguing for respondent was Harry McCall Jr., Chang, McCall, Philips, Toler & Sarpy, 2300 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163, (504) 585-7000.

28. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). In the Tax Reform Act of 1986, Congress authorized the Chief Judge of the United States Tax Court to appoint special trial judges to hear certain cases. The question before the Court was whether vesting this power in the Chief Judge was consistent with the Appointments Clause of the Constitution. Representing the Commissioner, I argued that petitioners had waived their constitutional claim by consenting to trial before a special trial judge and that, in any event, vesting this power with the Chief Judge was consistent with the Appointments Clause. The Court ruled that the Tax Court, as a "Court of Law" within the meaning of the Appointments Clause, was eligible to exercise the appointment power.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Shirley D. Peterson, then Assistant Attorney General, Stephen J. Marzen, then Assistant to the Solicitor General, Gary R. Allen, Steven W. Parks, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioners was Kathleen M. Sullivan, then at Harvard Law School, 1525 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4633. Ms. Sullivan is now at Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305, (650) 725-9875.

29. *Florida v. Jimeno*, 500 U.S. 248 (1991). A police officer received consent to search the car of a suspected drug trafficker, and found a kilogram of cocaine in a paper bag lying on the floor of the car; the suspect challenged the search of the bag. The question before the Court was whether the contents of the paper bag were beyond the scope of the consented search. I argued on behalf of the United States as *amicus curiae* that consent to search a car, in the absence of any express or implied limitation, includes consent to search a container within the car. The Court agreed, ruling that a search satisfies the Fourth Amendment if it is objectively reasonable for an officer to believe that the scope of a suspect's consent permitted a search of the container.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Amy L. Wax, then Assistant to the Solicitor General, Sean Connelly,

Attorney, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Michael J. Neimand, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 Northwest 2nd Avenue, Miami, FL 33128, (305) 377-5441. Arguing for respondent was Jeffrey Weiner, Weiner & Ratzan, P.A., Two Datran Center, Nineteenth Floor, Suite 1910, 9130 South Dadeland Boulevard, Miami, FL 33156, (305) 670-9919.

30. *Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 499 U.S. 554 (1991). Cottage Savings Association exchanged a pool of its own mortgages for an equivalently-valued pool of mortgages belonging to four other savings and loans; the Internal Revenue Service disallowed Cottage's attempt to claim a deduction for a realized loss on the transaction. The question before the Court was whether, under the relevant statute, an exchange of interests in mortgages gave rise to a tax-deductible loss. Representing the Commissioner as Acting Solicitor General, I argued that the exchange of substantially identical pools of mortgages did not give rise to a deductible loss because the property transferred was not materially different from that received. The Court disagreed in an opinion by Justice Marshall, ruling that a gain or loss is realized so long as the properties exchanged embody "legally distinct entitlements."

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioner was Dennis L. Manes, Schwartz, Manes & Ruby, 2900 Carew Tower, 441 Vine Street, Cincinnati, OH 45202, (513) 579-1414.

31. *United States v. Centennial Savings Bank FSB*, 499 U.S. 573 (1991). On its 1981 tax return, Centennial Savings Bank claimed a deduction for a realized loss from an exchange of mortgages, and excluded certificate of deposit withdrawal penalties from its income; the Internal Revenue Service disallowed both. The question before the Court was whether the deduction and exclusion were permitted under the relevant statutes. As Acting Solicitor General, I argued on behalf of the United States that an exchange of substantially identical pools of mortgages did not give rise to a tax-deductible loss, and that withdrawal penalties did not constitute income from the discharge of indebtedness and therefore could not be excluded. The Court agreed as to the exclusion of withdrawal penalties, but relying on *Cottage Savings, supra*, which was argued the same day, ruled that Centennial could claim a tax-deductible loss on the mortgage transaction.

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Michael F. Duhl, Hopkins & Sutter, 888 Sixteenth Street, N.W., Washington, D.C. 20006, (202) 835-8257.

32. *Grogan v. Garner*, 498 U.S. 279 (1991). Before petitioners could collect on a securities fraud judgment they had won against respondent, respondent included the judgment as a dischargeable debt in a petition under Chapter 11 of the Bankruptcy Code. Petitioners then brought an action claiming that the judgment was not dischargeable under the Bankruptcy Code because it was money obtained by "actual fraud." The question before the Court was whether petitioners' claim under the Bankruptcy Code required proof of fraud by clear and convincing evidence, rather than by the preponderance of the evidence — the standard applied in the securities fraud trial. I argued on behalf of the United States as *amicus curiae* that the language of the relevant statute was silent as to burden of proof and that applying a standard of clear and convincing evidence in bankruptcy actions would require burdensome relitigation of fraud claims. The Court agreed, and in a unanimous opinion by Justice Stevens, ruled that the preponderance of the evidence standard applied.

Co-counsel with me on the briefs were James R. Doty, then General Counsel, Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Richard A. Kirby, Senior Litigation Counsel, Joseph O. Click, Attorney, Securities and Exchange Commission, Washington, D.C. 20549; Alfred J.T. Byrne; General Counsel, Federal Deposit Insurance Corporation, Washington, D.C. 20429, Kenneth W. Starr, then Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Michael J. Gallagher, One Main Plaza, Suite 840, 4435 Main Street, Kansas City, MO 64111, (816) 756-0030. Arguing for the respondent was Timothy K. McNamara, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, MO 64108, (816) 842-0820.

33. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The lower court dismissed Shirley Irwin's suit under Title VII of the Civil Rights Act of 1964 because it was filed more than 30 days after the Equal Employment Opportunity Commission (EEOC) denied Irwin's discrimination claim. The questions before the Court were whether the statutory 30-day period began to run when the EEOC letter was delivered to Irwin's attorney, as opposed to when Irwin or his attorney actually received the letter, and whether the 30-day period was subject to equitable tolling. Representing the Department of Veterans Affairs as Deputy Solicitor General, I argued that Irwin received constructive notice of the EEOC decision when the letter was delivered to his counsel and that the 30-day time limit was jurisdictional and therefore not subject to equitable tolling. The Court, in an opinion by Chief Justice Rehnquist, ruled that the 30-day period ran from delivery of the letter and that equitable tolling, while not categorically barred by the statute, did not extend to the circumstances of this case.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Harriet S. Shapiro, Assistant to the Solicitor General, Robert S. Greenspan, Michael E. Robinson, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jon R. Ker, P.O. Box 1087, Hewitt, TX 76643.

34. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Two individuals filed suit challenging thousands of agency decisions affecting millions of acres of public land. The question presented was whether the individuals' allegations of injury, based on their affidavits alone, were sufficient to support standing to bring such a broad-based challenge. As Acting Solicitor General, I argued that the allegations were insufficient to give the respondents standing to sue. The Court, in a 5-4 opinion by Justice Scalia, agreed and ruled that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not presume the specific facts necessary to establish adequate injury.

Co-counsel for the United States assisting me were then Assistant Attorney General Richard Stewart, then Deputy Solicitor General Lawrence G. Wallace, then Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

35. *United States v. Kokinda*, 497 U.S. 720 (1990). Two individuals soliciting contributions outside a U.S. Post Office were convicted under a postal regulation making it a misdemeanor to solicit funds on "postal premises" — defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The question before the Supreme Court was whether respondents' convictions were consistent with the First Amendment. As Deputy Solicitor General, I argued on behalf of the United States that the regulation was constitutionally valid as applied to the respondents. Writing for a plurality of four Justices, Justice O'Connor agreed that the postal walkway where the conduct at issue occurred was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails.

Other counsel on the brief with me were Kenneth W. Starr, then Solicitor General, then Assistant Attorney General Edward S.G. Dennis, Jr., then Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

36. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). The Virginia Hospital Association filed suit against several Virginia officials under 42 U.S.C § 1983 to enforce a provision of the Medicaid Act requiring "reasonable and adequate" reimbursement of medical care. The question before the Court was whether the provision was enforceable through an action under section 1983. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that neither the language nor the history of the provision evinced an intent by Congress to create a right enforceable through section 1983. The Court, by a 5-4 margin, ruled in an opinion by Justice Brennan that the mandatory language of the relevant provision of the Medicaid Act gave rise to an enforceable right.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Lawrence S. Robbins, then Assistant to the Solicitor General, Anthony J. Steinmeyer, Irene M. Solet, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was R. Claire Guthrie, Deputy Attorney General, 101 North Eighth Street, Richmond, VA 23219, (804) 786-4072. Arguing for respondent was Walter Dellinger, Corner of Science Drive and Towerview Road, Durham, N.C. 27706, (919) 684-3404.

37. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). USA Petroleum sued Atlantic Richfield, alleging antitrust violations. The question presented was whether a firm suffers an "antitrust injury" under section 4 of the Clayton Act when it loses sales to a competitor that charges non-predatory prices pursuant to a vertical, maximum-price-fixing scheme. Representing the United States as *amicus curiae* in support of the petitioner, I argued that a plaintiff suffers an "antitrust injury" only if its injury results from the anticompetitive effect of the alleged violation, and that the antitrust laws do not protect competitors from non-predatory pricing by their rivals. Justice Brennan, writing for the majority, accepted this argument and held that USA Petroleum could not maintain the antitrust suit.

My co-counsel on the brief were Kenneth W. Starr, then Solicitor General, Michael Boudin, then Acting Assistant Attorney General, David L. Shapiro, then Deputy Solicitor General, Michael R. Dreeben, then Assistant to the Solicitor General, Catherine G. O'Sullivan and Steve MacIsaac, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Kevin J. Arquit, General Counsel, Federal Trade Commission, Washington, D.C. 20530. Ronald C. Redcay of Hughes Hubbard & Reed, 555 South Flower Street, Los Angeles, CA 90071, (213) 489-5140, represented the petitioner. Maxwell M. Blecher of Blecher & Collins P.C., 611 West Sixth Street, Suite 2800, Los Angeles, CA 90017, (213) 622-4222, represented the respondent.

38. *United States v. Halper*, 490 U.S. 435 (1989). Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties for the same false Medicaid claims. The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. In private practice at the time, I was appointed by the Supreme Court to argue in support of the judgment below and handled the case on a pro bono basis. I argued that the aspect of the Double Jeopardy Clause forbidding successive punishments was not limited to the criminal context, but applied in certain circumstances to civil penalties as well. In a unanimous opinion authored by Justice Blackmun, the Court agreed.

I had no co-counsel assisting me. Arguing for the United States was then Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

Cases in which, while I was in private practice, my name appeared on the briefs of petitioners or respondents, but in which I did not present oral argument:

1. *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461 (2004). The Alaska Department of Environmental Conservation (DEC), in approving the operation of a mine, determined that the mine's proposed electric power generation plan made use of the "best available control technology," as required by the Clean Air Act. EPA disagreed with DEC's determination. The question before the Court was whether EPA had authority under the Clean Air Act to review DEC's determination and block issuance of the permit. My participation in the case was interrupted by confirmation to the D.C. Circuit, and I participated only at the certiorari stage and in petitioner's opening brief. The Court ruled, 5-4, that EPA had authority to block the permit.

With me on the briefs were Gregg D. Renkes, then Attorney General, State of Alaska Department of Law, P.O. Box 110300, Juneau, Alaska 99811, (907) 465-3600, Cameron M. Leonard, Assistant Attorney General, State of Alaska Department of Law, 100 Cushman Street, Suite 400, Fairbanks, AK 99701, (907) 451-2811, Jonathan S. Franklin, Lorane F. Hebert, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the respondents was Thomas Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *Goldberg v. Sweet*, 488 U.S. 252 (1989). The State of Illinois imposed a tax on all interstate telecommunications charged to a service address within the State. The question for the Court was whether this tax violated the Constitution's Commerce Clause. We argued on behalf of two Illinois residents that it did. The Court disagreed, holding that the tax was fairly apportioned, non-discriminatory, and fairly related to the activities of taxpayers within the State.

With me on the briefs were Walter A. Smith, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6448, William G. Clark, Jr., William G. Clark, Jr. & Associates, Ltd., 29 South LaSalle Street, Chicago, IL 60603, (312) 263-0830, John G. Jacobs, Jonah J. Orlofsky, Plotkin & Jacobs, Ltd., 116 South Michigan Avenue, Suite 1300, Chicago, IL 60603, (312) 372-0001. Arguing for appellees was Andrew L. Frey, Mayer, Brown & Platt, 2000 Pennsylvania Ave., N.W., Suite 6500, Washington, D.C. 20006, (202) 778-0602.

3. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 485 U.S. 976 (1988). The Webster County tax assessor valued petitioners' recently purchased properties at their purchase prices, but made only minor adjustments to the value of similar property that had not been recently conveyed. The question presented was whether this practice — the so-called "welcome stranger" approach — denied petitioners equal protection of the laws under the Fourteenth Amendment. We argued on behalf of petitioners that it did. The Court, in a unanimous opinion by Chief Justice Rehnquist, agreed.

With me on the briefs were William James Murphy, Robert T. Shaffer, III, Murphy & McDaniel, 118 West Mulberry St., Baltimore, MD 21201, (301) 685-3810, E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th St., N.W., Washington, D.C. 20004, (202) 637-5685, Ernest V. Morton, Jr., 210 Back Fork St., Webster Springs, W.V. 26288, (304) 847-5256, William D. Peltz, 900 Louisiana St., P.O. Box 2463, Houston, TX 77252, (713) 241-2414, Dan O. Callaghan, Callaghan & Ruckman, 48 East Main St., Richwood, W.V. 26261, (304) 846-2561, W. T. Weber, Jr., 208 Main Ave., Weston, W.V. 26452, (304) 269-2228. Arguing for the respondents was C. William Ullrich, Chief Deputy, Attorney General's Office, State of West Virginia, State Capitol, Charleston, W.V. 25305, (304) 348-2021.

4. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In this case, environmental groups sued Gwaltney of Smithfield, the holder of a Clean Water Act discharge permit, for having exceeded in past years the effluent limitations of its permit. The question before the Court was whether the action could be maintained under the Clean Water Act. Representing Gwaltney, E. Barrett Prettyman, Jr. of Hogan & Hartson argued that the citizen-suit provision of the Act did not authorize such suits for wholly past violations. The Court agreed, in an opinion by Justice Marshall.

I was on the briefs with Mr. Prettyman, along with Richard M. Poulson, Patrick M. Raher, David J. Hayes, and Catherine James LaCroix of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20009, (202) 637-5600. Respondents were represented by the late Louis F. Claiborne, Washburn and Kemp P.C., 144 Second Street, San Francisco, CA 94188, (415) 543-8131.

5. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). The Pole Attachments Act calls on the FCC to regulate the rates that utilities can charge cable television companies for use of the utilities' poles. The question presented was whether the Act violates the Takings Clause of the United States Constitution. Representing appellants Group W Cable Inc., National Cable Television Association Inc., and Cox Cablevision Corporation, Jay E. Ricks, then of Hogan & Hartson, argued that rate regulation does not constitute a *per se* taking of property, and that the specific rate imposed by the FCC provided for adequate compensation. The Court, Justice Marshall writing for the majority, accepted both arguments and upheld the constitutionality of the Act.

I was on the briefs with Mr. Ricks, along with E. Barrett Prettyman, Jr., Gardner F. Gillespie, III, and Timothy J. Dowling of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217, argued the case on behalf of the FCC. The appellees were represented by Allan J. Topol of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, (202) 662-6000.

Cases in which, while I was in private practice, my name appeared on an amicus brief at the merits stage:

1. *Pharmaceutical Research & Mnfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). State law created a drug rebate in excess of that provided by Medicaid, and subjected non-participating companies to a pre-authorization regime for Medicaid sales. The question presented was whether the state regime was consistent with federal law and the United States Constitution. On behalf of the United States Chamber of Commerce, I submitted an *amicus* brief in support of petitioner, in which I contended that the state law was preempted by the Medicaid Act and conflicted with the Commerce Clause. The Court disagreed. While no opinion on Medicaid preemption commanded a majority of the Justices, the Court held that the district court had abused its discretion in enjoining the state program. Writing for a majority, Justice Stevens also rejected the Commerce Clause challenge.

My co-counsel on the brief were Catherine E. Stetson, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600 and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H Street, N.W., Washington, D.C. 20062 (202) 463-5337. Carter G. Phillips of Sidley Austin Brown & Wood L.L.P., 1501 K Street, N.W., Washington, D.C. 20005, (202) 736-8000, represented the petitioners and shared oral argument with Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae* supporting reversal. Andrew S. Hagler, Assistant Attorney General, Six State House Station, Augusta, ME 04333, (207) 626-8800, represented the respondents.

2. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Petitioner, representing the estate of a boat passenger who had died when struck by a propeller blade, brought a tort suit in state court against the boat engine designer. The question presented was whether federal law preempted the suit. In an *amicus* brief on behalf of the Chamber of Commerce, I maintained that the uniquely federal field of maritime law, the Federal Boat Safety Act, and a Coast Guard decision not to require propeller guards on engines such as the one at issue, all conflicted with the petitioner's state tort claim. Writing for the majority, Justice Stevens disagreed and held that the suit could go forward.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H. Street, N.W., Washington, D.C. 20062, (202) 463-5337. Leslie A. Brueckner, Trial Lawyers for Public Justice P.C., 1717 Massachusetts Avenue, N.W., Suite 800, Washington, D.C. 20036, (202) 797-8600, represented the petitioner and shared oral argument with Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae*. The respondent was represented by Stephen M. Shapiro of Mayer, Brown, Rowe & Maw, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

3. *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002). Fior D'Italia, a restaurant, challenged the IRS's method of assessing Federal Insurance Contribution Act (FICA) taxes on tips received by restaurant employees. The question presented was whether FICA authorized the IRS to base the assessment on an aggregate estimate of all the tips received by restaurant employees, rather than estimating each employee's tip income separately. On behalf of the American Gaming Association, I filed an *amicus* brief in support of the restaurant, in which I contended that the IRS's aggregate method improperly shifted the responsibility of policing tip reporting from the agency onto the employer. Justice Breyer, writing for the majority, disagreed and held that FICA allowed the IRS to use an aggregate method.

I was assisted by John S. Stanton, Robert H. Kapp, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004 (202) 637-6500. Eileen J. O'Connor, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the United States. Tracy J. Power of Power & Power, 2300 Clarendon Blvd., Arlington, VA 22201, (703) 841-1330, represented the respondents.

4. *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002). The Court of Appeals for the Federal Circuit held that patent-holders cannot rely on the "doctrine of equivalents" — which protects them from copyists who try to circumvent the patent by making minor alterations in design — if the holders had previously submitted a claim-narrowing amendment to the Patent and Trademark Office. The question before the Supreme Court was whether this ruling complied with the Patent Act and the United States Constitution. Representing Litton Systems, Inc., I filed an *amicus* brief in support of petitioner, arguing that the Federal Circuit's decision effected a taking of private property without just compensation, and that the ruling should not be applied retroactively. The Court, in a unanimous opinion by Justice Kennedy, vacated the Federal Circuit's decision and held that claim-narrowing amendments do not always bar patentholders from relying on the doctrine of equivalents.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Frederick A. Lorig and Sidford L. Brown of Bright & Lorig, 633 West 5th Street, Los Angeles, CA 90071, (213) 627-7774, Rory J. Radding of Pennie & Edmonds L.L.P., 1155 Avenue of the Americas, New York, N.Y. 10036, (212) 790-9090, and Stanton T. Lawrence III and Carl P. Bretscher of Pennie & Edmonds L.L.P., 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Robert H. Bork, Suite 1000, 1150 17th Street, N.W., Washington, D.C. 20036, (202) 862-5851, argued the case for the petitioner. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued for the United States as *amicus curiae* supporting vacatur and remand. Arthur I. Neustadt of Oblon, Spivak, Mcclelland, Maier & Neustadt P.C., 1755 Jefferson Davis Highway, Arlington, VA 22202, (703) 413-3000, argued for the respondents.

5. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). Petitioner Adarand Constructors challenged a Department of Transportation program on the ground that racial preferences in the program violated the Equal Protection Clause of the Fourteenth Amendment. On behalf of the Association of General Contractors of America, I filed an *amicus* brief supporting petitioner, in which I argued that the DOT program did not have a sufficient basis in evidence of discrimination, as required by Supreme Court precedent, to support the preferences. The Court dismissed certiorari as improvidently granted — finding that Adarand lacked standing — and hence did not reach the merits of the dispute.

My co-counsel on the brief were Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Michael E. Kennedy, General Counsel, The Associated General Contractors of America Inc., 333 John Carlyle Street, Suite 200, Alexandria, VA 22314, (703) 837-5335. Adarand was represented by William Perry Pendley, Mountain States Legal Foundation, 707 Seventeenth Street, Suite 3030, Denver, CO 80202, (303) 292-2021. The Secretary of Transportation was represented by Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668.

6. *United States and Dep't of Agriculture v. United Foods, Inc.*, 533 U.S. 405 (2001). A mushroom producer challenged a federal assessment imposed on the mushroom industry to fund advertisements promoting mushroom sales. The question before the Court was whether the assessment violated the First Amendment. On behalf of the American Mushroom Institute, the National Cattlemen's Beef Association, the American Soybean Association, the National Milk Producers Federation, the Milk Industry Foundation, the United Egg Producers, and the United Egg Association, I filed an *amicus* brief in support of the United States and the Department of Agriculture, in which I defended the assessment as a form of government speech. In an opinion by Justice Kennedy, the Court struck the assessment down, but specifically noted that it was not engaging the government speech argument, because the petitioners had not raised it below.

With me on the brief were David G. Leitch, then of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne R. Watkinson Richard and T. Rossier McLeod of Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Barbara McDowell, Assistant to the Solicitor General, Department of Justice Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Laurence H. Tribe, Hauser Hall 420, 1575 Massachusetts Ave., Cambridge, MA 02138, (617) 495-4621, represented the respondents.

7. *Jones v. United States*, 529 U.S. 848 (2000). The defendant in this case set fire to his cousin's house. The question before the Court was whether this act constituted a federal crime under 18 U.S.C. § 884(i), which outlaws the arson of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In an *amicus* brief on behalf of Dale Lynn Ryan — another defendant convicted of a similar act — I argued that the arson of private residences does not fall within the statute's compass.

The Court, in an opinion by Justice Ginsburg, agreed and dismissed the federal prosecution.

With me on the brief was Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. The petitioner was represented by Donald M. Falk of Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Representing the United States was Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

8. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999). Petitioners sued the United States and the FCC, seeking to establish their right to broadcast advertisements for legal gambling at area casinos. The question presented was whether 18 U.S.C. § 1304, which criminalizes broadcast advertising of lotteries and casino gambling, could be applied in areas where gambling was legal. In an *amicus* brief on behalf of the American Gaming Association, I argued that such an application violated the First Amendment of the United States Constitution. The Court agreed, in an opinion by Justice Stevens.

My co-counsel on the brief were David G. Leitch and Adam K. Levin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf, Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6500. The petitioners were represented by the late Bruce J. Ennis, Jr. of Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005. The United States was represented by Barbara D. Underwood, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Ms. Underwood is now Chief Assistant United States Attorney for the Eastern District of New York, 147 Pierrepont St., Brooklyn, N.Y. 11201, (718) 254-7000.

9. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). This case involved a challenge to the Coal Act, which required employers to fund coal industry retiree benefits, even if the employer had since exited the coal business. The question presented was whether this funding mechanism violated the Takings Clause of the United States Constitution. In an *amicus* brief on behalf of the Ohio Valley Coal Company and Maple Creek Mining, Inc., I argued that the Act did not effect a taking of private property. The Court disagreed and held that the Act was unconstitutional as applied to employers who had left the coal industry.

With me on the brief was Mathew A. Lamberti of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. John T. Montgomery of Ropes & Gray, One International Place, Boston, MA 02110, (617) 951-7000, argued on behalf of the petitioner. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Peter Buscemi of Morgan, Lewis & Bockius L.L.P, 1800 M Street, N.W., Washington, D.C. 20036, (202) 467-7190, represented the respondents.

10. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). Growers, handlers, and processors of California tree fruits challenged targeted federal assessments used to fund generic advertising of California nectarines, plums, and peaches. The question presented was whether the assessments violated the First Amendment. On behalf of the National Association of State Departments of Agriculture, the National Milk Producers Federation, and the National Cattlemen's Beef Association as *amici curiae* in support of petitioner, I argued that the assessment was a constitutional exercise of government speech. The Court upheld the assessments but did not engage the government speech argument.

With me on the brief were Wayne R. Watkinson and Richard T. Rossier of McLeod, Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Alan Jenkins, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Thomas E. Campagne of Thomas E. Campagne & Associates, 1685 North Helm Avenue, Fresno, CA 93727, (209) 255-1637, represented the respondents.

11. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997). A California law prohibited employers from paying an apprentice wage to workers in unapproved apprenticeship programs; an employer brought suit challenging the law. The question before the Court was whether the law was pre-empted by the federal Employee Retirement Income Security Act (ERISA). I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued that if the Court found the California law protected by ERISA's saving clause, it should do so only to the extent that California's standards for approving apprenticeship programs were consistent with federal apprenticeship standards. The Court held that the California law did not fall within ERISA's pre-emption clause, and did not reach the saving clause issue.

With me on the brief were William G. Jeffery, Jeffery, Fenning & Jenkel, 1000 Second Avenue, Suite 3300, Seattle, WA 98104, (206) 623-4600, David P. Wolds, Merrill, Schultz & Wolds, Ltd., 401 West "A" Street, Suite 2550, San Diego, CA 92101, (619) 234-4525, Carmel Martin, Hogan & Hartson L.L.P., 555 13th Street, N.W. Washington, D.C. 20004, (202) 637-5600, Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735. Arguing for the petitioners was John M. Rea, Chief Counsel, State of California Department of Industrial Relations, Office of the Director, Legal Unit, 45 Fremont Street, Suite 450, San Francisco, CA 94105, (415) 972-8900. Arguing for the respondents Richard N. Hill, Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, CA 94108, (415) 433-1940. Arguing for the United States as *amicus curiae* was James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

12. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The question presented was whether the Medical Device Amendments (MDA) of 1976 pre-empted a state common-law negligence action. I participated in an amicus brief filed on behalf of the Center for

Patient Advocacy and the California Health Care Institute. We argued that the comprehensive regulatory scheme established by the MDA pre-empted state common law claims. The Court ruled, 5-4, that respondents' common law claims were not pre-empted by the MDA.

With me on the brief were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5810. Arguing for the petitioner was Arthur R. Miller, 1545 Massachusetts Avenue, Cambridge, Massachusetts 02138. Arguing for the respondents was Brian Wolfman, Public Citizen Litigation Group, 1600 20th Street, N.W., Washington, D.C. 20009, (202) 588-1000. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

13. *Brown v. Pro Football, Inc., D/B/A Washington Redskins*, 518 U.S. 231 (1996). After labor negotiations reached an impasse, NFL owners agreed among themselves to impose unilaterally the terms of their last bargaining offer. The question for the Court was whether this agreement fell within an implicit antitrust exemption for collective bargaining. I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued in support of the respondents that certain activities of multi-employer bargaining groups were exempt from the antitrust laws. The Court held, 8-1, that the collective-bargaining exemption applied.

With me on the brief were Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, Charles E. Murphy, Murphy, Smith & Polk, P.C., Twenty-Fifth Floor, Two First National Plaza, Chicago, IL 60603, (312) 558-1220, Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was Kenneth W. Starr, Kirkland & Ellis, 655 15th Street, N.W., Washington, D.C. 20005, (202) 879-5000. Arguing for the respondents was Gregg H. Levy, Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004, (202) 662-6000. Arguing for the United States as *amicus curiae* was Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

14. *Holly Farms Corporation v. NLRB*, 517 U.S. 392 (1996). The NLRB approved a collective bargaining unit that included a class of workers known in the poultry industry as "live-haul" workers; Holly Farms challenged the Board's decision on the ground that "live-haul" workers are agricultural laborers exempt from the coverage of the National Labor Relations Act (NLRA). The question before the Court was whether the Board's decision was based on a reasonable interpretation of the NLRA. I participated in an amicus brief filed on behalf of the National Broiler Council. We argued in support of the petitioners that the Board's decision was contrary to the NLRA. The Court disagreed, and ruled that the Board's interpretation was reasonable.

With me on the brief were Gary Jay Kushner and Jonathan S. Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5856.

Arguing for the petitioners was Charles P. Roberts III, Haynsworth, Baldwin, Johnson & Greaves, P.A., 2709 Henry Street, Greensboro, N.C. 27405, (910) 375-9737. Arguing for the respondents was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

15. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). A group of employee welfare benefit plan beneficiaries sued their employer alleging that they had been misled into withdrawing from the plan. The questions before the Court involved whether the employer breached its fiduciary obligations under the Employee Retirement Income Security Act (ERISA) and whether the particular ERISA provision at issue authorized the beneficiaries to sue to enforce those obligations. I participated in an amicus brief filed on behalf of the U.S. Chamber of Commerce in support of the petitioner. We argued, first, that the relevant provision did not provide a cause of action because the liability of fiduciaries was governed by other sections of ERISA, and second, that ERISA contemplated a different standard from the one argued for by the beneficiaries. The Court disagreed, and ruled for the beneficiaries.

With me on the brief were Stephan A. Bokat, Mona C. Zieberg, The National Chamber Litigation Center, Inc., 1615 H Street, N.W., Washington, D.C. 20062, (202) 463-5337, Evan Miller, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Floyd Abrams, 80 Pine Street, New York, N.Y. 10005, (212) 701-3000. Arguing for the respondent was H. Richard Smith, Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., 100 Court Avenue, Suite 600, Des Moines, IA 50309, (515) 243-7611. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Adarand Constructors challenged a federal government preference in the award of contracts for firms that employ minority-owned subcontractors. The question before the Court was whether this preference was subject to strict scrutiny. I participated in an amicus brief filed on behalf of the Associated General Contractors of America in support of petitioner. We argued that the Court's earlier decision to apply strict scrutiny in the context of state and local contracts should apply equally to federal contracts. The Court agreed.

With me on the brief were Michael E. Kennedy, Special Counsel, Associated General Contractors of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, David G. Leitch, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was William Perry Pendley, Mountain States Legal Foundation, 1660 Lincoln Street, Suite 2300, Denver, Colorado 80264, (303) 861-0244. Arguing for the respondents was Drew S. Days, III, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Days is now at Morrison & Foerster, 2000 Pennsylvania Avenue, N.W., Suite 5500, Washington, D.C. 20006, (202) 887-6920.

17. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995). The Plant Variety Protection Act of 1970 grants the developer of a novel plant variety a limited monopoly to sell seeds of that variety; petitioners alleged that respondents were selling seeds in violation of the Act. The question presented was whether respondents' sales fell within an exemption provided for by the Act. I participated in an amicus brief filed on behalf of the American Seed Trade Association in support of the petitioner. We argued that reading the Act to exempt respondents' sales was inconsistent with its language and purpose. The court, in an 8-1 decision, agreed.

With me on the brief were Gary Jay Kushner, Mark D. Dopp, David G. Leitch, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Richard L. Stanley, Arnold, White & Durkee, 750 Bering Drive, Suite 400, Houston, Texas 77057, (713) 787-1400. Arguing for the respondents was William H. Bode, William H. Bode & Associates, 1150 Connecticut Avenue, N.W., Ninth Floor, Washington, D.C. 20036, (202) 828-4100. Arguing for the United States as *amicus curiae* was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

18. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Several individuals brought suit challenging retroactive changes in the terms and conditions of an airline frequent flyer program. The question before the Court was whether the Airline Deregulation Act of 1978 pre-empted respondents' claims. I participated in an amicus brief filed on behalf of the Air Transport Association of America, arguing that state regulation of frequent flyer programs was pre-empted. The Court held that the respondents' claims under an Illinois consumer fraud act were pre-empted, but that their common-law breach of contract claim could go forward.

With me on the brief were John R. Keys, Jr., Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005, (202) 371-5700, Calvin P. Sawyier, Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 558-5600, and Walter A. Smith, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was the late Bruce J. Ennis, Jr., Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005, (202) 639-6000. Arguing for the respondents was Gilbert W. Gordon, Marks, Marks, and Kaplan, Ltd., 120 North LaSalle Street, Suite 3200, Chicago, IL 60602, (312) 332-5200. Arguing for the United States as *amicus curiae* was Cornelia T.L. Pillard, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

19. *Washington v. Harper*, 494 U.S. 210 (1990). A mentally-ill inmate in a Washington prison challenged the State's attempt to administer psychiatric medication against his will. The question presented was whether in deciding to medicate the inmate, the State afforded him the process required by the Due Process Clause of the Fourteenth Amendment. I participated in a brief filed on behalf of the American Psychological Association, arguing that the inmate had not been afforded a truly impartial hearing. The Court held that the procedures established by the prison met the requirements of due process.

With me on the brief were Clifford D. Stromberg, Barbara F. Mishkin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was William L. Williams, Sr., Assistant Attorney General, Mail Stop FZ-11, Olympia, WA 98504, (206) 586-1445. Arguing for the respondent was Brian Reed Phillips, 3223 Oakes Avenue, Everett, Washington 98201, (206) 252-3221. Arguing for the United States as *amicus curiae* was Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

20. *South Dakota v. Dole*, 483 U.S. 203 (1987). Under federal law, a state is denied a portion of its federal highway funds if its laws allow persons under the age of 21 to purchase alcohol; South Dakota challenged this provision. The question before the Court was whether the law was a valid exercise of Congress's Spending Clause power. I participated in a brief filed on behalf of the National Beer Wholesalers' Association and 46 state beer, wine, and distilled spirits associations. We argued that the Twenty-First Amendment of the Constitution reserved to the States the authority to regulate alcohol and that Congress could not use its Spending Clause power to circumvent this limitation. The Court disagreed, holding that the provision was valid under the Spending Clause.

With me on the brief were E. Barrett Prettyman, Jr., Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John F. Stasiowski, General Counsel, National Beer Wholesalers' Association, 5205 Leesburg Pike, Suite 505, Falls Church, VA 22041, (703) 578-4300. Arguing for the petitioner was Roger A. Tellinghuisen, Attorney General, State of South Dakota, State Capitol, Pierre, S.D. 57501; (605) 773-3215. Arguing for the respondent was Louis R. Cohen, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217.

While in private practice, I was also the counsel of record on the following petitions for certiorari, which did not result in an argument before the Court:

Mulvaney Mechanical, Inc. v. Sheet Metal Workers Intern. Ass'n, Local 38 (No. 02-924), *cert. granted and judgment vacated*, 538 U.S. 918 (2003).
Discover Bank v. Szetela (No. 02-829), *cert. denied*, 537 U.S. 1226 (2003).
Bazain v. United States (No. 02-616), *cert. denied*, 537 U.S. 1171 (2003).
Green Spring Health Services, Inc. v. Pennsylvania Psychiatric Society (No. 02-65), *cert. denied*, 537 U.S. 881 (2002).
Besser v. Hardy (No. 01-936), *cert. denied*, 535 U.S. 970 (2002).
National Union Fire Ins. Co. of Pittsburgh, PA v. Textron Financial Corp. (No. 01-176), *cert. granted and judgment vacated*, 534 U.S. 947 (2001).
Ritter v. Stanton (No. 01-1456), *cert. denied*, 536 U.S. 904 (2002).
Citizens Bank of Weston, Inc., v. City of Weston (No. 00-1876), *cert. denied*, 534 U.S. 824 (2001).
Litton Systems, Inc. v. Honeywell, Inc. (No. 00-1617), *cert. dismissed in light of an intervening decision*, 534 U.S. 1109 (2002).
Baltimore Scrap Corp. v. David J. Joseph Co. (No. 00-1592), *cert. denied*, 533 U.S. 916 (2001).

Smithfield Foods, Inc. v. United States (No. 99-1760), *cert. denied*, 531 U.S. 813 (2000).
Mobil Oil Corp. v. McMahon Foundation (No. 99-1830), *cert. denied*, 530 U.S. 1263 (2000).
Roberts v. United States (No. 99-1174), *cert. denied*, 529 U.S. 1108 (2000).
NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County (No. 99-712), *cert. denied*, 528 U.S. 1117 (2000).
Shoen v. Shoen (No. 99-662), *cert. denied*, 528 U.S. 1075 (2000).
Mary Hitchcock Memorial Hosp. v. Klonoski (No. 98-1181), *cert. denied*, 526 U.S. 1039 (1999).
U-Haul Co. of Cleveland v. Kunkle (No. 98-1097), *cert. denied*, 526 U.S. 1144 (1999).
Kansas City Southern Ry. Co. v. McKenna (No. 98-479), *cert. denied*, 525 U.S. 1016 (1998).
Shoen v. Shoen (No. 98-86), *cert. denied*, 525 U.S. 923 (1998).
UNUM Corp. v. United States (No. 97-1679), *cert. denied*, 525 U.S. 810 (1998).
Shakespeare Co. v. Silstar Corp. of America, Inc. (No. 97-580), *cert. denied*, 522 U.S. 1046 (1998).
Delaware River and Bay Authority v. International Union of Operating Engineers, Local 68, AFL-CIO (No. 97-81), *cert. denied*, 522 U.S. 861 (1997).
Hydranautics v. Filmtec Corp. (No. 95-1887), *cert. denied*, 519 U.S. 814 (1996).
National Union Fire Ins. Co. of Pittsburgh, Pa. v. American Medical Intern., Inc. (No. 95-447), *cert. granted and judgment vacated*, 516 U.S. 984 (1995).
Keystone Sanitation Co., Inc. v. Arcata Graphics Fairfield, Inc. (No. 95-273), *cert. denied*, 516 U.S. 928 (1995).
State Farm Mut. Auto. Ins. Co. v. New Jersey Comm'r of Ins. (No. 95-184), *cert. denied*, 516 U.S. 1184 (1996).
20th Century Ins. Co. v. Garamendi (No. 94-1119), *cert. denied*, 513 U.S. 1140 (1995) & 513 U.S. 1153 (1995).
NationsBank of Texas, N.A. v. Executive Life Ins. Co. (No. 94-884), *cert. denied*, 513 U.S. 1147 (1995).
Bellsouth Advertising & Pub. Corp. v. Donnelley Information Pub., Inc. (No. 93-862), *cert. denied*, 510 U.S. 1101 (1994).
Pardee & Curtin Lumber Co. v. Webster County Comm'n (No. 93-226), *cert. denied*, 510 U.S. 990 (1993).

Finally, while in private practice, I was the counsel of record on the following oppositions to certiorari:

Renzi v. Connelly School of the Holy Child, Inc. (No. 00-1118), *cert. denied*, 531 U.S. 1192 (2001).
Michigan v. EPA (No. 00-632) and Ohio v. EPA (No. 00-633), *cert. denied*, 532 U.S. 904 (2001).
Anadarko Petroleum Corp. v. FERC (No. 99-1429), *cert. denied*, 530 U.S. 1213 (2000).
Miccosukee Tribe of Indians of Fla. v. Tamiami Partners, Ltd. (No. 99-1013), *cert. denied*, 529 U.S. 1018 (2000).
Rockwell Intern. Corp. v. Celeritas Technologies, Ltd. (No. 98-850), *cert. denied*, 525 U.S. 1106 (1999).

Goetz v. Glickman (No. 98-607), *cert. denied*, 525 U.S. 1102 (1999).
Kamilewicz v. Bank of Boston Corp. (No. 96-1184), *cert. denied*, 520 U.S. 1204 (1997).
Amoco Production Co. v. Public Service Co. of Colorado (No. 96-954), *cert. denied*, 520 U.S. 1224 (1997).
Rockland Industries, Inc. v. Chumbley (No. 87-1220), *cert. denied*, 485 U.S. 961 (1988).

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

If any of these cases has already been described in 15(D) above, it need not be repeated here.

1. *United States v. Halper*, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See *United States v. Halper*, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions — which did not apply to civil cases — from that aspect of the Clause forbidding successive punishments — which, I argued, had no such limitation. In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not

limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in *Hudson v. United States*, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *United States v. Kokinda*, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment. The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Kenneth W. Starr, then Solicitor General, then Assistant Attorney General Edward S.G. Dennis, Jr., then Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Secretary of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing

for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not "presume" the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were then Assistant Attorney General Richard Stewart, then Deputy Solicitor General Lawrence G. Wallace, then Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* — which applies only to organizations that receive federal financial assistance — applied to the NCAA, because it received dues from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding — those who knowingly entered into a bargain by accepting the funding — and does not "follow [] the aid past the recipient to those who merely benefit from the aid." *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA's "receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage." 525 U.S. at 468.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100 and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN

46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

5. *Rice v. Cayetano,* 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl L. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, HI 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

6. *TrafFix Devices, Inc. v. Marketing Displays. Inc.*, 532 U.S. 23 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. TrafFix Devices copied