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SUPREME COURT REVIEW AND PREVIEW

John C. Cruden, President

AMERICAN ELECTRIC POWER CO., INC., ET AL. v. CONNECTICUT ET AL.

1. Whether States and private parties have standing to pursue federal common law nuisance claim against large GHG emitting utilities

2. Whether claim non-justiciable because presents political question

3. Whether CAA displaces claim

CERTIORARI GRANTED

10-174 AM. ELECTRIC POWER CO., ET AL. V. CONNECTICUT, ET AL.

The petition for a writ of certiorari is granted. Justice Sotomayor took no part in the consideration or decision of this petition.

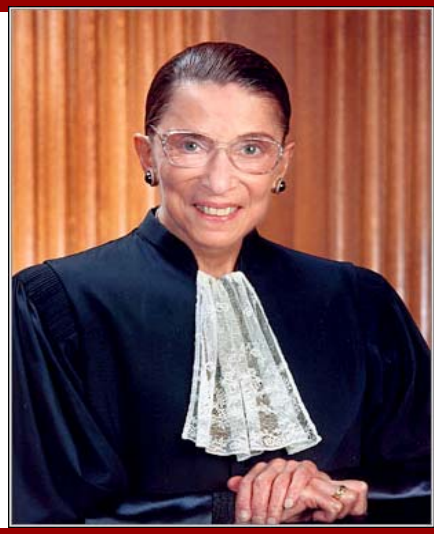
- Litigation in 3 Circuits
- Peter Keisler for Petitioner Power Cos.
- Obama SG Intervenes for Petitioners

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL., PETITIONERS *v.* CONNECTICUT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 20, 2011]

JUSTICE GINSBURG delivered the opinion of the Court.



- 4-4 Federal Court Jurisdiction Affirmed
- 8-0 CAA Displaces Federal Common Law

Reg. 82392. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

Hill, 437 U. S. 153, 194 (1978). The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978); see *Milwaukee II*, 451 U. S., at 315; *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 236–237 (1985).

We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emis-

We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their

Oral Argument

JUSTICE GINSBURG: General Underwood, the -- the relief that you're seeking, asking a court to set standards for emissions, sounds like the kind of thing that EPA does. I mean, Congress set up the EPA to promulgate standards for emissions, and now what -- the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of super EPA.

Oral Argument

JUSTICE BREYER: Can the courts set a tax?

* * * * *

MS. UNDERWOOD: I don't think so.

JUSTICE SCALIA: Indeed, you know, tapping the case to State judges instead of Federal judges, I would frankly rather have Federal judges do it, probably.

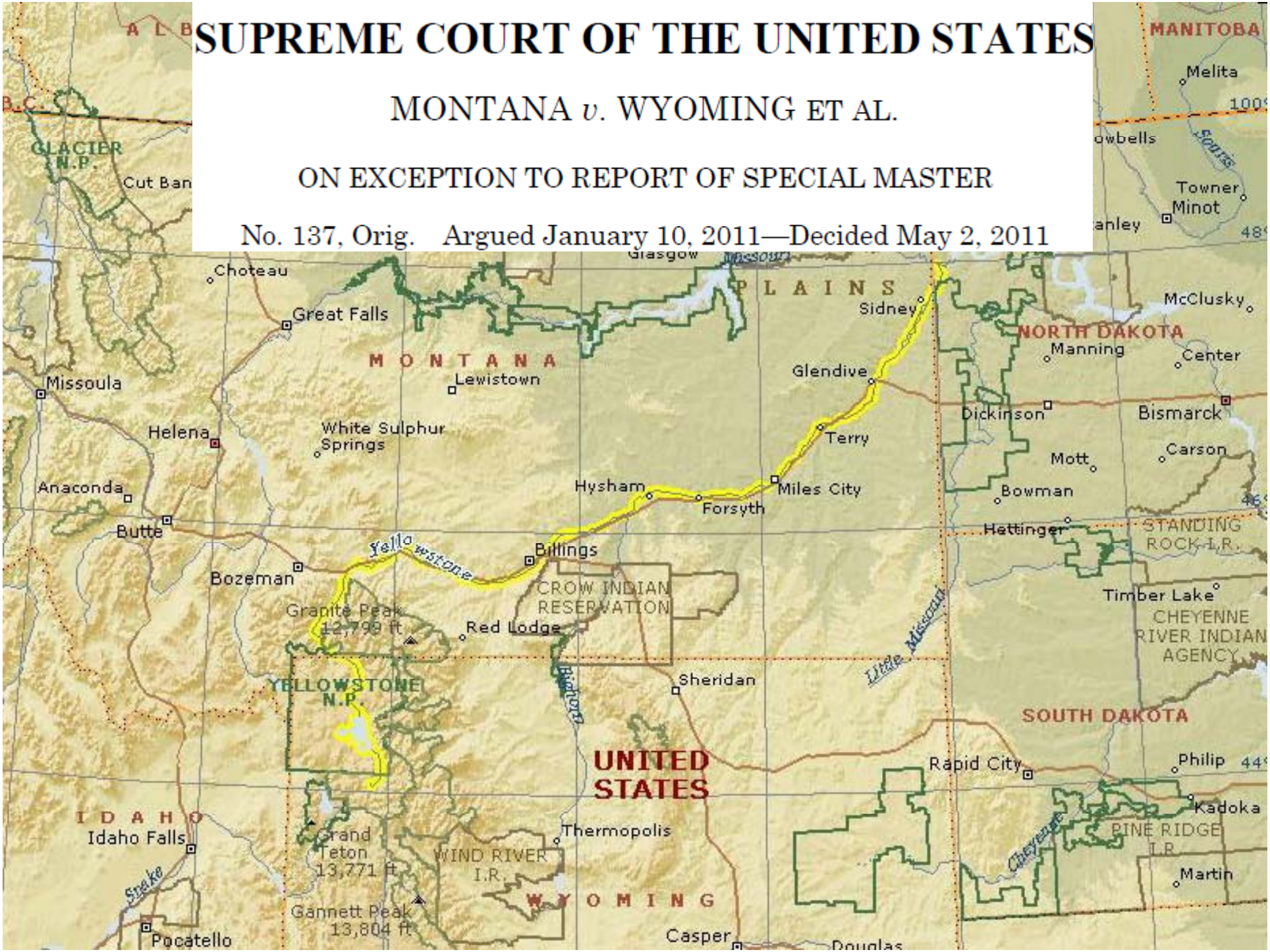
JUSTICE SCALIA: You're -- you're lumping them all together. Suppose you lump together all the cows in the country. Would -- would that allow you to sue all those farmers? I mean, don't you have to do it defendant by defendant?

SUPREME COURT OF THE UNITED STATES

MONTANA *v.* WYOMING ET AL.

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 137, Orig. Argued January 10, 2011—Decided May 2, 2011



JUSTICE THOMAS delivered the opinion of the Court.

This case arises out of a dispute between Montana and Wyoming over the Yellowstone River Compact. Montana alleges that Wyoming has breached Article V(A) of the Compact by allowing its pre-1950 water appropriators to increase their net water consumption by improving the efficiency of their irrigation systems. The new systems, Montana alleges, employ sprinklers that reduce the amount of wastewater returned to the river, thus depriving Montana's downstream pre-1950 appropriators of water to which they are entitled. The Special Master has filed a First Interim Report determining, as relevant here, that Montana's allegation fails to state a claim because more efficient irrigation systems are permissible under the Compact so long as the conserved water is used to irrigate the same acreage watered in 1950. We agree with the Special Master and overrule Montana's exception to that conclusion.

[4]As with all contracts, we interpret the Compact according to the intent of the parties, here the signatory States. We thus look primarily to the doctrine of appropriation in Wyoming and Montana, but, like the States, we also look to Western water law more generally and authorities from before and after 1950. The States appear to have assumed that the doctrine has not changed in a way directly relevant here. We therefore do not decide whether Article V(A) intended to freeze appropriation law as it stood in 1949, or whether it incorporates the evolution of the doctrine over time, allowing Compact-protected rights to grow or shrink accordingly. We resolve the matter of Montana's exception without prejudice to that issue. See Report 39–40.

[5]The lack of clarity in this area of water law highlights the sensitive nature of our inquiry and counsels caution. Our original jurisdiction over cases between States brings us this dispute between Montana and

§1251(a). Yet, because the Compact references and the parties direct us to principles of appropriation doctrine, we find ourselves immersed in state water law. See n. 4, *supra*. Our assessment of the scope of these water rights is merely a federal court's description of state law.

rule, however superior it may appear from the viewpoint of 'general law'"). Our decision is not intended to restrict the States' determination of their respective appropriation doctrines.

495, 505, 103 P. 2d 1067, 1072 (1940) ("[P]lace of diversion, or place or purpose of use, may be changed only if others are not thereby injured" (internal quotation marks omitted)); see also 1 S. Wiel, Water Rights in the Western States §498, p. 532 (3d ed. 1911) (hereinafter Wiel); Mont. Code Ann. §89–803 (1947); Wyo. Stat. Ann. §41–3–104 (1977). Accordingly, certain types of changes can occur even though they may harm downstream appropriators. See D. Getches, Water Law in a Nutshell 175 (4th ed. 2009) (hereinafter Getches). For instance, an appropriator may increase his consumption by changing to a more water-intensive crop so long as he makes no change in acreage irrigated or amount of water diverted. See *id.*, at

JUSTICE SCALIA, dissenting.

Thanks to improved irrigation techniques, Wyoming's farmers and cattlemen appear to consume more of the water they divert from the Yellowstone River and its tributaries today than they did 60 years ago—that is to say, less of the diverted water ultimately finds its way back into the Yellowstone. The Court interprets the Yellowstone River Compact (Compact), see Act of Oct. 30, 1951, ch. 629, 65 Stat. 663, to grant those Wyomans* the right to increase their consumption so long as they do not

*The dictionary-approved term is "Wyomingite," which is also the name of a type of lava, see Webster's New International Dictionary 2961 (2d ed. 1957). I believe the people of Wyoming deserve better.

In the Supreme Court of the United States

No. 10-1062

CHANTELL SACKETT AND MICHAEL SACKETT,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

Does EPA administrative order (UAO) violate Due Process?

- CWA §309(a)(3) administrative order to cease violating
  - Court enforcement $37,500 civil penalty per day + criminal
- 9th Cir: implied preclusion of pre-enforcement judicial review but "cannot assess penalties … unless EPA proves .. defendants actually violated the CWA." 622 F.3d 1139
- Pacific Legal Foundation:
  - *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)("constitutionally intolerable" choice between complying and "coercive penalties").
  - *TVA v. Whitman*, 336 F.3d 1236 (11th Cir, 2003), *cert. denied*, 541 U.S. 1030 (2004).
- Solicitor General unsuccessfully opposes *cert.*
  - No conflict in circuits
  - CWA: "a civil action for appropriate relief … for any violation <u>for which [EPA] is authorized to issue a compliance order</u>."
    - Can apply for permit – appeal denial

Wetland Determination

- Dan Quayle (1989): "if the land isn't wet, maybe we shouldn't call it a wetland."
- Justice Kennedy (2006): "alone or in combination …significantly affect the chemical, physical, and biological integrity of other covered waters"

  Rapanos v. United States, 547 U.S. 715, 779-80 (2006)(Kennedy, J., concurring)
- **Pacific Legal Foundation, *cert* petition (2011)**:
  - **Avg cost to apply for wetland permit: $271,596**
  - 1,500-3000 admin orders/yr vs. only 400 court referrals
  - "maintain as public park … refused the prompt hearing they should have received as a matter of right in any court. Thousands of landowners across the country are in similar straights. [sic]"
- *GE v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), *cert denied*

What could Supreme Court do?

- Dismiss *cert* as improvidently granted?
  - No record on *Mathews v. Eldridge,* 424 U.S. 319 (1976), due process factors
- Affirm 9th Cir's statutory construction?
- **Reverse on no pre-enforcement APA judicial review** – *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), balance of "substantial hardship"
- As usual, Justice Kennedy is key, but
  - Justice Thomas opposes "implied preclusion" – judicial restraint
  - Scalia and Thomas concurring in *Thunder Hill*: no due process violation if "judicial review is provided before a penalty for noncompliance can be imposed."

(ORDER LIST: 564 U.S.)

Argument December 7, 2011

MONDAY, JUNE 20, 2011

CERTIORARI GRANTED

10-218 PPL MONTANA, LLC V. MONTANA

The motion of Professor David Emmons, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

Upper Missouri River and Great Falls Reach

In the
Supreme Court of the United States

PACIFIC MERCHANT SHIPPING ASSOCIATION,
Petitioner,

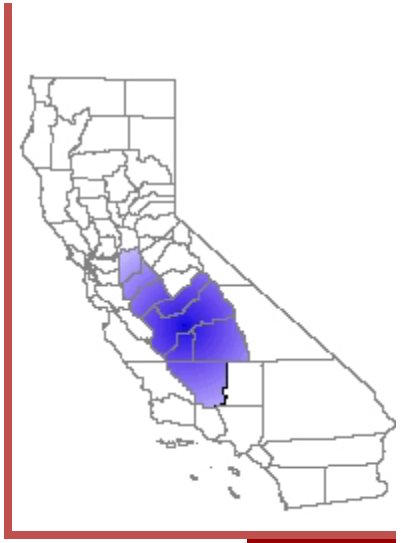
v.

JAMES GOLDSTENE, IN HIS OFFICIAL CAPACITY AS EXECUTIVE OFFICER OF THE CALIFORNIA AIR RESOURCES BOARD, NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., AND SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SUPREME COURT
OF THE UNITED STATES



No. 10-1528
Title: The National Association of Home Builders, Petitioner
v.
The San Joaquin Valley Unified Air Pollution Control District, et al.
Docketed: June 20, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-17309)
Decision Date: December 7, 2010
Rehearing Denied: March 18, 2011

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 16 2011	Petition for a writ of certiorari filed. (Response due July 20, 2011)
Jul 20 2011	Brief of respondents Environmental Defense Fund, and Sierra Club in opposition filed.
Jul 20 2011	Brief of respondents The San Joaquin Valley Unified Air Pollution Control District, et al. in opposition filed.
Aug 3 2011	DISTRIBUTED for Conference of September 26, 2011.
Aug 5 2011	Reply of petitioner The National Association of Home Builders filed. (Distributed)

No. 11-30 JUL 1 - 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MORRISON ENTERPRISES, LLC,

Petitioner,

v.

DRAVO CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

In the

Supreme Court of the United States

STEWART & JASPER ORCHARDS; ARROYO FARMS, LLC; and KING PISTACHIO GROVE,
Petitioners,

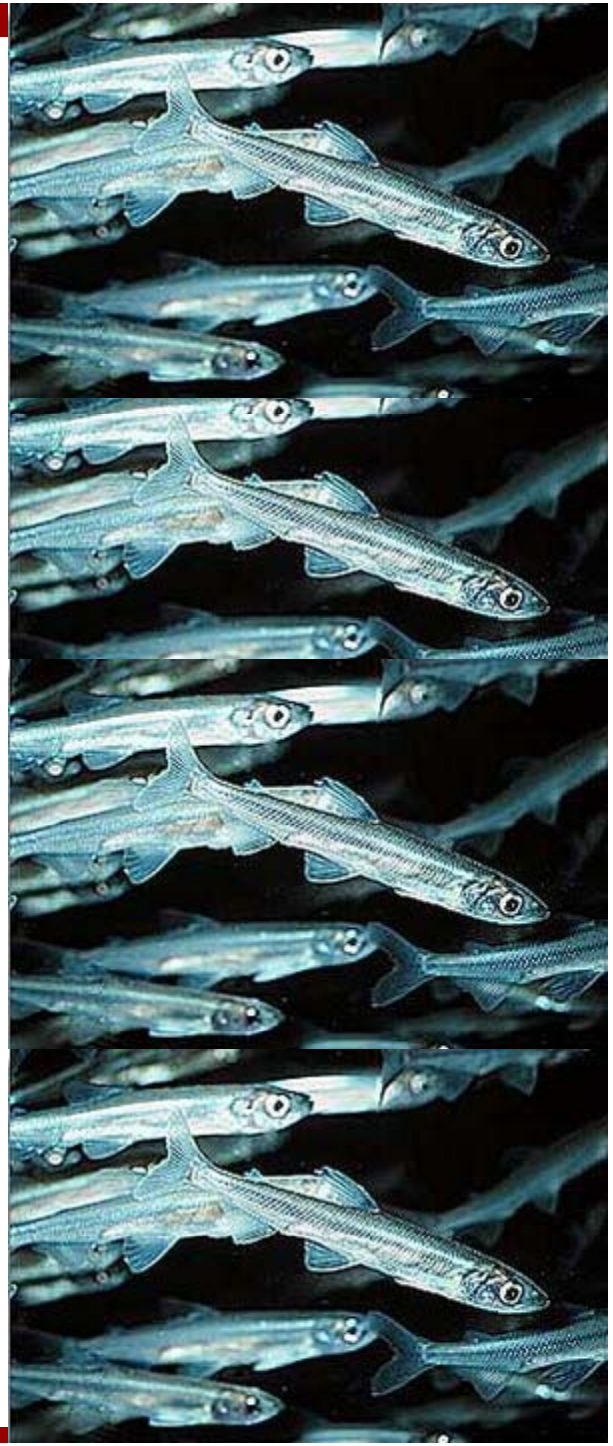
v.

KENNETH LEE SALAZAR, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

M. REED HOPPER
DAMIEN M. SCHIFF
*BRANDON M. MIDDLETON
*Counsel of Record
Pacific Legal Foundation




Q&A