



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
October 19, 2009**

Prepared by Brian Bilford, 2009–2010 SCAP Fellow

a b o u t
t h i s
l i s t

The [Alan Morrison Supreme Court Assistance Project](#) (SCAP) of Public Citizen Litigation Group regularly distributes this watch list to raise awareness of public interest issues presented to the U.S. Supreme Court. SCAP monitors cert. petitions where the question presented implicates our public interest mission and there is a chance of a grant. SCAP also offers pro bono assistance to litigants involved in some cases.

[Subscribe to the S.Ct. Watch List](#) to receive an update before each Supreme Court conference. Past conference watch lists are available in the [Watch List Archives](#). For more information, contact Brian Bilford, 2009–2010 Supreme Court Assistance Project Fellow, at (202) 588-1000 or supremecourt@citizen.org.

WATCH LIST CONTENTS

Issue Index.	<u>3</u>
Resources.	<u>4</u>
Links for More Information.	<u>4</u>
Key Terms & Abbreviations.	<u>5</u>
October 19 Conference.	<u>6</u>
Pending for Upcoming Conferences.	<u>11</u>
Calls For Response.	<u>18</u>
New CFR.	<u>18</u>
Pending CFR.	<u>18</u>
Calls for the Views of the Solicitor General.	<u>26</u>
New CVSG.	<u>26</u>
Pending CVSG.....	<u>26</u>
Held/Awaiting Action.	<u>29</u>
Last Conference.	<u>34</u>
Certiorari Granted.	<u>34</u>
Certiorari Denied.	<u>35</u>
Granted Cases Involving Public Citizen 2009 Term.	<u>38</u>

ISSUE INDEX

Alien Tort Claims Act		
<i>State Action</i>	<u>8</u>	
Arbitration		
<i>Class Arbitration</i>	<u>33, 39</u>	
Attorney's Fees		
<i>"Prevailing Party"</i>	<u>32, 37, 40</u>	
<i>Enhancements</i>	<u>38</u>	
Bankruptcy		
<i>First Amendment</i>	<u>30</u>	
<i>Judicial Discretion</i>	<u>11</u>	
Civil Procedure		
<i>Class Actions</i>	<u>11, 39</u>	
<i>Interlocutory Appeal</i>	<u>38</u>	
<i>Remedies</i>	<u>7</u>	
<i>Subject-Matter Jurisdiction</i>	<u>26</u>	
Civil Service Reform Act		
<i>Reviewability</i>	<u>11</u>	
Copyright Law		
<i>First-Sale Doctrine</i>	<u>27</u>	
Criminal Law		
<i>Brady Suppression</i>	<u>37</u>	
<i>Ex Post Facto</i>	<u>34</u>	
<i>Examining of Evidence</i>	<u>17</u>	
<i>Honest Services Fraud</i>	<u>34</u>	
<i>Money Laundering</i>	<u>13</u>	
<i>Private Prosecutions</i>	<u>28</u>	
<i>Rape Shield Law</i>	<u>22</u>	
<i>Sentencing</i>	<u>6, 7, 30</u>	
<i>Speedy Trial Act</i>	<u>31</u>	
<i>Suppression Hearings</i>	<u>25</u>	
Due Process		
<i>Forfeiture</i>	<u>38</u>	
<i>Judicial Recusal</i>	<u>16</u>	
<i>Retroactivity</i>	<u>18</u>	
<i>Standing</i>	<u>22</u>	
Employment Law		
<i>Polling Notice</i>	<u>14</u>	
<i>Strikebreakers</i>	<u>35</u>	
<i>Union Fiduciary Duties</i>	<u>37</u>	
Environmental Law		
<i>National Environmental Policy Act</i>	<u>20</u>	
ERISA		
<i>Preemption</i>	<u>27</u>	
FDCPA		
<i>Defenses</i>	<u>39</u>	
Federal Jurisdiction		
<i>Foreign Sovereign Immunities Act</i>	<u>21</u>	
First Amendment		
<i>Attorney Sanctions</i>	<u>23</u>	
<i>Child Pornography and Overbreadth</i>	<u>25</u>	
<i>Employee Speech</i>	<u>19, 21</u>	
<i>Religious Student Groups</i>	<u>6</u>	
<i>Standing</i>	<u>30</u>	
<i>Student Speech</i>	<u>13, 20, 23</u>	
<i>Violence</i>	<u>32</u>	
FOIA		
<i>Detainee Abuse Photographs</i>	<u>9</u>	
<i>Military Death Sentences</i>	<u>36</u>	
Fourth Amendment		
<i>Exigent Circumstances</i>	<u>8</u>	
<i>Reasonable Expectation of Privacy</i>	<u>36</u>	
<i>Seizure</i>	<u>36</u>	
<i>Terry Stops</i>	<u>6</u>	
<i>Workplace Privacy</i>	<u>18</u>	
FTCA		
<i>"Person"</i>	<u>12</u>	
<i>Bivens Actions</i>	<u>13</u>	
Habeas Corpus		
<i>"Clearly Established"</i>	<u>29</u>	
<i>"Second or Successive"</i>	<u>16</u>	
<i>Collateral Estoppel</i>	<u>21</u>	
<i>Guantanamo Detainees</i>	<u>31</u>	
<i>Ineffective Assistance</i>	<u>6, 9, 14, 16, 35</u>	

<i>Mootness</i>	<u>7</u>	Punitive Damages	
<i>Sufficient Evidence</i>	<u>29, 32</u>	<i>State Percentage Recovery</i>	
Immigration Law		<i>Statutes</i>	<u>9</u>
<i>Adjustment of Status</i>	<u>22, 35</u>	RLUIPA	
<i>Reviewability</i>	<u>14</u>	<i>Damages</i>	<u>12</u>
International Law		<i>Eleventh Amendment</i>	<u>14</u>
<i>Child Abduction</i>	<u>30</u>	Second Amendment	
<i>Manuel Noriega</i>	<u>8</u>	<i>Incorporation</i>	<u>33</u>
Military Law		Section 1983	
<i>Jurisdiction of Military</i>		<i>Counterfeit Money</i>	<u>24</u>
<i>Courts</i>	<u>7</u>	Sixth Amendment	
NLRB		<i>Confrontation Clause</i>	<u>8</u>
<i>Quorum Requirement</i>	<u>12, 17</u>	<i>Miranda Rights</i>	<u>31</u>
Patent Law		Statute of Limitations	
<i>"Business Methods"</i>	<u>19</u>	<i>Inquiry Notice</i>	<u>29</u>
Preemption		<i>Tolling</i>	<u>9</u>
<i>FEHBA</i>	<u>34</u>	Supremacy Clause	
<i>Maritime Law</i>	<u>16</u>	<i>Waiver of Claims</i>	<u>23</u>
<i>Motor Vehicle Safety</i>	<u>27</u>	Title VII	
<i>Undocumented Alien Hiring</i>	<u>15</u>	<i>Burden Shifting</i>	<u>15</u>
<i>Vaccine Act</i>	<u>15, 26</u>	<i>EEOC Jurisdiction</i>	<u>12</u>
Public Citizen			
<i>Cert. Granted</i>	<u>38, 39</u>		
<i>Cert. Pending</i>	<u>27, 40</u>		

RESOURCES

LINKS FOR MORE INFORMATION

- ✓ **Supreme Court's Website:**
<http://www.supremecourtus.gov>. For info or status updates on a particular petition, click on the Docket Number included on this list for that petition. View the Orders List which comes out after each conference for news on all petitions here:
<http://www.supremecourtus.gov/orders/08ordersofthecourt.html>
- ✓ **Alan Morrison Supreme Court Assistance Project of Public Citizen:**
<http://www.citizen.org/litigation/SupremeCourt>. SCAP Information.
- ✓ **SCOTUS Blog:**
<http://www.scotusblog.com>. Frequent Supreme Court Updates.
- ✓ **Office of Solicitor General:**
<http://www.usdoj.gov/osg>. Briefs Filed by the United States.

KEY TERMS & ABBREVIATIONS

Petition for Certiorari <i>“Cert” Petition</i>	The brief filed at the Supreme Court by a party who lost in a lower federal or state court, asking the Supreme Court to grant certiorari and review the decision of the lower court. If cert is granted, the Court will hear the case. If cert is denied, the decision below stands.
Petitioner	The party petitioning the Supreme Court for a <i>grant</i> of certiorari—who lost in the lower court and is asking the Supreme Court to overturn the lower court decision.
Respondent	Any party other than the petitioner, but generally the party opposing a grant of certiorari. These parties usually want the Court to <i>deny</i> cert.
BIO <i>Brief in Opposition</i>	The brief in opposition to certiorari is the brief filed by a respondent in response to the petitioner’s petition for certiorari (“cert petition”). This is the brief in which the respondent may explain why the Court should not hear the case.
CFR <i>Call For a Response</i>	Where the respondent has initially waived filing a response, after reading the petition for certiorari but before deciding whether to hear the case, the Court sometimes issues a CFR, or asks the respondent to file a brief in opposition.
Conf. <i>Conference</i>	This is the term for the meeting the Justices regularly hold regarding pending cert petitions and cases. Conference dates are listed on the current Supreme Court calendar .
CVSG <i>Call for the Views of the Solicitor General</i>	Before deciding whether to hear a case, the Court sometimes chooses to CVSG the petition. This means the Court is inviting the Solicitor General to file a brief providing the views of the United States regarding the question presented by the petition. The brief eventually filed is called an “invitation brief.” Briefs filed this term are available here .
Dist. <i>Distributed</i>	This provides the date of the Conference for which this petition and related filings were distributed to the Justices, and the date when the Court may take action on the petition.
GVR <i>Granted, Vacated, and Remanded</i>	The Supreme Court granted, vacated, and remanded the petition, usually in light of an intervening case. Essentially, this means the Supreme Court has cancelled out the lower court’s decision and sent the case back to that court for reconsideration.
Held	The Court frequently holds petitions for later consideration if they raise the same or similar questions as those presented by other petitions or granted cases. The Court will consider these petitions again later, usually after announcing a decision in another case.
QP <i>Question/s Presented</i>	The question or questions presented in a petition for the Supreme Court to decide. The Court usually does not address issues not included in the QP.
Vide	Occasionally, more than one party will ask the Supreme Court to hear the same case. Marking a petition “Vide” recognizes that it comes from the same lower court opinion as another pending petition.

OCTOBER 19 CONFERENCE

Habeas Corpus: Guantánamo Detainees

[08-1234](#) *Kiyemba v. Obama* (D.C. Cir.)

BIO 5/29. Reply 6/4. *Amici* Federal Pub. Defender for the Dist. of Or. 4/29, ACLU 5/6, Ass'n of the Bar of the City of N.Y., Uyghur Am. Ass'n 5/7. Letter from S.G. 6/11. Dist. for 6/25. Re-listed for 6/29. Re-listed for 9/29. Letter from S.G. 9/23. Re-listed for 10/9. Re-listed for 10/19.

Whether a federal court exercising its *habeas* jurisdiction, as confirmed by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.

Habeas Corpus: Ineffective Assistance of Counsel

[08-1263](#) *Ayers v. Belmontes* (9th Cir.)

BIO 6/15. Reply 6/25. Dist. 9/29. Re-listed for 10/9. Re-listed for 10/19.

Does the Sixth Amendment right to effective assistance of counsel in the penalty-phase of a capital trial require counsel to present and explain evidence in support of an alternative theory that is inconsistent with his client's testimony and that would likely open the door to previously excluded evidence that the defendant had personally committed another murder?

First Amendment: Religious Student Groups

[08-1371](#) *Christian Leg. Soc'y Chapter of Univ. of Cal., Hastings College of the Law v. Martinez* (9th Cir.)

BIO 7/8. Reply 7/21. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

Whether the Ninth Circuit erred when it held, directly contrary to the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), that the Constitution allows a state law school to deny recognition to a religious student organization because the group requires its officers and voting members to agree with its core religious viewpoints.

Fourth Amendment: *Terry* Stops

[08-1385](#) *Virginia v. Harris* (Va.)

BIO 7/9 Reply 7/17. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

When a law enforcement officer receives a detailed anonymous tip that a driver is driving drunk or dangerously, what degree of corroboration is required for the officer to make a valid *Terry* stop?

Criminal Law: Sentencing

08-1427 Brockman v. United States (5th Cir.)

CFR 6/10. BIO 8/25. Reply 9/9. Dist. for 10/19.

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner’s federal sentence run consecutively with a state sentence that has yet to be imposed. That ruling perpetrates a direct and acknowledged circuit conflict concerning a federal district courts’s authority under 18 U.S.C. § 3584(a)—the statute governing consecutive and concurrent sentences—to order a federal sentence to be served consecutively with a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack the authority to impose such a sentence. The question presented is whether a district court has authority to order a defendant’s federal sentence to be served consecutively with a state sentence that has not yet been imposed.

Habeas Corpus: Mootness

08-1428 Burkey v. Marberry (3rd Cir.)

BIO 9/18. Reply 9/30. Dist. for 10/19.

Petitioner was sentenced to a term of imprisonment, followed by a term of supervised release. He filed a petition for habeas corpus under 28 U.S.C. § 2241, alleging that he was being held in prison beyond his proper release date. A magistrate judge agreed. But before petitioner’s case was finally adjudicated, the Bureau of Prisons released him. Petitioner continued to pursue his claim that he had been imprisoned too long in order to support an application to reduce his period of supervised release. The Third Circuit, in an acknowledged conflict with decisions of other circuits, dismissed the petition as moot. The question presented is:

Whether a prisoner’s challenge to his continued detention is mooted by his release when a judgment in his favor would establish that he was incarcerated beyond the proper expiration of his prison term, thereby supporting a claim for reduction in his term of supervised release.

Civil Procedure: Remedies

08-1441 Boim v. Salah (7th Cir.)

CFR 7/16. BIO 9/16. Dist. for 10/19.

Whether this Court’s decision in the *Central Bank of Denver* case bars victims of international terrorism from recovering damages against aiders and abettors of terrorist acts.

Criminal Law: Sentencing

08-1453 Rollins v. United States (8th Cir.)

CFR 6/16. BIO 9/16. Reply 9/29. Dist. for 10/19.

Petitioner was prosecuted on federal weapons possession charges at the same time state authorities tried and convicted him for the same conduct (and other, related offenses). The federal court declared that its sentence would be “consecutive to” whatever sentence the state court, which had yet to sentence, would later impose. The questions presented are:

1. Whether the statutory provision governing consecutive and concurrent sentencing in the federal courts, 18 U.S.C. § 3584, allows district courts to impose an anticipatory consecutive sentence.
2. If so, whether the decision to impose an anticipatory consecutive sentence is subject to the same rules—focused on the overlap between the conduct charged in the two prosecutions—that govern federal courts’ sentencing of defendants already-sentenced in state courts.

Military Law: Jurisdiction of Military Courts

08-1465 Rodriguez v. United States (C.A.A.F.)

CFR 6/15. BIO 8/14. Dist. for 10/19.

Whether the Court of Appeals for the Armed Forces misapplied this Court’s jurisdictional decision in *Bowles v. Russell*, 551 U.S. 205 (2007), thereby denying Petitioner servicemember his statutory right to appeal his court-martial conviction.

Alien Tort Claims Act: State Action

09-34 Pfizer v. Abdullahi (2d Cir.)

BIO 8/10. Reply 8/25. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

1. Whether jurisdiction under the Alien Tort Statute (“ATS”) can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law.
2. Whether, absent state action, a complaint that a private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the “high bar to new private causes of action” under the ATS recognized by the Supreme Court in *Sosa*.

International Law: Manuel Noriega

09-35 Noriega v. Pastrana (11th Cir.)

BIO 9/9. Reply 9/22. Dist. for 10/9. Re-listed for 10/19.

1. Whether the Eleventh Circuit Court of Appeals’s interpretation of Section 5 of the Military Commissions Act of 2006 violates the Supreme Clause of the Constitution of the United States.
2. Whether the Eleventh Circuit Court of Appeals’s interpretation of the Geneva Convention to permit the extradition of prisoners of war conflicts with previous decisions of this Court on treaty interpretation and statutory construction.

Sixth Amendment: Confrontation Clause

9-69 Norwood v. U.S. (9th Cir.)

BIO 9/16. Dist. for 10/19.

Whether an *ex parte* affidavit prepared solely for the purpose of establishing a critical fact at a federal criminal trial—namely, that the Government performed a “diligent search” but found no record of defendant’s lawful employment, thus providing circumstantial evidence that the defendant was dealing (not merely using) narcotics—is “testimonial” evidence subject to the demands of the Confrontation Clause.

Fourth Amendment: Exigent Circumstances

09-91 Michigan v. Fisher (Mich. Ct. App.)

BIO 8/21. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

1. Police officers do not violate the Fourth Amendment by entering a home without a warrant if it is reasonable to believe someone inside may need immediate assistance. In responding to a reported disturbance, police officers here discovered (a) a smashed truck, with fresh blood inside and out, near broken fence posts, (b) a house with broken windows and blood on the door, and (c) an unknown man inside who was screaming and breaking things and who refused to identify himself—and so an officer entered without a warrant. Is the Michigan Court of Appeals' holding that entry was impermissible absent evidence of a serious and life-threatening injury inconsistent with *Brigham City v. Stuart*?
2. Regardless of whether a warrantless entry into a residence is justified, the Fourth Amendment does not give occupants of the house the right to assault the entering police. As the officer was attempting to enter respondent's house, respondent aimed a gun at him. Is the respondent's assault excused by the Fourth Amendment?

Habeas Corpus: Ineffective Assistance

09-144 Bobby v. Hook (6th Cir.)

BIO 8/29. Reply 9/14. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

1. For purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), should defense counsel's performance be reviewed under professional standards that existed at the time of trial, as the majority of circuits require, rather than under the professional standards now in existence, as is the Sixth Circuit's practice?
2. Does the threshold for finding prejudice under *Strickland* vary depending on the number of statutory aggravating circumstances, as opposed to the weight of the aggravating evidence?
3. Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim?

FOIA: Detainee Abuse Photographs

09-160 U.S. Dep't of Defense v. ACLU (2nd Cir.)

BIO 9/8. Reply 9/25. *Amici* Reporters Comm. for Freedom of the Press, 9/4; Human Rts. Watch 9/8. Dist. for 10/9. Re-listed for 10/19.

Whether Exemption 7(F) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(F), exempts from mandatory disclosure photographic records concerning allegations of abuse and mistreatment of detainees in United States custody when the government has demonstrated that the disclosure of those photographs could reasonably be expected to endanger the lives or physical safety of United States military and civilian personnel in Iraq and Afghanistan.

Statute of Limitations: Tolling

09-166 U.S. v. Seale (5th Cir.)

Certified Question 7/31. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19.

Pursuant to 28 U.S.C. § 1254(2) and Supreme Court Rule 19, a majority of the members of the en banc Fifth Circuit voted to certify the following question of law to the Supreme Court: What statute of limitations

applies to a prosecution under 18 U.S.C. § for a kidnapping offense that occurred in 1964 but was not indicted until 2007?

Punitive Damages: State Percentage Recovery Statutes

09-195 Reust v. Alaska (Alaska S. Ct.).

BIO 9/14. Reply 9/29. Dist. for 10/19.

The Supreme Court of the State of Alaska upheld the validity of a state statute that took a percentage of Reust's recovery in a civil action for public use, aligning the Alaska Supreme Court with the Ninth Circuit and six State Supreme Courts that have held such statutes constitutional and furthering the split with two State Supreme Courts that have held such statutes violate the Takings Clause of the Fifth Amendment to the United States Constitution. The first question presented is:

1. Whether a state statute that allows a percentage of a civil judgment to be taken for public use violates the Takings Clause of the Fifth Amendment to the United States Constitution?

The Supreme Court of the State of Alaska upheld the taking of a percentage of Reust's recovery even though the recovery was through a settlement and not a judgment as required by the State statute. The second question presented is:

2. Did the taking of a percentage of Reust's civil recovery violate the Due Process Clause of the Fourteenth Amendment?

PENDING FOR UPCOMING CONFERENCES

Bankruptcy: Judicial Discretion

08-998 Hamilton v. Lanning (10th Cir.)

CFR 4/2. Letter from resp. 5/19. Dist. for 6/11. CVSG 6/15, filed 9/29 (urging a grant). Dist. for 10/30.

Did the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 eliminate judicial discretion by requiring an above-median income debtor to pay to unsecured creditors the net result reported on Official Form 22C?

Civil Procedure: Class Actions

08-1307 Holster v. Gatco, Inc. (2d Cir.)

CFR 6/17, due 9/16 (ext.). BIO 10/8.

1. Whether the United States Court of Appeals for the Second Circuit correctly held that claims brought in federal court under the Telephone Consumer Protection Act (TCPA), where the basis of federal jurisdiction is diversity under 28 U.S.C. § 1332(d)(2) of the Class Action Fairness Act, are governed by state substantive law.
2. Whether the United States Court of Appeals for the Second Circuit correctly held that Section 901(b) of the New York Civil Practice Law and Rules, which states that “[u]nless a statute creating or imposing a penalty or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action,” is substantive under the *Erie* doctrine.

Civil Service Reform Act: Reviewability

08-1415 Filebark v. DOT (D.C. Cir.)

08-1418 Grosdidier v. Chairman, Broadcasting Bd. of Governors (D.C. Cir.)

BIOs 9/23. Dist. for 10/30.

The Civil Service Reform Act of 1978 regulates adverse personnel actions, i.e. official actions that unfavorably alter the employment, classification, or salary of federal employees. The Act provides a comprehensive set of remedies for such adverse personnel actions, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court held that the Act precludes judicial review of such adverse personnel actions under the Back Pay Act.

The Question Presented is: Does the Civil Service Reform Act, as the District of Columbia Circuit held, preclude judicial review under statutes other than the Civil Service Reform Act itself of “federal employee claims” generally, including claims that are neither adverse personnel actions nor otherwise covered by the Act?

RLUIPA: Damages

08-1438 Sossamon v. Texas (5th Cir.)

BIO 7/22. Reply 8/4. Dist. for 10/30.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides an express private right of action to “obtain appropriate relief against the government.” 42 U.S.C. § 2000cc-2. The statute defines “government” to include state and local governmental entities and any “official of [such] an entity.” *Id.* § 2000cc-5(4)(A). The Fifth Circuit held, in conflict with the decisions of other courts, that the Constitution prohibits Congress from authorizing damages claims against states, or against state officials in their individual or personal capacities, for violations of the statute. The question presented is whether states and state officials may be subject to suit for damages for violations of RLUIPA.

NLRB: Quorum Requirement

08-1457 New Process Steel v. NLRB (7th Cir.)

BIO 9/29. Dist. for 10/30.

Does the National Labor Relations have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that “three members of the Board shall, at all times, constitute a quorum of the Board”?

Title VII: EEOC Jurisdiction

08-1500 Federal Express v. EEOC (9th Cir.)

BIO 10/5.

If Title VII precludes the Equal Employment Opportunity Commission (“EEOC”) from bringing a direct action against an employer once the employee elects to requests the right-to-sue notice and files suit on the claims alleged in his charge, would it be inconsistent with Title VII to allow the EEOC to maintain perpetual jurisdiction to investigate the charge?

FTCA: “Person”

08-1507 Meier v. U.S. (9th Cir.)

BIO 10/8.

1. The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), waives sovereign immunity in “circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” Does this provision render the United States liable in circumstances where the relevant state law makes corporations, but not private individuals, liable for certain acts?
2. Where the VA has admitted that its emergency-services protocol broke down, causing damage to a veteran in its care, is there a cause of action under the FTCA, where the relevant state law allows plaintiffs to bring claims against healthcare providers for failing to provide emergency services?
3. Where state statutes define a standard of care for when healthcare providers are required to provide records to their patients, and the VA admittedly failed to satisfy that standard of care, can the VA be held liable under the FTCA for breach of fiduciary duty resulting in emotional distress damages?

4. Where the VA admits that its physicians owe fiduciary duties to their patients, is the VA liable for breach of fiduciary duty under the FTCA where a VA physician admits that he did not accurately describe his malpractice and disciplinary history in response to direct questions from a patient?

First Amendment: Student Speech

08-1566 McComb v. Crehan (9th Cir.)

CFR 8/6. BIO 10/8.

1. Does the First Amendment prohibit public high school officials from censoring student-initiated, student-composed religious speech at a high school graduation ceremony?
2. Do the First Amendment Free Speech, Free Exercise, and Establishment Clauses prohibit a school district from censoring religious speech that expressly identifies with a particular religion while permitting non-sectarian religious speech?
3. Does the First Amendment and this Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), prohibit a public high school from using viewpoint-based criteria in restricting student-initiated religious speech at high school graduation ceremonies?
4. Can a interlocutory appellant unilaterally restart the 30-day clock for filing an interlocutory appeal (per Fed. R. App. P. 4) by re-filing the same motion previously denied by the lower court?

FTCA: *Bivens* Actions

08-1595 Manning v. U.S. (7th Cir.)

BIO 9/25. Reply 10/6. Dist. for 10/30.

Whether 28 U.S.C. § 2676, which renders “[t]he judgment in an action” against the United States under the FTCA a bar to “any action” against its employee for the same injury, also bars a plaintiff from pursuing a *Bivens* claim in the same suit, even though this Court has recognized that “Congress views FTCA and *Bivens* as parallel [and] complementary.” *Carlson v. Green*, 446 U.S. 14, 20 (1980).

Criminal Law: Money Laundering

09-49 Lazarenko v. United States (9th Cir.)

CFR 7/31. BIO 9/30. Reply 10/8. Dist. for 10/30.

1. Is the omission of an element of a criminal offense from a federal indictment—here, that a specified unlawful activity must violate federal law—structural error?
2. May a foreign head of state be convicted of money laundering based on purported bribes received on foreign soil, when American government officials had formally stated that such conduct was not then within the scope of the money laundering statute?

Habeas Corpus: Ineffective Assistance

09-74 **Smith v. Mason (6th Cir.)**

BIO 9/21. Reply. 10/5. Dist. for 10/30.

Did the Sixth Circuit exceed its authority under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) when it concluded that trial counsel provided ineffective assistance at sentencing instead of deferring to the Ohio Supreme Court’s objectively reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Immigration Law: Reviewability

09-77 **Martinez-Rodriguez v. Holder (10th Cir.)**

BIO 9/21. Reply 10/7. Dist. for 10/30.

Do the federal courts of appeals have jurisdiction to review decisions by a single member of the Board of Immigration Appeals that “streamline” appeals rather than designate them for resolution by a full three-member appellate panel?

Employment Law: Polling Notice

09-95 **Grenada Stamping and Assembly v. NLRB (5th Cir.)**

BIO 9/23. Dist. for 10/30.

1. Is the National Labor Relations Board’s case law which requires employers to give reasonable advance notice of an impending poll to the union rational and consistent with the National Labor Relations Act and relevant Supreme Court case law?
2. Is the National Labor Relations Board’s decision in the instant case supported by substantial evidence?

RLUIPA: Eleventh Amendment

09-109 **Cardinal v. Metrish (6th Cir.)**

BIO 9/28. Dist. for 10/30.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to “obtain appropriate relief against a government,” *id.* § 2000cc-2. Exacerbating a circuit split, the Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against states and state officials in their official capacities. The question presented is:

Whether states and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

Preemption: Undocumented Alien Hiring

09-115 Chamber of Commerce v. Candelaria (9th Cir.)

BIO 9/28. Dist. for 10/30.

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly “preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).
2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.
3. Whether the Arizona statute is impliedly preempted because it undermines the “comprehensive scheme” that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 525 U.S. 137, 147 (2002).

Title VII: Burden Shifting

09-141 Bennett v. Verizon Wireless (2nd Cir.)

BIO 10/2. Dist. for 10/30.

1. Did the Second Circuit improperly apply the “pretext plus” standard, overruled in *Reeves*, when it determined Petitioner did not adduce sufficient evidence to defeat Respondent’s motion for summary judgment under Fed. R. Civ. P. 56?
2. What kind of evidence is enough to overcome the Respondent’s legitimate nondiscriminatory explanation for whatever action it took to allow a jury to infer discrimination under Fed. R. Civ. P. 56?
3. What weight should temporal proximity evidence be given beyond the prima facie case stage under Fed. R. Civ. P. 56?

Preemption: Vaccine Act

09-152 Bruesewitz v. Wyeth, Inc. (3rd Cir.)

BIO 10/7.

Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 [“the Act”] expressly preempts certain design defect claims against vaccine manufacturers “if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” 42 U.S.C. § 300aa-22(b)(1). A-104. The Question Presented is

Whether the Third Circuit erred in holding that, contrary to its plain text and the decisions of this Court and others, Section 22(b)(1) preempts all vaccine design defect claims, whether the vaccine’s side effects were unavoidable or not?

Habeas Corpus: “Second or Successive”

09-158 Magwood v. Culliver (11th Cir.)

BIO 10/8.

1. When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a “second or successive” claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?
2. Did petitioner’s attorney provide ineffective assistance of counsel warranting federal habeas relief by failing to raise an argument at petitioner’s resentencing proceedings that would have made clear that petitioner was constitutionally ineligible for the death penalty?

Due Process: Judicial Recusal

09-168 Pinnick v. Corboy & Demetrio, P.C. (Sup. Ct. Ill.)

BIO 10/8.

1. Are petitioners denied due process when one or more Justices of the Illinois Supreme Court hearing their appeal receive substantial contributions for their election campaigns directly from----and have close personal and professional ties with----the respondents, the parties opposing their appeal?
2. Do members of the Illinois judiciary hearing an appeal involving a party who makes substantial contributions to their election campaign----and with whom they have closer personal and professional ties----lose, or appear to lose, their ability to decide the appeal as fairly and impartially so that recusal is required as a matter of due process?

Habeas Corpus: Ineffective Assistance

09-216 McNeil v. Asay (11th Cir.)

09-234 McNeil v. Thomas (11th Cir.)

BIOs 9/21, 9/24. Dist. for 10/30. (NOTE: Will likely be held for 09-5327 *Holland v. Florida*)

Whether the Eleventh Circuit abused its discretion in denying an interlocutory appeal where the district court had found equitable tolling of the statute of limitations based on habeas counsel’s “malfeasance” contrary to 28 U.S.C. § 2254(i) which precludes relief based on ineffectiveness or incompetence of habeas counsel?

Preemption: Maritime Law

09-218 McCrory v. Can Do, Inc. (3rd Cir.)

BIO 9/21. Reply 10/6. Dist. for 10/30.

1. Whether recovery of damages against a river pilot under the federal maritime law for failure to exercise reasonable care under the circumstances can be overthrown by a state statute, which instead requires proof of gross negligence or willful misconduct.
2. Whether a state statute can alter the burden of proof – a preponderance of the evidence – in a tort action brought against a river pilot under federal maritime law. To explain. Can a state statute circumvent the federal maritime law and require a tort victim to prove every essential part of his claim by clear and convincing evidence?

3. By granting the states the authority to regulate the use of compulsory pilots, their qualifications and the rates charged for their services, did Congress intend to confer the authority to significantly limit the remedies available tort victims under the general maritime law?

Criminal Law: Examining of Evidence

09-278 Rivas v. Ohio (Sup. Ct. Ohio)

BIO 10/5.

Whether, under the Confrontation and Due Process Clauses, a defendant has a Constitutional right to examine the prosecution's physical trial evidence against him so that he may challenge its authenticity and reliability?

And, if so, whether a state procedural rule that conditions a defendant's ability to examine the prosecution's trial evidence upon the defendant's showing that the prosecution "has provided false, incomplete, adulterated, or spoliated evidence" improperly shifts the prosecution's evidentiary burden onto a defendant in violation of the Due Process Clause?

NLRB: Quorum Requirement

09-377 NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc. (D.C. Cir.)

BIOS 10/2, 10/7. Dist. for 10/30.

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

CALLS FOR RESPONSE

NEW CFR

Due Process: Retroactivity

09-233 Triple-S Management Corp. v. Mun. Revenue Collection Ctr. (Sup. Ct. P.R.)
CFR 10/13, due 11/12.

For nearly 30 years, the executive branch invited specific reliance on its interpretation of law by issuing numerous authoritative, formal, and expressly binding rulings that a private entity was legally entitled to tax-exempt status as long as it complied with a long list of conditions. The executive branch then reversed its legal position. Rather than make that change prospective only, however, it reached back to impose 15 years of retroactive financial liability as well. The question presented is:

Is the executive branch, unlike the legislative branch, free of all due process constraints on retroactive government action, no matter how far back in time that retroactivity runs, how harsh and oppressive the retroactivity might be, how justified a private entity's reliance might be, or whether the government has any rational basis for making its change retroactive, as long as the executive branch asserts that its earlier interpretation of law was "wrong"?

PENDING CFR

Fourth Amendment: Workplace Privacy

08-1332/8-1472 City of Ontario v. Quon/USA Mobility Wireless, Inc. v. Quon (Conditional Cross-Petition) (9th Cir.)
CFR 9/3, due 11/4 (ext). BIO of City of Ontario 10/1 in 08-1472.

08-1332:

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer – for non-investigatory work-related purposes or for investigations of work-related misconduct – is permissible if reasonable under the circumstances. *Id.* at 725-26 (plurality). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.
2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.
3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

08-1472 (conditional cross-petition):

Whether the Ninth Circuit erred by holding that a service provider is liable as a matter of law under the Stored Communications Act, 18 U.S.C. §§ 2701-2712, for disclosing to a subscriber of the service the contents of communications stored in long-term archives on the provider's computers, without the consent of the sender or recipient of the message.

Preemption: Reverse Preemption

08-1375 Cassens Transport Co. v. Brown (6th Cir.)

CFR 9/2, due 11/2 (ext.).

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), "precludes application of a federal statute" that would "invalidate, impair, or supersede" a state law "enacted * * * for the purpose of regulating the business of insurance." The questions presented in this case are:

1. Whether a state workers' compensation law that transfers the risk of workplace injuries to employers, and requires that employers secure their ability to assume those risks either by purchasing of insurance or by self-insuring, regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act.
2. Whether a State's exclusive, administrative remedial scheme for handling contested workers' compensation benefit determinations is impaired within the meaning of the McCarran-Ferguson Act by the availability of suits under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, contesting the denial of worker's compensation claims.

First Amendment: Employee Speech

08-1462 York v. Robinson (9th Cir.)

CFR 9/22, due 11/23 (ext.).

1. In a First Amendment retaliation case, is the issue of whether a public employee spoke pursuant to "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a question of law for the court, as determined by the First, Fifth, Tenth, Eleventh, and D.C. Circuits, or a mixed question of law and fact to be first submitted to a trier of fact as determined by the Ninth and Third Circuits?
2. What criteria are to be applied in determining whether a public employee's communication occurred pursuant to "official duties" under *Garcetti*?
3. Given that the court in *Garcetti* expressly declined to provide specific criteria for determining when public employee speech is pursuant to an "official duty," are individual defendants shielded by qualified immunity for allegedly mistakenly determining that employment regulations requiring employees to report acts of discrimination, misconduct, or excessive force could subject an employee to adverse employment action based upon a failure to adhere to the proper chain of command for reporting such violations?

Patent Law: "Business Methods"

08-1509 Classen Immunotherapies, Inc. v. Biogen IDEC, Inc. (Fed. Cir.)

BIO of two parties and waiver of third party filed 8/7. Dist. for 9/29. CFR 9/22, due 10/22.

Is the Federal Circuit's test for patentability under 35 U.S.C. § 101, the "machine or transformation test" as defined in *Bilski*, appropriate for determining patentability of a method of using pharmaceuticals and medical activities?

Environmental Law: National Environmental Policy Act

08-1520/08-1524 *Dallas v. Gould/Texas Water Development Bd. v. Dept. of the Interior* (5th Cir.)
CFR 9/15, due 11/16.

08-1520:

This case involves the U.S. Fish and Wildlife Service's ("FWS") compliance with the National Environmental Policy Act ("NEPA") when it established the boundaries for a new, permanent 25,281-acre national wildlife refuge along the upper Neches River in East Texas.

1. When establishing a permanent wildlife refuge covering thousands of acres, did FWS comply with NEPA when it (i) established a short-term time horizon that it knew would preclude consideration of reasonably foreseeable effects beyond that time horizon; (ii) excluded the known indirect impacts of its actions on a reservoir project planned, pursuant to Texas law, for the same area; and (iii) refused to consider any alternative that would allow both the wildlife refuge and the reservoir to proceed?
2. Whether the Fifth Circuit failed to follow this Court's "proximate causation" requirement, as enunciated in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), when it excused FWS's failure to assess, under NEPA, the indirect impacts associated with the loss of a municipal water source?
3. May a court properly hold that FWS's reliance on 20-year-old, inaccurate data did not affect its NEPA decision even though the data concerned the central environmental issue in FWS's decision, and despite the absence in the administrative record of any suggestion that FWS had accounted for the inaccuracy in its decisionmaking?

08-1524:

After performing an Environmental Assessment (EA) and issuing a Finding Of No Significant Impact (FONSI), in lieu of preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h, the U.S. Fish and Wildlife Service (FWS) established the 25,281-acre Neches River National Wildlife Refuge (NRNWR or Refuge) as a wintering habitat for migrating waterfowl. The creation of the Refuge, however, conflicted with plans that the State of Texas and the City of Dallas had for building a reservoir on the same land (Fastrill Reservoir or Lake Fastrill) in order to provide a future water supply for Dallas residents and others. This case presents the following question:

1. Whether NEPA § 102(C), 42 U.S.C. § 4332(C), requires a federal agency to prepare an EIS when the agency's proposed action conflicts with a State's long-range planning efforts to provide a future water supply for its citizens.

First Amendment: Student Speech

08-1564 *ACLU of Florida v. Miami-Dade County School Board* (11th Cir.)
CFR 8/11, due 10/13 (ext).

In a case challenging the removal of a book from all school libraries in Miami-Dade County, the district court, after an extensive preliminary injunction hearing that included testimony from twelve witnesses, granted the injunction based on findings rooted in credibility determinations "that the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school official disagreed, and that this intent was the decisive factor in their removal decision."

A panel of the Eleventh Circuit reversed, refusing to accord the district court's factual findings any deference, based on its own review of the record and independent consideration of materials outside the record.

The questions presented are:

1. Whether, in a First Amendment case, the district court's findings of historical fact, motivation, intent, pretext and credibility are entitled to deference under Fed.R.Civ.P. 52(a)(6) or, as the court of appeals held, are subject to plenary review.
2. Whether the courts of appeals are required to undertake "independent review" of a trial court's factual findings when those findings *support* a holding in favor of First Amendment claims?

First Amendment: Employee Speech

08-1571 Cooley v. Eng (9th Cir.)

CFR 9/22, due 11/23 (ext.).

1. Does the inquiry into whether a public employee's speech was within the scope of his or her "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) present a pure question of law for the court, as determined by a majority of circuits, or a mixed question of fact and law to be submitted in the first instance to a jury, as determined by the Ninth Circuit?
2. What criteria must be applied in determining whether a public employee's speech was within the scope of his or her official duties?
3. Absent specific criteria for determining when public employee speech is pursuant to an official duty, are supervisors shielded by qualified immunity for allegedly concluding they could discipline a deputy district attorney for comments made during a meeting with the District Attorney and his executive staff on matters relating to a task force investigation of which he was a part, although the comments were not within the scope of his particular assignment?
4. What is the scope of the First Amendment interest a public employee may have, if any, in an interview given by his or her attorney to the press about the public employee's dispute with his employer?

Habeas Corpus: Collateral Estoppel

08-1575 Linder v. United States (4th Cir.)

CFR 7/9, due 10/9 (ext.).

1. Does the doctrine of collateral estoppel bar consideration of a claim in a petition filed pursuant to 28 U.S.C. § 2255 if there was not prior ruling on the merits of that claim?
2. Do the holdings of *Day v. McDonough*, 547 U.S. 198 (2006), apply to a petition filed pursuant to 28 U.S.C. § 2255?

Federal Jurisdiction: Foreign Sovereign Immunities Act

09-1 Holy See v. Doe (9th Cir.)

CFR 9/15, due 10/15.

Respondent John V. Doe seeks to hold petitioner Holy See, a recognized foreign sovereign, vicariously liable for sexual abuse committed by a Catholic priest in Portland, Oregon.

To establish jurisdiction over a foreign sovereign, the tort exception of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(5), requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment[.]"

This case presents the following question:

Whether the FSIA's tort exception confers jurisdiction when the tortious act itself falls outside the scope of the employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.

Criminal Law: Rape Shield Law

09-10 Joyner v. Arkansas (Sup. Ct. Ark.)

CFR 9/23, due 10/23.

Whether the right to present a defense, particularly the right of compulsory process, is violated by a State's imposition of a prohibition on calling the alleged victim as a witness in an *in camera* "rape shield" hearing.

Immigration Law: Adjustment of Status

09-79 Bellevue v. Holder (4th Cir.)

CFR 9/17, due 11/16 (ext.).

1. Whether under Section 240B(d)(1) INA, 8 U.S.C. § 1229(c)(d), an alien who fails to depart is eligible to adjust after the lapse of 10 years (5 under the old law) from the expiration of the voluntary departure period given to him;
2. Whether the IJ or the BIA may validly decline to exercise their sua sponte authority to reopen a case and consider an alien's application for adjustment, on the ground that the alien is not entitled to adjust because he fault to depart, notwithstanding the fact that more than 10 years has already lapsed from the expiration of the voluntary departure period; and
3. Whether the Court of Appeals erred in holding that it had no jurisdiction to review the refusal of the Board of Immigration Appeals to exercise its sua sponte authority to re-open the case even if questions of law are involved and constitutional claims are raised.

Due Process: Standing

09-108 Davis v. Tarrant County, Tex. (5th Cir.)

CFR 9/16, due 10/16.

1. This Court has held that an applicant for admission to be included on a list of attorneys eligible to practice law before a court has, at a minimum, a property interest subject to due process in being admitted to the list. *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 122-23 (1926).

In this case, Petitioner, a licensed attorney, applied to be included on a list of attorneys eligible to be included on a list of attorneys eligible to receive felony court appointments and was denied admission. Petitioner requested a hearing. The judges did not respond. The judges then changed the application requiring attorneys to waive their *Goldsmith* property interest before their application would be considered. The question presented is whether the Fifth Circuit correctly held that a criminal defense attorney lacked standing to challenge to new policy because he never reapplied under the new application which required a written

waiver of the property interest. There is a conflict between this Court and the United States Court of Appeals for the Fifth Circuit on this question.

2. This Court recently held that “[a]ttachment [of the Sixth Amendment right to counsel] occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer and Jackson*.” *Rothgery v. Gillespie County, Tex.*, 128 S.Ct. 2578, 2591 (2008) (alteration in original).

In this case, the Fifth Circuit held that “the appointment process must be viewed holistically” in providing the district judges judicial immunity in the denial of a criminal defense attorney’s application to be included on a list of attorneys eligible to receive felony court appointments. The question presented is whether a screening committee comprised of judges for selecting attorneys to be included on a list of attorneys eligible to receive felony court appointments is entitled to receive judicial immunity where, as a matter of law, there is no case or controversy during the selection process that would entitle the judges to judicial immunity. There is a conflict between the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fifth Circuit on this question.

First Amendment: Attorney Sanctions

09-142 Fieger v. Mich. Sup. Ct. (6th Cir.)

CFR 9/24, due 10/26.

Does an attorney have a First Amendment Right to public express non-defamatory personal criticism of a judge when that criticism could not affect any pending trial, as the Ninth Circuit and the supreme courts of Colorado, Oklahoma, and Tennessee have held, or is the attorney subject to discipline for such criticism, as the Seventh Circuit and the supreme courts of Michigan, Mississippi, and Missouri have held?

Supremacy Clause: Waiver of Claims

09-208 Wrinn v. Johnson (6th Cir.)

CFR 9/14, due 11/13 (ext.).

Under the Supremacy Clause, the “elements of, and defenses to, a federal cause of action are defined by the federal law.” The Sixth Circuit held that the waiver-of-claims provision in Ohio’s Court of Claims Act barred Wrinn’s federal civil-rights claims against individual state employees because Wrinn sued the State in Ohio’s Court of Claims. Does the Ohio statute’s waiver provision, as applied by the Sixth Circuit, violate the Supremacy Clause by creating a state-law defense to federal civil-rights claims?

First Amendment: Student Speech

09-257 Corder v. Lewis Palmer School Dist. (10th Cir.)

CFR 9/16, due 10/16.

Erica Corder, a high school graduate with a 4.0 GPA, was denied her diploma until she issued a publically disseminated coerced written apology after she presented a thirty-second valedictory speech that included a religious reference. Miss Corder was one of fifteen co-valedictorians who each gave a thirty-second message during commencement. Without warning or lawful authority, the principal withheld Miss Corder’s diploma until she issued a public apology, part of which was expressly dictated by the principal. Colorado law provides “that students of the public schools shall have the right to exercise freedom of speech and of the press, and that no expression contained in a student publication, whether or not such publication is

school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section [obscene, defamatory, threatening harm]”

The District Court concluded that the school district did not violate Miss Corder’s First and Fourteenth Amendment rights and granted the school district’s motion for judgment on the pleadings. The Tenth Circuit Court of Appeals affirmed the District Court. The questions presented for review are:

1. Whether a message delivered by a high school valedictorian who is selected by a neutral criterion of having the highest grade point average constitutes school-sponsored speech that can be censored under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), or is private student speech under *Tinker v. Des Moines Indep. Comm. School Dist.* 393 U.S. 503 (1969).
2. Assuming that *Kuhlmeier* could be applied to the commencement message delivered by a student who is selected by the neutral criterion of having the highest grade point average, whether a school district’s withholding of a high school valedictorian’s diploma to compel her to apologize for a commencement message is reasonably related to legitimate pedagogical concerns and therefore does not violate the graduate’s First and Fourteenth Amendment rights.
3. Whether a school district violates a high school valedictorian’s First Amendment right against compelled speech, as described in *West Virginia v. Barnette*, 319 U.S. 624, 631 (1943) and its progeny when it withhold’s the graduate’s diploma to compel her to publically apologize and dictate what she must say after she offered a commencement speech that included a religious reference.

Section 1983: Counterfeit Money

09-275 Rodis v. City and County of San Francisco (9th Cir.)

CFR 10/6, due 11/5.

1. 18 U.S.C. § 472 makes it illegal to pass a *counterfeit bill* with intent to defraud. An innocent passing of counterfeit currency does not violate the statute. Did the Ninth Circuit err in concluding that Respondent police officers, who admit they did nothing to determine Petitioner’s intentions, did not have to do so because the mere act of passing a *suspected counterfeit bill*, by and of itself, furnishes police officers with sufficient probable cause to arrest an individual pursuant to 18 U.S.C. § 472, even if the arresting officers have absolutely no evidence of intent to defraud and in fact have an abundance of evidence under the totality of the circumstances to conclude that there was no criminal intent whatsoever regardless of the actual authenticity of the bill?
2. The Ninth Circuit cited *Hunter v. Bryant*, 502 U.S. 224 (1991), and reiterated that “[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.” Did the Ninth Circuit err in concluding that Respondents are entitled to qualified immunity for civil rights claims brought against them under 42 U.S.C. § 1983 when it focused solely on the “plainly incompetent” clause of *Hunter* and completely ignored the clause “those who knowingly violate the law,” even where Petitioner has asserted numerous facts which, if viewed in the light most favorable to him as mandated by *Saucier v. Katz*, 522 U.S. 194 (2001), should have been more than sufficient to constitute as intentional violations of his constitutional rights?

Criminal Law: Suppression Hearings

09-293 Ozuna v. U.S. (7th Cir.)

CFR 9/29, due 10/29.

The district court granted Petitioner's motion to suppress evidence found during a search of his vehicle, holding that Petitioner did not consent to the search. The government moved to reopen the suppression hearing in order to introduce expert handwriting analysis claiming that Petitioner signed a form consenting to the search. Although the government could have introduced handwriting analysis at the initial suppression hearing, the district court reopened the hearing to admit the handwriting analysis, vacated its prior decision, and found the evidence discovered in Petitioner's vehicle admissible. The Seventh Circuit affirmed. Expressly rejecting decisions from several other circuits, it held that the government was not required to justify its failure to introduce handwriting analysis at the initial suppression hearing.

The question presented is whether a litigant moving to reopen a suppression hearing in order to introduce additional evidence must justify its failure to introduce that evidence at the initial hearing.

First Amendment: Child Pornography and Overbreadth

09-306 Allen v. Virginia (Va. Sup. Ct.)

CFR 10/5, due 12/4 (ext.).

Virginia Prosecuted Mr. Allen for electronically pasting the faces of minors onto sexually explicit pictures of adults. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002), this Court explicitly reserved the issue of First Amendment protections for such images.

Is Virginia Code § 18.2-374.1 (2003), prohibiting the production of "sexually explicit visual material which utilizes or has as a subject a person less than eighteen years of age," overbroad on its face because it reaches a substantial amount of protected speech?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

No new CVSGs were issued at the October 19th conference.

PENDING CVSG

Preemption: Vaccine Act

08-1120 Am. Home Prods. Corp. v. Ferrari (Ga.)

BIO 5/8. Reply 5/18. Dist. for 6/4. CVSG 6/8.

The National Childhood Vaccine Injury Act of 1986 shielded vaccine manufacturers from categories of tort litigation, directed federal agencies to develop safer childhood vaccines, and established a Vaccine Court to administer a no-fault remedy for vaccine-related injuries. The Act's express preemption provision states that "[n]o vaccine manufacturer shall be held liable in a civil action" if the injury "resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The question presented is:

Does the Vaccine Act expressly preempt a state-law claim against a vaccine manufacturer based on an allegation that the vaccine-related injury could have been avoided by a vaccine design allegedly safer than the one approved by the U.S. Food and Drug Administration for use nationwide?

Civil Procedure: Subject-Matter Jurisdiction

08-1191 Morrison v. Nat'l Austl. Bank, Ltd. (2d Cir.)

BIO 5/1. Reply 5/11. *Amicus* Nat'l Ass'n of Shareholder & Consumer Attorneys 4/24. Dist. for 5/28. CVSG 6/1. Supp. br. of Pet. 8/27.

1. Whether the antifraud provisions of the U.S. securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange, and its financial statements were filed with the Securities and Exchange Commission (SEC) and (b) the claim arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida-based subsidiary and were merely reported from overseas in the parent company's financial statements.
2. Whether this Court, which has never addressed the issue of whether subject-matter jurisdiction may extend to claims involving transnational securities fraud, should set forth a policy to resolve the three-way conflict among the circuits.
3. Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject-matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's *amicus* brief submitted at the request of the Second Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject-matter jurisdiction exists here due to the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.

Preemption: Motor Vehicle Safety Standards

08-1314 Williamson v. Mazda Motor of Am., Inc. (Cal. Ct. App.)

BIO 6/25. Dist. for 9/29. CVSG 10/5.

1. Where Congress has provided that compliance with a federal motor vehicle safety standard “does not exempt a person from liability at common law,” 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?
2. Under this Court’s recent ruling in *Wyeth v. Levine*, does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

Copyright Law: First-Sale Doctrine

08-1423 Costco Wholesale Corp. v. Omega, S.A. (9th Cir.)

BIO 7/17. Reply 7/28. *Amici* Pub. Citizen 6/16, Pub. Knowledge, Entm’t Merchs. Ass’n, eBay, Inc., Retail Indus. Leaders Ass’n 6/17. Dist. for 9/29. CVSG 10/5.

Adina Rosenbaum and Greg Beck are co-counsel for amicus Public Citizen.

Amicus Brief in Support of Petitioner

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

ERISA: Preemption

08-1515 Golden Gate Restaurant Assoc. v. San Francisco

BIO 8/24. Reply 9/8. *Amicus* Washington Legal Foundation 7/10. Dist. for 9/29. CVSG 10/5.

San Francisco’s Health Care Security Ordinance—a “pay-or-play” law—mandates either ongoing employer contributions at set minimum rates for employee health-benefits or equal payments to the City’s Health Access Program, along with extensive record-keeping and reporting and disclosure requirements. In a decision directly conflicting with Supreme Court ERISA preemption decisions, the Ninth Circuit rejected petitioner’s ERISA-preemption challenge despite repeated *amicus* support by the Secretary of Labor. Identifying “an issue of exceptional national importance,” an eight Judge dissenting opinion from denial of rehearing *en banc*, including Chief Judge Alex Kozinski, observed that the decision “creates a circuit split with the Fourth Circuit . . . , renders meaningless the [ERISA preemption] tests the Supreme Court set out in *Shaw v. Delta Airlines* . . . , and disregards the “need for nationally uniform plan administration.” [sic] It also warned that the decision “will undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures,

thereby creating the very kind of health care balkanization ERISA was intended to avoid.” The Question Presented is:

Whether ERISA section 514(a), 29 U.S.C. § 1144(a) preempts local laws mandating ongoing employer contributions for employee health-benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements, a question on which the courts of appeals are in conflict.

Criminal Law: Private Prosecutions

08-6261 Robertson v. United States (D.C. Cir.)

CFR 12/11. BIO 2/11. Dist. for 3/20. CVSG 3/23.

Whether prosecution for criminal contempt of a Congressionally created court must be done in the name of the United States, or whether the prosecution may be pursued by a private individual.

HELD/AWAITING ACTION

Habeas Corpus: Sufficient Evidence

[07-1483](#) **Patrick v. Smith (9th Cir.)**

CFR 8/5/08. BIO 8/29/08. Reply 9/11/08. Dist. for 3/27.

In a state trial for causing the death of an infant, prosecution and defense experts disagreed on whether there was sufficient evidence that the baby died from shaking. The jury convicted. In federal habeas proceedings, the Ninth Circuit held that there was insufficient evidence to support the state criminal conviction, and that state appellate court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), in upholding it. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit reinstated its earlier opinion, concluding that its analysis was “unaffected by *Musladin*.” The question presented is: Did the Ninth Circuit exceed its authority under the deferential standard for habeas review in 28 U.S.C. § 2254(d) by reinstating its opinion granting relief on an insufficient-evidence claim based on accepting the testimony of defense experts on cause of death over the contrary opinions of prosecution experts?

Statute of Limitations: Inquiry Notice

[07-1489](#) **Trainer Wortham & Co., Inc. v. Betz (9th Cir.)**

BIO 6/30/08. Reply 7/10/08. Dist. for 9/29/08. CVSG 10/6/08, filed 4/22 (urging the Court to deny cert.). Dist. for 5/21. (NOTE: Likely held for 08-905 *Merck & Co., Inc. v. Reynolds*.)

1. Did the Court of Appeals err in concluding that the statute of limitations begins to run not from the moment the plaintiff is on inquiry notice that there may have been a misrepresentation (as some circuits have held), and not from the subsequent point at which a reasonable investigation would have revealed that she had a possible fraud claim (as other circuits have held), but only from the point at which she receives evidence that the investment advisor intended to defraud her?
2. Did the Court of Appeals err in holding that an investor who is on inquiry notice that she has a basis for a fraud claim, and is, therefore, obliged to make a reasonable inquiry, may reasonably end her investigation just because the suspected defrauders have made assurances that contradict known facts.

Habeas Corpus: “Clearly Established”

[08-652](#) **Beard v. Abu-Jamal (3d Cir.)**

BIO 2/13, reply 3/2. Suppl. brief of pet. 3/18. Dist. for 3/20.

1. Can a state court’s failure to anticipate a rule not clearly stated by this Court but derived from *Mills v. Maryland*, which held invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously, by a circuit court be an unreasonable application of “clearly established” federal law?
2. Can a state court ruling amount to an “unreasonable” application of federal law where the state court decision conforms to consistent decisions of federal appellate courts over the course of a decade?

International Law: Child Abduction

08-775 Duran v. Beaumont (2d Cir.)

CFR 2/11. BIO 3/13. Reply 3/23. Suppl. brief of pet. 3/23. Dist. for 4/17. Re-listed for 6/25. (NOTE: Likely held for 08-645 *Abbott v. Abbott*.)

1. Should the Supreme Court resolve the circuit split between the Second Circuit, on one hand, and the Fourth and Tenth Circuits, on the other hand, regarding whether a foreign sovereign's statement of its own law, provided pursuant to a duly-ratified treaty, is entitled to deference?
2. Is Supreme Court review warranted to correct the Second Circuit's disregard of this Court's precedents requiring deference to a foreign sovereign's authoritative interpretation of its own domestic law?
3. Is Supreme Court review warranted because the uncertainty caused by the circuit split could hamper international efforts to combat inter-county child abduction?

Criminal Law: Sentencing

08-1131 Phon v. Kentucky (Ky.)

CFR 5/4. BIO 6/16. Reply 6/26. Dist. for 9/29. (NOTE: Likely held for 08-7412 *Graham v. Florida* and 08-7621 *Sullivan v. Florida*.)

1. Whether petitioner, a juvenile under the age of eighteen at the time of his offense, is entitled to a new sentencing hearing in light of *Roper v. Simmons*, given that his original sentencing was premised on the theory that the death penalty was permissible and as such, the jury was instructed on the mitigating sentence of life without parole, which was an otherwise inapplicable sentence.
2. In light of *Roper v. Simmons*, the evolving standards of decency in this country, and overwhelming international opinion, does the sentence of life imprisonment without the possibility of parole constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

Bankruptcy: First Amendment

08-1174 Hersh v. United States (5th Cir.)

BIO 5/4. Dist. for 6/4. (NOTE: Likely held for 08-1119/08-1225 *Milavetz, Gallop & Milavetz, P.A. v. United States/United States v. Milavetz, Gallop & Milavetz, P.A.*).

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The question presented is whether Section 526(a)(4), construed with due regard for principles of constitutional avoidance, violates the First Amendment.

First Amendment: Standing

08-1222 Boy Scouts of Am. v. Barnes-Wallace (9th Cir.)

BIO 6/3. Reply 6/16. *Amici* Individual Rights Found., ACLU, Am. Legion, Alliance Def. Fund 5/4. Dist. for 6/25.

Pursuant to leases from the City of San Diego, San Diego Boy Scouts built and operates a campground and an aquatic center for use by Scouts and the general public. There are no religious symbols at either facility.

Plaintiffs have never visited either facility, but feel offended that the City leases public property to Boy Scouts. The district court found an Establishment Clause violation because the City's leases were not the result of a competitive bidding process. The Ninth Circuit held that Plaintiffs have standing to bring an Establishment Clause challenge based on feeling offended. The questions presented:

1. Whether Plaintiffs have Article III standing to bring an Establishment Clause challenge to City leases of recreational facilities to the Boy Scouts when Plaintiffs have never visited the facilities and the facilities are available for use by the public and display no religious symbols.
2. Whether Plaintiffs have Article III standing bring an Establishment Clause challenge to City leases to the Boy Scouts where the violation found by the district court was the lack of competitive bidding and Plaintiffs are not potential bidders, but rather object to Boy Scouts being the lessee under any circumstance.

Sixth Amendment: *Miranda* Rights

08-1229 Florida v. Rigterink (Fla.)

BIO 5/5. Dist. for 6/4. Re-listed for 6/11. Re-listed for 6/18. (NOTE: Likely held for 08-1175 *Florida v. Powell*).

1. Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation conflicts with *Miranda v. Arizona* and decisions of federal and state appellate courts.
2. Whether use of an arguably defective *Miranda* warning requires suppression of a suspect's statement when law enforcement officers reasonably relied upon a standard warning informing a suspect of his right to an attorney prior to questioning and there is no evidence that the defendant was confused or misled by the warning and the resulting statement was otherwise voluntary.
3. Whether the Florida Supreme Court's opinion finding the defendant was in custody conflicts with *Miranda* and its progeny defining custodial interrogations where the defendant voluntarily came to the station to provide fingerprints, volunteered his desire to make a statement, and where he was never restrained or told he could not leave during a lengthy but non-coercive interview.

Criminal Law: Speedy Trial Act

08-1264 Oberoi v. United States (2d Cir.)

BIO 7/15. Reply 9/1. Dist. for 9/29. (NOTE: Likely held for 08-728, *Bloate v. U.S.*)

The Speedy Trial Act requires that the trial of a criminal defendant in federal court begin within 70 days of the filing of the information or indictment or the defendant's first appearance, whichever occurs last. 18 U.S.C. § 3161(c)(1). The Act automatically excludes from this 70-day period any "delay resulting from other proceedings concerning the defendant, including but not limited to . . . (D) delay resulting from any pretrial motion, from *the filing of the motion* through the conclusion of the hearing on or other prompt *disposition of, such motion.*" See *id.* § 3161(h)(1) (emphasis added). The questions presented are:

1. Whether the Second Circuit erred in holding—in acknowledged conflict with the Fourth Circuit and the Sixth Circuit—that the time for preparing a pretrial motion is automatically excluded under § 3161(h)(1)(d).
2. Whether the Second Circuit erred in holding—in acknowledged conflict the Seventh Circuit and the Eleventh Circuit—that the time for filing objections to a report and recommendation of a magistrate judge is automatically excluded under § 3161(h)(1)(D).

Attorney’s Fees: “Prevailing Party”

08-1335 Astrue v. Wilson (8th Cir.)

BIO 7/29. Reply 8/13. Dist. for 9/29. (NOTE: Likely held for 08-1332 *Astrue v. Ratliff*.)

Whether an “award of fees and other expenses “ under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is payable to the “prevailing party” rather than to the prevailing party’s attorney, and therefore is subject to an offset for a pre-existing child-support debt owed by the prevailing party.

Habeas Corpus: Sufficient Evidence

08-1401 Metrish v. Newman (6th Cir.)

BIO 6/15. Reply 7/13. Supp. brief of pet. 9/18. Dist. for 9/29. Re-listed for 10/9.

Where the Sixth Circuit on federal habeas review applied a legal rule (“reasonable speculation”) that has not been squarely established by this Court—and which conflicts with this Court’s rule in *Jackson v. Virginia*—whether the Sixth Circuit erred in granting habeas relief when the state court’s decision applied the *Jackson* standard and found there was sufficient evidence.

First Amendment: Violence

08-1448 Schwarzenegger v. Video Software Dealers Ass’n (9th Cir.)

BIO 7/22. Dist. for 9/29.

California Civil Code §§ 1746–1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeal to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court’s judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?
2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of games to minors?

Arbitration: Class Arbitration

08-1473 Am. Express Co. v. Italian Colors Rest. (2d Cir.)

BIO 7/21. Reply 8/5. *Amici* Am. Bankers Ass’n 6/26, Bus. Roundtable, Verizon Commc’ns, Inc. 6/29. Dist. for 9/29.

1. Whether, under the Federal Arbitration Act (FAA), courts may invalidate a commercial agreement to arbitrate claims only on an individual basis—and not on a classwide basis—upon a “showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing

an individual” Sherman Act claim, even though nothing in the FAA evidences any intent by Congress to preclude parties from agreeing exclusively to individual arbitration and Congress expressly rejected adding a class action procedure when it enacted the Sherman Act.

2. Whether, under this Court’s decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), costs that a plaintiff would incur in either arbitration or litigation—such as expert and attorney’s fees—provide a basis to invalidate a provision of an arbitration agreement providing for individual rather than class arbitration.

Second Amendment: Incorporation

08-1592 *Maloney v. Rice* (2nd Cir.)

BIO 8/28. Reply 9/9. *Amicus* NRA 6/16. Dist. for 9/29. (NOTE: Likely held for 08-1521, *McDonald v. Chicago*.)

A New York statute makes the possession of a type of weapon known as nunchaku a criminal misdemeanor. Petitioner was arrested in his home and charged with possessing nunchaku. No other conduct, such as misusing the weapon or bearing it in public, was involved. The possession charge was ultimately dropped, though Petitioner was required to destroy the nunchaku.

Desiring to continue freely exercising his individual constitutional right to keep such arms in his home for self-defense, Petitioner brought this declaratory judgment action seeking to have the New York statute pronounced invalid insofar as it applies to criminalize the mere possession of nunchaku in one’s home. The second Circuit held that under this Court’s precedent, it was constrained to rule that the Second Amendment does not apply against the States, and dismissed his complaint. The questions presented are:

1. Whether the Second Amendment’s individual right to keep and bear arms is incorporated against the States through the Due Process Clause of the Fourteenth Amendment.
2. Whether the Second Amendment’s individual right to keep and bear arms is a privilege or immunity of citizens of the United States applicable to the States under the Privileges or Immunities Clause of the Fourteenth Amendment.

LAST CONFERENCE

View the [October 13 Order List](#) from the October 9th Conference.

CERTIORARI GRANTED

Criminal Law: Ex Post Facto

[08-1341](#) United States v. Marcus (2d Cir.)

BIO 7/1. Reply. 7/15. Dist. for 9/29. Re-listed for 10/9. Granted 10/13.

Whether the court of appeals departed from this Court’s interpretation of Rule 52(b) of the Federal rules of Criminal Procedure by adopting as the appropriate standard for plain error review of an asserted ex post facto violation whether “there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.”

Criminal Law: Honest Services Fraud

[08-1394](#) Skilling v. U.S. (5th Cir.)

BIO 8/12. Reply. 8/26. Dist. for 9/29. Re-listed for 10/9. Granted 10/13.

1. Whether the federal “honest services” fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant’s conduct was intended to achieve “private gain” rather than to advance the employer’s interests, and, if not, whether § 1346 is unconstitutionally vague.
2. When a presumption of jury prejudice arises because of the widespread community impact of the defendant’s alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

Preemption: Federal Employees Health Benefits Act

[09-38](#) Health Care Serv. Corp. v. Pollitt (7th Cir.)

BIO 8/7. Reply 8/18. Dist for 9/29. Re-listed for 10/9. Granted 10/13.

1. Whether the Federal Employees Health Benefits Act (“FEHBA”), 5 U.S.C. §§ 8901-14, completely preempts (and therefore makes removably to federal court) a state court suit challenging enrollment and health benefits determinations that are subject to the exclusively federal remedial scheme established in FEHBA?
2. Whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which authorizes federal removal jurisdiction over state court suits brought against persons “acting under” a federal officer when sued for actions “under color of [federal] office,” encompasses a suit against a government contractor administering a FEHBA plan, where the contractor is sued for actions taken pursuant to the government contract.

Habeas Corpus: Ineffective Assistance

09-5327 **Holland v. Florida (11th Cir.)**

BIO 9/11. Dist. for 10/9. Granted 10/13.

Whether the Eleventh Circuit erred in denying equitable tolling to the defendant to excuse his late filing of his habeas petition, based on the conclusion that the late filing was due to “gross negligence” of counsel, while factors beyond “gross negligence” are required for equitable tolling; whether equitable tolling is available to toll the statute of limitation under the AEDPA.

CERTIORARI DENIED

Employment Law: Strikebreakers

08-1211 **Church Homes, Inc. v. NLRB (2d Cir.)**

CFR 5/20. BIO 8/19. Dist. for 10/9. Cert. denied 10/13.

Since this Court’s 1938 opinion *NLRB v. Mackay Radio & Telegraph Co.*, employers have been free, consistent with the National Labor Relations Act, to permanently replace employees who are engaged in economic strike. This right has only one narrow restriction: employers may not exercise this right for an “independent unlawful purpose.” *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964). Until this case, the Board has never found an employer to have had such a motive. In this case, although employers are not required to notify a union of their hiring plans, the Second Circuit held that the mere fact that the employer did not affirmatively give the union advance notice that it was hiring permanent replacements established that the employer had an independent unlawful motive. The questions presented are:

1. Did the Board unlawfully shift the burden of proof from the General Counsel by holding that it would find Petitioner acted for an independent unlawful purpose unless Petitioner proved that it has a legitimate reason for not disclosing its hiring plans to the Union?
2. Did the Board err when it disregarded as hearsay the testimony of Dr. Miriam Parker as to why Petitioner did not inform the union of its staffing plans and required Petitioner to produce actual evidence of the Union’s potential for disruption?
3. Did the Board err, in light of the record, when it found that Petitioner hired permanent replacements for an independent unlawful purpose?

Immigration Law: Adjustment of Status

08-1356 **Kim v. Holder (8th Cir.)**

BIO 8/31. Reply 9/16. Dist. for 10/9.

Section 1256(a) of Title 8, U.S. Code, imposes a five-year limitations period during which the Attorney General may rescind an alien’s permanent resident status upon a finding that the alien was not eligible for the status at the time it was granted. The question presented is:

Whether the five-year limitations period of 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the five-year period has passed based solely on the alien’s ineligibility for permanent resident status at the time it was granted, where the final removal order rescinds the alien’s permanent resident status.

FOIA: Military Death Sentences

08-1476 Loving v. DOD (D.C. Cir.)

BIO 8/31. Reply 9/8. Dist. for 10/9. Cert. denied 10/13.

Whether death sentencing recommendations forwarded to the President in a military capital case may be withheld from disclosure to the subject servicemember under FOIA Exemption 5.

Immigration Law: LIFE Act

08-1478 Kurji v. Holder (5th Cir.)

BIO 9/2. Dist. for 10/9. Cert. denied 10/13.

There is a tension between the provisions of 8 U.S.C. § 1255(i), enacted by the Legal Immigration Family Equity Act (“LIFE Act”), Pub. L. No. 106553, 114 Stat. 2762A-143 through 149 (2000), as amended by the LIFE Act Amendments of 2000 (“LIFE Act Amendments”), Pub. L. No. 106-554, 114 Stat. 2763A-324 through 328 (2000); and the provisions of section 8 U.S.C. § 1229a providing for the procedure for removal of aliens; and the jurisdiction stripping provisions of 8 U.S.C. § 1252(a)(2)(B) regarding discretionary actions of the Attorney General.

May the government by commencing removal proceedings and determining under its regulations what cases will be continued and what cases reopened, defeat the lengthy legalization process contemplated by 8 U.S.C. § 1255(i) in contravention of Congressional intent? What are the parameters for judicial review of these proceedings?

Fourth Amendment: Reasonable Expectation of Privacy

08-1482 Mincey v. U.S. (4th Cir.)

BIO 9/2. Reply 9/15. Dist. for 10/9. Cert. denied 10/13.

1. Does a driver who borrows a rental car with the renter’s, but not the owner’s, permission have a reasonable expectation of privacy in the car?
2. If so, can the rental company unilaterally and immediately extinguish the driver’s reasonable expectation of privacy during a traffic stop by instructing the police not to release the car to the driver?

Fourth Amendment: Seizure

08-1530 Sirmons v. Williams (11th Cir.)

CFR 7/9. BIO 9/8. Dist. for 10/9. Cert. denied 10/13.

Whether it was clearly established in May 2005 that a police officer, who already possessed actual probable cause to arrest a fleeing felony suspect, was required to be knowledgeable of all legally cognizable affirmative defenses and judge during the chase whether the affirmative defense of necessity/duress had been conclusively established in the suspect’s favor before seizing and arresting the fleeing suspect.

Criminal Law: *Brady* Suppression

09-53 Kelley v. Florida (Fl. Sup. Ct.)

BIO 9/10. Dist. for 10/9. Cert. denied 10/13.

Long after petitioner's trial, prosecutors for the first time disclosed "evidence disposition forms" identifying a significant amount of crime scene evidence that had never been provided to the defense. Petitioner challenged the failure to disclose the forms under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner alleged that the forms were "material" because they would have led his counsel to secure the exculpatory evidence described on the forms. The Florida Supreme Court rejected his claim, holding that *Brady* applies only to evidence that would itself be both "favorable" and "material" at trial. Under that standard, the court held that because *the forms themselves* would not have changed the jury's judgment, no *Brady* violation occurred. On this view, the materiality of the evidence described in the forms was irrelevant. The question presented is.

Did the Florida Supreme Court err in holding that the prosecution's duty to disclose under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) is limited to evidence that would itself be both "favorable" and "material" at trial, without regard to whether that evidence would have led to the disclosure of material exculpatory evidence.

Attorney's Fees: "Prevailing Party"

09-161 Miller v. Villegas (Ind. Ct. of App.)

BIO 9/2. Reply 9/15. Dist. for 10/9. Cert. denied 10/13.

Whether a plaintiff who successfully challenges a government policy on state administrative procedure grounds is entitled to attorney fees under 42 U.S.C. § 1988 without (1) prevailing on a federal claim, (2) achieving any relief, or (3) prevailing on a state claim that shields a federal claim from ever being adjudicated.

Employment Law: Union Fiduciary Duties

09-196 Ward v. Internat'l Union of Operating Eng. (7th Cir.)

BIO 9/4. Reply 9/15. Dist. for 10/9. Cert. denied 10/13.

Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(a), provides that certain union officials owe fiduciary duties to their union and its membership. Section 501(b) then provides *union members* with a cause of action (upon leave of the court and for good cause shown) to sue for the breach of those duties if their union has failed or refused "to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization." *Id.* § 501(b).

The question presented in this case is whether Congress implied a cause of action for *unions* to sue their officials under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, despite limiting the express cause of action under that section to suits by Union members.

GRANTED CASES INVOLVING PUBLIC CITIZEN - 2009 TERM

Due Process: Forfeiture

08-351 Alvarez v. Smith (7th Cir.)

CFR 11/12. BIO 1/9. Dist. for 2/20. Cert. granted 2/23. Arg. 10/14.

Allison Zieve of Public Citizen assisted the respondent.

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the “speedy trial” test employed in *United States v. \$8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

Civil Procedure: Interlocutory Appeal

08-678 Mohawk Indus., Inc. v. Carpenter (11th Cir.)

BIO 12/23. Reply 1/6. Cert. granted 1/26. Arg. 10/5.

Deepak Gupta and Brian Wolfman of Public Citizen are co-counsel for the respondent.

Respondent’s Brief on the Merits

Are pretrial discovery orders denying claims of attorney-client privilege immediately appealable as “final decisions” under 28 U.S.C. § 1291?

Attorney’s Fees: Enhancements

08-970 Perdue v. Kenny A. (11th Cir.)

BIO 3/4. Cert. granted 4/3. Arg. 10/14.

Public Citizen joined an amicus brief in support of the respondents.

Amicus Brief in Support of Respondents

1. Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?
2. Is an enhancement to the lodestar based on quality of representation and results obtained contrary to this Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed?

Civil Procedure: Class Actions

08-1008 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. (2d Cir.)

CFR 3/6. BIO 4/3. Reply 4/14. Dist. for 5/1. Cert. granted 5/4. Arg. 11/2.

Scott Nelson of Public Citizen is lead counsel for the petitioner.

Petitioner’s Brief on the Merits

1. Can a state legislature properly prohibit the federal courts from using class actions for state law claims?
2. Can state legislatures dictate procedure in the federal courts?
3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

Arbitration: Class Arbitration

08-1198 Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp. (2d Cir.)

BIO 5/11. Reply 5/26. Dist. for 6/11. Cert. granted 6/15. Arg. 12/9.

Brian Wolfman and Scott Nelson of Public Citizen assisted the respondent at the cert. stage.

In *Green Tree Financial Corp. v. Bazzle*, this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act (FAA) permits the imposition of class arbitration when the parties’ agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement there was in fact “silent.” That threshold obstacle is not present in this case, and the question presented here—which continues to divide the lower courts—is the same one presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the FAA.

FDCPA: Defenses

08-1200 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (6th Cir.)

CFR 5/7. BIO 6/8. Reply 6/11. Dist. for 6/25. Cert. granted 6/29.

Public Citizen filed an amicus brief in support of the petitioner.

Amicus Brief in Support of Petitioner

Whether a debt collector’s legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692.

Attorneys Fees: “Prevailing Party”

08-1322 Astrue v. Ratliff (8th Cir.)

BIO 6/25. Reply 8/13. Dist. for 9/29. Cert. granted 9/30.

Scott Nelson and Brian Wolfman of Public Citizen were co-counsel for the respondent at the cert. stage.

Brief in Opposition

Whether an attorney fee awarded under the Equal Access to Justice Act in an *in forma pauperis* Social Security case is invariably and as a matter of law property of the plaintiff subject to offset based on the plaintiff’s debts to the federal government, without regard to any property rights of the attorney in the fee.