



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
December 4, 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>
December 4 Conference.	<u>6</u>
Pending for Upcoming Conferences.	<u>10</u>
Calls For Response.	<u>17</u>
New CFR.	<u>17</u>
Pending CFR.	<u>17</u>
Calls for the Views of the Solicitor General.	<u>21</u>
New CVSG.	<u>21</u>
Pending CVSG.....	<u>21</u>
Held/Awaiting Action.	<u>25</u>
Last Conference.	<u>31</u>
Certiorari Granted.	<u>31</u>
Certiorari Denied.	<u>33</u>
Granted Cases Involving Public Citizen - 2009 Term.	<u>38</u>

ISSUE INDEX

ADA	<i>IDEA Disability Status</i> 15	<i>Preemption</i> 22	<i>Standard of Review</i> 19
Alien Tort Claims Act	<i>State Action</i> 23	<i>Standing</i> 14	
Arbitration	<i>Class Arbitration</i> 28, 39		
	<i>Unconscionability</i> 17		
Attorney's Fees	<i>"Prevailing Party"</i> 27, 40		
	<i>Class Actions</i> 8		
	<i>Enhancements</i> 38		
	<i>§1988</i> 14		
Bankruptcy	<i>First Amendment</i> 26		
Civil Procedure	<i>Class Actions</i> 29, 37, 39		
	<i>Interlocutory Appeal</i> 38		
	<i>Jurisdictional Statutes</i> 35		
	<i>Subject-Matter Jurisdiction</i> 31		
Copyright Law	<i>First-Sale Doctrine</i> 21		
Criminal Law	<i>Private Prosecutions</i> 7		
	<i>Rape Shield Law</i> 33		
	<i>Sentencing</i> 12, 15, 20, 26, 34		
	<i>Speedy Trial Act</i> 27		
	<i>Suppression Hearings</i> 19		
Due Process	<i>Forfeiture</i> 38		
	<i>Retroactivity</i> 18		
Employment Law	<i>"Cat's Paw"</i> 24		
	<i>Union Member Speech</i> 37		
Environmental Law	<i>National Environmental Policy Act</i> 17		
ERISA	<i>Pre-existing Conditions</i> 15		
		<i>FDCPA</i>	<i>Defenses</i> 39
		Federal Jurisdiction	<i>Foreign Sovereign Immunities Act</i> 22
		First Amendment	<i>Attorney Sanctions</i> 18
			<i>Campaign Finance</i> 11
			<i>Child Pornography and Overbreadth</i> 19
			<i>Commercial Speech</i> 13, 20
			<i>Employee Speech</i> 10, 15
			<i>Religious Student Groups</i> 6
			<i>Standing</i> 26
			<i>Student Speech</i> 14, 35
			<i>Violence</i> 28
		FOIA	<i>Detainee Abuse Photographs</i> 32
		Fourth Amendment	<i>Exigent Circumstances</i> 7
			<i>Terry Stops</i> 34
			<i>Workplace Privacy</i> 6
		FTCA	<i>Plane Crashes</i> 34
			<i>Statute of Limitations</i> 8
		GITMO Detainees	<i>Torture</i> 12
		Habeas Corpus	<i>"Clearly Established"</i> 25
			<i>Batson Challenges</i> 8
			<i>Collateral Estoppel</i> 33
			<i>Double Jeopardy</i> 32
			<i>Good Time Credit</i> 32
			<i>Ineffective Assistance</i> 37
			<i>Successive Petitions</i> 36
			<i>Sufficient Evidence</i> 9, 25, 28

Immigration Law

Adjustment of Status..... [18](#)
Aggravated Felonies. [10](#), [33](#)
Ineffective Assistance..... [11](#), [33](#)
Notice..... [34](#)
Questions of Law. [12](#)

International Law

Child Abduction..... [26](#)
Manuel Noriega..... [7](#)

Limitation of Liability Act

Admiralty Law. [34](#)

Native American Law

Police Protection. [35](#)

NLRB

Quorum Requirement..... [29](#)

Patent Law

"Business Methods"..... [29](#)

Preemption

Firearms..... [13](#)
Motor Vehicle Safety. [21](#)
Reverse Preemption..... [7](#)

Undocumented Alien Hiring. [23](#)
Vaccine Act. [21](#), [30](#)

Punitive Damages

Vagueness. [36](#)

Restitution Orders

Time Limits. [15](#)

RLUIPA

Eleventh Amendment. [22](#), [23](#)

Second Amendment

Incorporation..... [29](#)

Section 1983

Counterfeit Money. [18](#)

Sixth Amendment

Miranda Rights. [27](#)

Statute of Limitations

Inquiry Notice. [25](#)

Title VII

Third-Party Retaliation. [14](#)

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.

DECEMBER 4 CONFERENCE

**08-1332/8-1472 City of Ontario v. Quon/USA
Mobility Wireless, Inc. v. Quon (Conditional
Cross-Petition) (9th Cir.)**

Fourth Amendment: Workplace Privacy

CFR 9/3, due 11/4 (ext). BIO of City of Ontario 10/1 in 08-1472. BIO of Quon 11/4. Reply 11/13. Dist. for 12/4.

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.

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

First Amendment: Religious Student Groups

BIO 7/8. Reply 7/21. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19. Re-listed for 10/30. Re-listed for 11/6. Record requested 11/9. Re-listed for 11/13. Re-listed for 12/4.

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.

08-1375 Cassens Transport Co. v. Brown (6th Cir.)
CFR 9/2. BIO 11/2. Reply 11/17. Dist. for 12/4.

Preemption: Reverse Preemption

Deepak Gupta and Allison Zieve of Public Citizen are co-counsel for the respondent.
Respondent's Brief in Opposition

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.

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

Criminal Law: Private Prosecutions

CFR 12/11. BIO 2/11. Dist. for 3/20. CVSG 3/23, filed 11/6. Supp. br. of Pet. 11/17. Dist. for 12/4.

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.

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

International Law: Manuel Noriega

BIO 9/9. Reply 9/22. Dist. for 10/9. Re-listed for 10/19. Re-listed for 10/30. Re-listed for 11/6. Re-listed for 11/13. Re-listed for 11/24. Re-listed for 12/4.

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.

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

Fourth Amendment: Exigent Circumstances

BIO 8/21. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19. Re-listed for 10/30. Record requested 10/27. Re-listed for 12/4.

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?

09-270 Marley v. U.S. (9th Cir.)

FTCA: Statute of Limitations

BIO 11/2. Reply 11/17. Dist. for 12/4.

28 U.S.C. § 2401(b) establishes a six-month statute of limitations for damage actions brought against the United States under the Federal Tort Claims Act. Is this statute of limitations:

- (1) jurisdictional, and therefore a bar to the application of equitable limitations, as the Ninth Circuit has held;
- (2) not jurisdictional, and therefore not a bar to the application of equitable limitations, as the First, Third, Fifth, and Sixth Circuits have held; or
- (3) jurisdictional, but also not a bar to the application of equitable limitations, as the Eighth Circuit has held?

09-273 Quarterman v. Haynes (5th Cir.)

Habeas Corpus: *Batson* Challenges

BIO 10/26. Reply 11/5. Dist. for 11/24. Re-listed for 12/4.

Is a capital defendant entitled to a new trial under *Batson v. Kentucky*, 476 U.S. 79 (1986), even where there has been no judicial finding of a racially motivated peremptory strike?

1. Specifically, does this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), require a new trial—even where a prosecutor struck a prospective juror based on her friendly demeanor towards defense counsel, and not race—solely because the trial judge observed the prosecutor's un rebutted explanation for the strike, but did not also observe voir dire firsthand?
2. Was this purported right to an automatic new trial “clearly established” under this Court's precedents at the time of trial in 1999, as required under the Antiterrorism and Effective Death Penalty Act of 1996? And does this purported right prevent federal courts from applying the presumption of correctness to the state court finding that the peremptory strike was not racially motivated, as required under AEDPA?

09-341 D'Aria v. Glass (9th Cir.)

Attorney's Fees: Class Actions

BIO 10/16. Reply 10/27. Dist. for 12/4.

Unlike a traditional common fund class action settlement, in which attorney's fees are paid out of the common fund available to the class (and any reduction in fees correspondingly increases the class recovery), the proposed class action settlement in this case includes a *reversionary fee structure* which provides that if the court reduces the proposed fee award, the un-awarded funds revert to the defendants-respondents rather than to the class. Class counsel are in effect paid directly by the defendants-respondents rather than by the class, and the class cannot benefit from any objections to, or judicial reduction of, the proposed fee award, discouraging scrutiny by objectors and the court. In a detailed legal analysis submitted to the American Bar Association's Standing Committee on Ethics and Professional Responsibility, twenty prominent law professors concluded that the increasingly common practice of negotiating such direct payment of attorney's fees by an adversary defendant while simultaneously inhibiting judicial scrutiny of the proposed settlement amounts to a *per se* breach of class counsel's duties to the class.

The question presented is whether such a reversionary fee structure by its nature breaches the fiduciary duty and ethical obligations that class counsel owe to absent class members and violates the constitutional due process rights of absent class members which are protected by Rule 23 of the Federal Rules of Civil Procedure, precluding approval of a proposed class actions settlement.

09-395 Hendricks v. Kamienski (3rd Cir.)

Habeas Corpus: Sufficient Evidence

BIO 11/4. Reply 11/13. Supp. brief of Respondent 11/19. Dist. for 12/4.

1. What is the standard of review for a federal appellate court analyzing a sufficiency-of-evidence claim in a petition for habeas corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).
2. Did enactment of the AEDPA eliminate the need for direct application of *Jackson v. Virginia*, 443 U.S. 307 (1979) by a federal habeas court considering a sufficiency-of-evidence claim, and replace it with the “unreasonable application” standard found in AEDPA?

PENDING FOR UPCOMING CONFERENCES

08-1462 York v. Robinson (9th Cir.)
CFR 9/22. BIO 11/20.

First Amendment: Employee Speech

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?

08-1571 Cooley v. Eng (9th Cir.)
CFR 9/22. BIO 11/20.

First Amendment: Employee Speech

Adina Rosenbaum and Allison Zieve of Public Citizen are co-counsel for respondent.
Brief in Opposition.

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?

**09-60/09-203 Carachuri-Rosendo v. Holder (5th Cir.)/
Escobar v. Holder (7th Cir.)** (NOTE: Not vided by Court)
BIOs 11/16. Reply of Carachuri-Rosendo 11/25. Dist. for 12/11.

Immigration Law: Aggravated Felonies

Under the Immigration and Nationality Act, a lawful permanent resident who has been “convicted” of an “aggravated felony” is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case:

Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been “convicted” of an “aggravated felony” on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

09-122 Hunter v. U.S. (11th Cir.)
BIO 11/25.

Habeas Corpus: Appealability

1. Whether, under *Begay v. United States*, 128 S. Ct. 1581 (2008), a prior conviction for carrying a concealed weapon constitutes a “violent felony” under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e).
2. Whether a legally erroneous application of the ACCA, which resulted in a mandatory minimum sentence five years above the otherwise applicable statutory maximum for the offense, violates due process.
3. Whether the decision of the Eleventh Circuit denying a certificate of appealability (“COA”) on habeas review should be summarily reversed when the Solicitor General has confessed that it was error to deny the COA.

09-157 Li v. Holder (9th Cir.)
BIO 11/9. Dist. for 12/11.

Immigration Law: Ineffective Assistance

1. Whether a due process claim of ineffective assistance of counsel must be administratively exhausted at the Board of Immigration Appeals (“BIA”) where the BIA lacks jurisdiction to adjudicate constitutional issues.
2. Whether Petitioner should be faulted for failing to raise ineffective assistance of counsel at the BIA where the attorney representing him before the BIA was the same attorney who failed to provide effective assistance of counsel below.

**09-167/09-182 Scrusby v. U.S./
Siegelman v. U.S. (11th Cir.) (vided)**

First Amendment: Campaign Finance

BIOs 11/13. Reply of Siegelman 11/20. Reply of Scrusby 11/23. Dist. for 12/11.

09-167:

1. Does the *McCormick v. United States*, 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute bribery unless “the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act” mean what it says, or may a conviction be obtained by implying or inferring that such a promise occurred?
2. Did *Evans v. United States*, 504 U.S. 255 (1992), which was not a campaign contribution case, modify the *McCormick v. United States* “explicit promise” requirement?

09-182:

1. Under *McCormick v. United States*, 500 U.S. 257, 273 (1991), a connection between a campaign contribution and an official action is a crime “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.” Does this standard require proof of an “explicit” *quid pro quo* promise or undertaking in the sense of actually being

communicated expressly, as various Circuits have stated; or can there be a conviction based instead only on the inference that there was an *unstated* and *implied* agreement, a state of mind, connecting the contribution and an official action?

2. Does the “intent” clause of the obstruction of justice statute 18 U.S.C. § 1512(b)(3) (“with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .”) require proof of the specific intent to interfere with communications to law enforcement? Or is this element of the statute satisfied by proof of an intent to engage in a “coverup” or generally?

09-194 Gomis v. Holder (4th Cir.)
BIO 11/19.

Immigration Law: Questions of Law

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review “questions of law” pursuant to 8 U.S.C. 1252(a)(2)(D), but bar review of most discretionary claims and certain factual findings. The courts of appeal sharply disagree, however, about how to differentiate “questions of law” from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Fourth Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where she challenged only the application of the statutory eligibility standards to the facts of her case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny a late-filed asylum application.

09-227 Rasul v. Myers (D.C. Cir.)
BIO 11/13. Reply 11/23. Dist. for 12/11.

GITMO Detainees: Torture

1. Whether the Court of Appeals erred in failing to reach the question of whether detainees at Guantanamo have the constitutional right not to be tortured in light of this Court’s vacatur, on the basis of its decision in *Boumediene v. Bush*, of the Court of Appeals’ previous decision in this case that detainees have no constitutional rights?

2. Whether the Court of Appeals erred in holding that petitioners’ claim for religious abuse and humiliation at Guantanamo was not actionable under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, *et seq.*, because they are not “persons”?

3. Whether the Court of Appeals erred in holding that respondents are entitled to qualified immunity because petitioners’ right not to be tortured was not “clearly established” at the time of their detention?

09-244 U.S. v. Bowden (11th Cir.)
BIO 11/10. Reply 11/24. Dist. for 12/11.

Criminal Law: Sentencing

Congress has provided for enhanced statutory penalties for drug offenders with one or more prior drug convictions. See, *e.g.*, 21 U.S.C. 841(b)(1). Section 851(a) of Title 21 provides that no defendant may be

sentenced to such enhanced penalties unless, before trial or the entry of a guilty plea, the government files and serves an information “stating in writing the previous convictions to be relied upon.” 21 U.S.C. 851(a).

The question presented is whether the notice requirements of Section 851(a) are “jurisdictional,” such that they must be noticed on appeal or collateral review regardless whether the defendant preserved the claim in the district court.

09-253 Adames v. Beretta U.S.A. Corp. (Sup. Ct. Ill.)
BIO 11/13. Dist. for 12/11.

Preemption: Firearms

Section 4(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. § 7903(5)(A)(iii) (2005), bars certain lawsuits against the firearms industry when based on state common law, but allows the same claims when based on a state statute “applicable to the sale or marketing” of firearms, thus preempting state law based on which branch of state government authorized it rather than based on the sweep or content of the state law.

1. Does the Tenth Amendment prohibit Congress from preempting state law based only on whether the law is the product of legislation rather than authoritative judicial decision?
2. Are cases alleging a violation of the Tenth Amendment evaluated solely on whether the federal action being challenged “commandeers” a state executive or legislative officer, or does the analysis also include whether the challenged action attempts to revise or interfere with the structure and sovereign decisions of state government?
3. Do this Court’s statutory construction canons and preemption jurisprudence allow courts to construe the language of the PLCAA to preempt state product liability actions broadly despite Congress’ clearly stated intent not to bar such actions?

09-259 Metro Lights, LLC v. City of Los Angeles (9th Cir.)

First Amendment: Commercial Speech

BIO 11/16. Reply 11/23. Dist. for 12/11.

1. Whether this Court should resolve a circuit conflict on the precedential effect, if any, and meaning of its fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), with respect to First Amendment constraints on governmental regulation of commercial signs.
2. Whether Los Angeles’ selective and underinclusive ban on commercial signs violates the First Amendment.

09-288 Puget Sound Energy, Inc. v. California (9th Cir.)
BIO of F.E.R.C. 11/30.

Federal Power Act: Judicial Review

1. Whether the Ninth Circuit - in conflict with the decisions of at least four other circuits - erred in holding that the Federal Energy Regulatory Commission’s (“FERC”) use of a pre-enforcement evidentiary proceeding to inform its decision whether to enforce § 206 of the Federal Power Act, 16 U.S.C. § 824e, subjected to judicial review that agency’s otherwise unreviewable choice not to initiate a § 206 enforcement proceeding.
2. Whether the Ninth Circuit deviated from the settled administrative law of other circuits by interfering with FERC’s discretion to structure its own proceedings in ordering FERC to consider in one proceeding matters that FERC had determined were more properly addressed in a separate and ongoing proceeding.

3. Whether the Ninth Circuit, in conflict with the deferential approach in other circuits to reviewing agency interpretations of administrative complaints, exceeded its authority by rejecting FERC's interpretation of an administrative complaint that accorded with the complainant's own interpretation and was based on the entire context of the complaint.

**09-291 Thompson v. North American
Stainless, LP (6th Cir.)**

Title VII: Third-Party Retaliation

BIO 11/9. Dist. for 12/4. Reply 11/24. Re-listed for 12/11.

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

1. Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member, or fiancé, closely associated with the employee who engaged in such protected activity?
2. If so, may that prohibition be enforced in a civil action brought by the third party victim?

09-315 Busch v. Marple Newton Sch. Dist. (3rd Cir.)

First Amendment: Student Speech

BIO 11/12. Reply 11/24. Dist. for 12/11.

Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest.

09-350 County of Los Angeles v. Humphries (9th Cir.)

Attorney's Fees: §1988

BIO 11/23.

1. Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom, or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from *Monell's* requirement as determined by the Ninth Circuit?
2. May a plaintiff be a prevailing party under 42 U.S.C. § 1988 for purposes of a fee award against a local public entity based upon a claim for declaratory relief where the plaintiff has not demonstrated that any constitutional violation was the result of a policy, custom or practice attributable to the public entity under *Monell*?
3. May a plaintiff be a prevailing party on a claim for declaratory relief for purposes of a fee award under 42 U.S.C. § 1988 where there is neither a formal order nor judgment granting declaratory relief, nor any other order altering the legal relationship between the parties in a way that directly benefits the plaintiff?

09-356 Paulsen v. CNF Inc. (9th Cir.)

ERISA: Standing

BIO 11/25.

Do participants in a pension plan trustees by the Pension Benefit Guarantee Corporation, whose pension benefits have been reduced to due underfunding of the plan, have Article III standing to sue prior plan fiduciaries for breach of fiduciary duty under the Employee Retirement Income Security Act, 29 U.S.C. §

1001 et seq, as the Fourth Circuit held in *Wilmington Shipping Co. v. New England Life Insurance Co.*, 496 F.3d 326, 332 (4th Cir. 2007), or do they lack such standing, as the Ninth Circuit held below?

09-367 Dolan v. U.S. (10th Cir.)

Restitution Orders: Time Limits

BIO 11/27.

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

09-429 Ellenberg v. New Mex. Military Inst. (10th Cir.)

ADA: IDEA Disability Status

BIO 11/9. Dist. for 12/11.

1. Whether a school-aged person with current status as a “child with a disability” eligible for special education under the Individuals with Disabilities Education Act is, on the basis of such status, protected from disability discrimination by public schools under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act?

09-460 Milwaukee Deputy Sheriff’s Assoc. v. Clark (7th Cir.)

First Amendment: Employee Speech

BIO 11/18.

1. Does *Connick v. Myers*, 461 U.S. 138 (1983), permit the Seventh Circuit to emphasize the motivation for speech by a public employee when determining whether that employee spoke on a matter of public concern?
2. Whether a public employee’s speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection by *Garcetti v. Ceballos*, 547 U.S. 410 (2006)?

09-466 U.S. v. Williams (2d Cir.)

Criminal Law: Sentencing

BIO 11/19. Reply 12/1.

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with “any crime of violence or drug trafficking crime,” “[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law.”

The question presented is whether the “except” clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

09-474 Doroshov v. Hartford Life (3d Cir.)

ERISA: Pre-existing Conditions

BIO 11/23.

In a 2 to 1 decision, a panel of the Third Circuit affirmed the district court’s opinion that a physician’s entry in an office note, “Was not thought to be ALS,” constitute advice within the meaning of a disability insurance policy governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (“ERISA”). The policy contained a pre-existing condition clause which precluded coverage for any condition for which

medical advice or treatment was rendered during a three-month “look-back” period. The Third Circuit Court of Appeals denied a petition for rehearing en banc. This case presents a sole question:

Whether, under ERISA, a negative diagnosis recorded in a physician’s office note can be “advice” within the meaning of a pre-existing condition exclusion in a disability insurance policy.

CALLS FOR RESPONSE

NEW CFR

09-497 Rent-A-Center, West, Inc. v. Jackson (9th Cir.)
CFR 11/24, due 12/24.

Arbitration: Unconscionability

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act (“FAA”) is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this “gateway” issue to the arbitrator for decision?

PENDING CFR

**08-1520/08-1524 Dallas v. Gould/Texas
Water Development Bd. v. Dept. of the
Interior (5th Cir.)**
CFR 9/15, due 1/4 (ext.).

Environmental Law: National Environmental Policy Act

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.

09-79 Bellevue v. Holder (4th Cir.)
CFR 9/17, due 12/18 (ext.).

Immigration Law: Adjustment of Status

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 faulted 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.

09-142 Fieger v. Mich. Sup. Ct. (6th Cir.)
CFR 9/24, due 11/25 (ext.).

First Amendment: Attorney Sanctions

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?

09-233 Triple-S Management Corp. v. Mun. Revenue Collection Ctr. (Sup. Ct. P.R.)
CFR 10/13, due 12/2 (ext.).

Due Process: Retroactivity

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"?

09-275 Rodis v. City and County of San Francisco (9th Cir.)
CFR 10/6, due 12/7 (ext.).

Section 1983: Counterfeit Money

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?

09-293 Ozuna v. U.S. (7th Cir.)
CFR 9/29, due 11/30 (ext.).

Criminal Law: Suppression Hearings

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.

09-306 Allen v. Virginia (Va. Sup. Ct.)
CFR 10/5, due 12/4 (ext.).

**First Amendment: Child Pornography
and Overbreadth**

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?

09-347 Dutka v. AIG (5th Cir.)
CFR 11/4, due 1/4/2010 (ext.).

ERISA: Standard of Review

Whether, absent an express discretion clause in an ERISA governed insurance plan, the factual determinations of the administrator are subject to *de novo* review by the courts.

09-359 Maldonado v. Iwasaki (9th Cir.)
CFR 11/16, due 12/16.

First Amendment: Commercial Speech

1. As amended in 2008, the California Outdoor Advertising Act prohibits offsite commercial advertising, but exempts onsite commercial advertising, as well as “noncommercial, protected speech contained within any advertising display.” Petitioner Maldonado owns a billboard that was erected with a valid building permit in 1956, and the billboard is located on private property in a regulated zone. Is the legal distinction between commercial and noncommercial speech so vague, overbroad, and arbitrary that it violates Due Process and abridges the Freedom of Speech and Press?
2. A precedent of this Court held that a zoning law which banned newsracks displaying commercial publications, but exempted newsracks displaying noncommercial publications, was overbroad as a commercial speech regulation under prong four of the *Central Hudson* test, and could not otherwise qualify as a “time, place, and manner” regulation (subject to a different intermediate scrutiny test) because the commercial-noncommercial distinction was content-based. Is that precedent binding as to billboards? What legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction?
3. Under prong three of the *Central Hudson* balancing test, the government generally must submit substantial evidence to prove that its censorship of truthful, non-misleading commercial speech “materially advances” a substantial government interest. In the context of billboards, does an offsite commercial speech restriction materially advance aesthetic and traffic safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?

09-392 Moran v. U.S. (11th Cir.)
CFR 10/19, due 12/18 (ext.).

Criminal Law: Sentencing

1. Whether Federal Rule of Criminal Procedure 32(i)(1)(C)’s requirement that a defendant to be permitted to comment on “matters relating to an appropriate sentence” entitles a defendant to notice prior to the pronouncement of sentence that sex offender special conditions of supervised release are contemplated, where the special conditions are not among the statutory mandatory or discretionary conditions of supervised release and there is no nexus between the special conditions and the offense of conviction?
2. Whether 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3’s requirement of a reasonable relationship between special conditions of supervised release and a defendant’s offense of conviction, history, and characteristics and the statutory purposes of sentencing is satisfied when sex offender special conditions are imposed based on a single sex offense in the remote past even though there is no evidence the defendant presently has a propensity to commit sex offenses?
3. Whether, for purposes of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3’s requirement that special conditions of supervised release not involve a greater deprivation of liberty than reasonably necessary to achieve the statutory purposes of sentencing, a special condition of supervised release prohibiting internet access without the permission of the probation officer is an undue deprivation of liberty when there is no connection between computers or the internet and the offense of conviction or any prior alleged wrongdoing?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

The Court did not issue any new CVSGs at the November 24th Conference.

PENDING CVSG

08-1120 Am. Home Prods. Corp. v. Ferrari (Ga.) **Preemption: Vaccine Act**
BIO 5/8. Reply 5/18. Dist. for 6/4. CVSG 6/8. Supp. br. of Resp. 10/8. Supp. br. of Pet. 10/20.

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?

08-1314 Williamson v. Mazda Motor of Am., Inc. (Cal. Ct. App.) **Preemption: Motor Vehicle Safety Standards**
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?

08-1423 Costco Wholesale Corp. v. Omega, S.A. (9th Cir.) **Copyright Law: First-Sale Doctrine**
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 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.

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

RLUIPA: Eleventh Amendment

BIO 7/22. Reply 8/4. Dist. for 10/30. CVSG 11/2.

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

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

ERISA: Preemption

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.

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

Federal Jurisdiction: Foreign Sovereign Immunities Act

CFR 9/15. BIO 10/15. Reply 10/27. Dist. for 11/13. CVSG 11/16.

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.

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

Alien Tort Claims Act: State Action

BIO 8/10. Reply 8/25. Dist. for 9/29. Re-listed for 10/9. Re-listed for 10/19. Re-listed for 10/30. CVSG 11/2.

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*.

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

RLUIPA: Eleventh Amendment

BIO 9/28. Reply 10/14. Dist. for 10/30. CVSG 11/2.

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?

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

Preemption: Undocumented Alien Hiring

BIO 9/28. Dist. for 10/30. CVSG 11/2.

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).

09-400 Staub v. Proctor Hospital (7th Cir.)
BIO 10/5. Reply 10/16. Dist. for 11/6. CVSG 11/9.

Employment Law: “Cat’s Paw”

In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

HELD/AWAITING ACTION

07-1483 Patrick v. Smith (9th Cir.)

Habeas Corpus: Sufficient Evidence

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?

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

Statute of Limitations: Inquiry Notice

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.

08-652 Beard v. Abu-Jamal (3d Cir.)

Habeas Corpus: “Clearly Established”

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?

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

International Law: Child Abduction

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*, argt. 1/12)

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?

08-1131 Phon v. Kentucky (Ky.)

Criminal Law: Sentencing

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?

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

Bankruptcy: First Amendment

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.

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

First Amendment: Standing

BIO 6/3. Reply 6/16. *Amici* Individual Rights Found., ACLU, Am. Legion, Alliance Def. Fund 5/4. Dist. for 6/25. (NOTE: Likely held for 08-472 *Salazar v. Buono*).

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.

08-1229 Florida v. Rigterink (Fla.)

Sixth Amendment: *Miranda* Rights

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.

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

Criminal Law: Speedy Trial Act

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).

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

Attorney's Fees: "Prevailing Party"

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.

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

Habeas Corpus: Sufficient Evidence

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.

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

First Amendment: Violence

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?

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

Arbitration: Class Arbitration

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. (NOTE: Likely held for 08-1198, *Stolt-Nielsen S.A. v. Animalfeeds International*)

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.

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

Patent Law: “Business Methods”

BIO of two parties and waiver of third party filed 8/7. Dist. for 9/29. CFR 9/22. BIO 10/22. Supp. br. of pet. 10/26. Supp. br. of resp. 11/9. Dist. for 11/24.

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?

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

Second Amendment: Incorporation

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.

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

NLRB: Quorum Requirement

BIOs 10/2, 10/7. Reply 10/16. Dist. for 10/30. (NOTE: Likely held for 08-1457 *New Process Steel v. NLRB*, cert. granted 11/2.)

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.

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

Civil Procedure: Class Actions

CFR 6/17. BIO 10/8. Dist. for 11/6. (NOTE: Likely held for 08-1008 *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*)

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.

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

Preemption: Vaccine Act

BIO 10/7. Dist. for 11/6. (NOTE: Likely held for 08-1120 *Am. Home Prods. Corp. v. Ferrari*, for which the Court issued a CVSG on 6/8).

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?

LAST CONFERENCE

View [November 30th Order List](#) from the November 24th Conference.

CERTIORARI GRANTED

08-1191 Morrison v. Nat'l Austl. Bank, Civil Procedure: Subject-Matter Jurisdiction Ltd. (2d Cir.)

BIO 5/1. Reply 5/11. *Amicus* Nat'l Ass'n of Shareholder & Consumer Attorneys 4/24. Dist. for 5/28. Supp. br. of Pet. 8/27. CVSG 6/1, filed 10/27 (urging the Court to deny cert.). Second supp. br. of Pet. 11/9. Dist. for 11/24. Cert. granted 11/30.

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.

08-10537 Porter v. McCollum (11th Cir.)

BIO 7/22. Dist. 9/29. Record requested 9/30. Re-listed for 10/9. Re-listed for 10/19. Re-listed for 10/30. Re-listed for 11/6. Re-listed for 11/13. Re-listed for 11/24. Granted and summarily reversed with [per curiam opinion](#) 11/30.

1. Whether a competency hearing constitutes a critical stage of a capital proceeding when a defendant's competence to stand trial is reasonably in question, thereby mandating that the defendant be represented by counsel until the issue of competency has been resolved.
2. Whether a state court's prejudice determination with regard to ineffective assistance of counsel, which requires that a defendant demonstrate that he was deprived of a reliable penalty phase proceeding "by the greater weight of the evidence," is contrary to the standard set forth in *Strickland*.
3. Whether a state court's determination is entitled to deference in federal habeas proceedings when the state court's analysis is based on an unreasonable application of clearly established federal law.
4. Whether *de novo* review of a *Strickland* claim is appropriate where no finding was made by the state court regarding deficient performance.

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

FOIA: Detainee Abuse Photographs

BIO 9/8. Reply 9/25. Dist. for 10/9. Re-listed for 10/19. Re-listed for 10/30. Re-listed for 11/6. Re-listed for 11/13. Supp. br. of Pet. 11/13. Supp. br. of Resp. 11/18. Re-listed for 11/24. GVR in light of Section 565 of the Department of Homeland Security Appropriations Act, 2010, and the certification by the Secretary of Defense pursuant to that provision 11/30.

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.

09-338 Renico v. Lett (6th Cir.)

Habeas Corpus: Double Jeopardy

BIO 10/19. Reply 10/28. Dist. for 11/24. Cert. granted 11/30.

Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

09-5201 Barber v. Thomas (9th Cir.)

Habeas Corpus: Good Time Credit

CFR 7/30. BIO 10/30. Reply 11/6. Dist. for 11/24. Cert. granted 11/30.

The federal good time credit (GTC) statute provides for credits "up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. However, the Bureau of Prisons (BOP) interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The first question presented is:

Does "term of imprisonment" in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed?

The Circuits, using a variety of rationales, have rejected the BOP's claim that the statute was unambiguous, but deferred to the BOP interpretation under Chevron based on "term of imprisonment" being ambiguous. In this litigation, the BOP has conceded that the regulation implementing the GTC statute, and previously accorded deference, was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule under Skidmore. The second question presented is:

If "term of imprisonment" in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

CERTIORARI DENIED

08-1392 Massis v. Holder (4th Cir.)

Immigration Law: Ineffective Assistance

BIO 10/22. Reply 11/4. Dist. for 11/24. Cert. denied 11/30.

1. Whether the Fourth Circuit erred in concluding that it lacked jurisdiction to entertain a purely legal challenge to an alien's removal order on the ground that the alien had not raised that issue before the agency, even though the government neither argued in its brief that the alien had failed to exhaust the issue nor disputed the legal error underlying the alien's removal order, and the alien raised the issue in a motion to reopen.

2. Whether an alien in a removal proceeding is denied his Fifth Amendment right to due process when ineffective assistance of retained counsel caused him to concede before an immigration judge that he was removable as an aggravated felon, even though he had not committed an aggravated felony and there was no tactical advantage to counsel's concession.

08-1494 Arguelles-Olivares v. Holder (5th Cir.)

Immigration Law: Aggravated Felonies

BIO 10/20. Reply 10/28. Dist. for 11/24. Cert. denied 11/30.

1. The INA defines an aggravated felony, in part, as a conviction for either (i) fraud or deceit or (ii) an offense described in § 7201 of the Internal Revenue Code, namely tax evasion. Does the second, more specific subsection signify that tax evasion is the only tax code violation to constitute an aggravated felony under this subsection of the INA?

2. The categorical approach, derived from this Court's precedents in *Taylor* and *Shepard*, has been adopted by all circuit courts for ascertaining if an alien has been convicted of an aggravated felony under the INA, without the need for factfinding by the immigration court. The Fifth Circuit has limited the applicability of the categorical approach in certain circumstances, and held that immigration courts are instead required to engage in factfinding. Does the Fifth Circuit's new rule give a factfinding role to the immigration courts that violates this Court's holdings in *Taylor* and *Shepard* and which contravenes Congress's intent?

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

Habeas Corpus: Collateral Estoppel

CFR 7/9. BIO 10/29. Reply 11/10. Dist. for 11/24. Cert. denied 11/30.

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?

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

Criminal Law: Rape Shield Law

CFR 9/23. BIO 10/22. Dist. for 11/24. Cert. denied 11/30.

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.

09-26 Hertz v. U.S. (6th Cir.)

FTCA: Plane Crashes

BIO 10/29. Reply 11/6. Dist. for 11/24. Cert. denied 11/30.

Should this Court grant certiorari where the Sixth Circuit Court of Appeals established a new rule of law governing the accrual of claims under the Federal Tort Claims Act in plane crash cases, which decision conflicts with both a decision of this Court and decisions of other Circuit Courts of Appeals and which, if not reversed by this Court, will result in substantial prejudice to the Petitioner and lead to the filing of numerous unnecessary Administrative Claims?

09-98 Scurlark v. U.S. (8th Cir.)

Criminal Law: Sentencing

BIO 10/23. Reply 11/3. Dist. for 11/24. Cert. denied 11/30.

Section 3582(c)(2) of Title 18 of the U.S. Code authorizes a district court to reduce a term of imprisonment “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the sentencing commission.”

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the Government and the defendant may enter into a plea agreement that asks the district court to impose a sentence based on a particular “sentencing range” or “a particular provision of the Sentencing Guidelines.”

The questions presented is whether a district court is barred from exercising its statutory power to reduce a sentence under § 3582(c)(2) solely because the court accepted a Rule 11(c)(1)(C) plea agreement.

09-102 Virginia v. Rudolph (Sup. Ct. Va.)

Fourth Amendment: Terry Stops

BIO 10/23. Reply 11/3. Dist. for 11/24. Cert. denied 11/30.

Did the Supreme Court of Virginia err when, in conflict with the decisions of other courts, it invalidated a *Terry* stop by an officer who observed suspicious conduct in an area plagued by crime?

09-106 Pedernera v. Holder (11th Cir.)

Immigration Law: Notice

BIO 10/26. Reply 11/5. Dist. for 11/24. Cert. denied 11/30.

The Government did not notify Mr. Pedernera of the final order of removal rendered against him until 43 days after the order was signed. The question presented in this Petition is:

Whether the Government must comply with its obligation to serve notice of the final order of removal before the 30-day period to seek review of that order begins to run under 8 U.S.C. § 1252(b)(1).

09-222 Matheny v. Tenn. Valley Auth. (6th Cir.)

Limitation of Liability Act: Admiralty Law

BIO 10/23. Reply 11/3. Dist. for 11/24. Cert. denied 11/30.

This is an admiralty action arising from the drowning of Ronald Matheny caused by the negligent operation of a Tennessee Valley Authority (“TVA”) tugboat in a small inland harbor under TVA’s complete ownership, dominion, and control. Reversing the district court’s judgment for petitioners (and in conflict

with decisions of two other circuits), a Sixth Circuit panel ruled that TVA enjoyed the protection of the Limitation of Liability Act (46 U.S.C. § 30505(a) & (b)) because the tugboat's captain was qualified when hired and had a clean safety record up to the point of the accident in question, even though the captain was at all times under the direct supervision and control of TVA management. The court of appeals further held that the limitation applied even as to petitioners' direct action against TVA under state law for its negligent supervision of the captain (not just its vicariously liability for the captain's negligence as a matter of admiralty law). The questions presented are:

1. Whether the Limitation of Liability Act insulates a ship owner from vicarious liability for the negligence of an otherwise competent ship's master even when the owner is physically present and has direct control over the vessel's operations; and
2. Whether, as a newly minted proposition of federal admiralty law, the Limitation of Liability Act even insulates a ship owner from liability in a direct action for negligent supervision under state law, so long as its hiring of the immediately responsible tortfeasor was not negligent.

09-225 Block v. Shinseki (DC Cir.)

Civil Procedure: Jurisdictional Statutes

BIO 10/23. Dist. for 11/24. Cert. denied 11/30.

The case below was filed in district court in 1979. A decade later, Congress vested in the Federal Circuit exclusive jurisdiction over cases like this one. In 2009, the D.C. Circuit ordered the case dismissed for lack of subject matter jurisdiction and declined to transfer the case to the Federal Circuit.

1. Does this type of case constitute an important exception to the general rule, articulated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that new jurisdictional statutes are usually applied to pending cases?
2. If there is no exception, do the courts of appeals have inherent authority to effect transfer of such cases to courts having subject matter jurisdiction regardless of whether all the elements of 28 U.S.C. § 1631 are present?

09-242 Pyke v. Cuomo (2nd Cir.)

Native American Law: Police Protection

BIO 10/28. Reply 11/10. Dist. for 11/24. Cert. denied 11/30.

1. Whether a summary judgment motion which turns on the adequacy of plaintiff's evidence of intentional discrimination must be denied where a "plausible" inference of invidious intent can be drawn from all of the evidence, circumstantial and direct, taken as a whole.
2. Whether this Court should resolve a conflict among the circuits on the issue of what standards to apply in considering the strength of summary judgment evidence in cases of alleged intentional discrimination.
2. Whether Congress's enactment of 25 U.S.C. § 232 obviated any distinctions based on geography or sovereignty regarding New York's duty to provide police protection to Native American residents of reservations within the State.

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

First Amendment: Student Speech

CFR 9/16. BIO 10/13. Reply 10/26. Dist. for 11/13. Re-listed for 11/24. Cert. denied 11/30.

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.

09-297 Ford Motor Co. v. Buell-Wilson (Cal. Ct. App.)

Punitive Damages: Vagueness

BIO 10/23. Reply 11/3. Dist. for 11/24. Cert. denied 11/30.

This Court has previously addressed issues relating to defendants' due process right to fair notice of the *amount* of punitive damages that may be assessed. This case presents a different and even more fundamental question of procedural due process that this Court has never squarely resolved: the fair notice to which citizens are entitled so they can tailor their conduct to comply with the law and thereby avoid *liability* for punitive damages altogether. The question presented is:

Whether state law as applied deprives defendants of fair notice if it permits the imposition of punitive damages for conduct that reasonable persons could have concluded was lawful.

09-363 Cooper v. Wong (9th Cir.)

Habeas Corpus: Successive Petitions

BIO 10/28. Reply 11/9. Dist. for 11/24. Cert. denied 11/30.

1. Is a person convicted of murder, but later shown to be innocent, eligible for execution?
2. When a district court must conduct an evidentiary hearing with respect to evidence of innocence in a successive habeas corpus petition, what process is required to conduct a full and fair hearing to afford for a reliable determination?
3. When a habeas corpus petitioner has been allowed to file a successive petition in a federal district court, what standard applies?

**09-373 Hallinan v. Fraternal Ord. of Police
(7th Cir.)**

Employment Law: Union Member Speech

BIO 10/29. Dist. for 11/24. Cert. denied 11/30.

1. Whether public sector employees required by a collective bargaining agreement, under color of state law, to pay dues to and bargain through a state public sector union necessarily have right under the Constitution to be members of such a union if they disobey its reasonable rules and regulations.
2. Whether public sector employees may assert a claim enforcing such constitutional rights under the First and Fourteenth Amendments in the absence of any other remedy.
3. Whether state action is present where Illinois law grants a union the right to exclusively represent employees within a bargaining unit and requires those same employees to financially support the union.
4. Whether a state public sector union can expel from its membership employees it represents for the alleged offense of bringing the union into disrepute through criticizing their political opponents in a union election, without a fair hearing, and in retaliation for the exercise of the First Amendment rights.

09-376 Rosemeyer v. Hummel (3rd Cir.)

Habeas Corpus: Ineffective Assistance

BIO 10/15. Dist. for 11/24. Cert. denied 11/30.

Did the Third Circuit contravene the directives of, and exceed its authority under, the Antiterrorism and Effective Death Penalty Act of 1996 when it refused to defer to the state appellate court's reasonable rejection of a habeas petitioner's claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

09-398 Louisiana v. Abshire (5th Cir.)

Civil Procedure: Class Actions

BIO 10/30. Dist. for 11/24. Cert. denied 11/30.

1. Whether the filing of an amended petition converting an ordinary action to a class action after the effective date of the Class Action Fairness Act of 2005 ("CAFA") constitutes the commencement of an action under CAFA for purposes of removal when the amended petition adds a new claim for statutory attorney's fees subjecting defendants to a significant increase in exposure.
2. Whether state law "relation-back" tests should be used by Federal Courts to determine "commencement" of an action under CAFA, thereby creating disparate results in the issues of Federal jurisdiction.

GRANTED CASES INVOLVING PUBLIC CITIZEN - 2009 TERM

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

Due Process: Forfeiture

CFR 11/12. BIO 1/9. Cert. granted 2/23. Argued 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)?

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

Civil Procedure: Interlocutory Appeal

BIO 12/23. Reply 1/6. Cert. granted 1/26. Argued 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?

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

Attorney’s Fees: Enhancements

BIO 3/4. Cert. granted 4/3. Argued 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?

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

Civil Procedure: Class Actions

CFR 3/6. BIO 4/3. Reply 4/14. Cert. granted 5/4. Argued 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?

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

Arbitration: Class Arbitration

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

Scott Nelson and Deepak Gupta of Public Citizen filed an amicus brief in support of the respondent at the merits stage.

Amicus Brief in Support of Respondent

Scott Nelson and Brian Wolfman 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.

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

FDCPA: Defenses

CFR 5/7. BIO 6/8. Reply 6/11. Cert. granted 6/29. Arg. 1/13.

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.

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

Attorneys Fees: “Prevailing Party”

BIO 6/25. Reply 8/13. Dist. for 9/29. Cert. granted 9/30. Argt. 2/22.

Scott Nelson of Public Citizen is co-counsel for the respondent.

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.