



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
January 15, 2010**

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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.

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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 the 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.

JANUARY 15 CONFERENCE

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 3/27/09. Re-listed for 1/15.

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?

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. Re-listed for 1/15.

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?

08-1401 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. Re-listed for 1/15.

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.

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. Re-listed for 12/11.
Re-listed for 1/8. Re-listed for 1/15.

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.

09-224 Nickels v. Grand Trunk Western Railroad (6th Cir.)

Preemption: FRSA

BIO 12/7. Reply 12/15. Dist. for 1/15.

1. Whether the court below erroneously interpreted the Federal Railroad Safety Act of 1970 (“FRSA”) codified at 49 U.S.C. §20101 *et seq.* to preclude a Federal claim pursuant to the Federal Employers’ Liability Act (“FELA”) 45 U.S.C. §51 *et seq.* by an injured rail worker solely because a similar state common law claim would be preempted. This interaction of FRSA and FELA would be a question of first impression before this Court.
2. Whether the court below improperly relied upon a concern for uniformity instead of safety contrary to the safety objective of FRSA and the mandate expressed at 49 U.S.C. §103(c) which states that the greatest priority of Congress is the “highest degree of safety in railroad transportation.”
3. Whether this Court should resolve the conflict currently present in the legal holdings of the Fifth and Sixth Circuit Courts of Appeal compared to the legal holdings of the Seventh and Ninth Circuit Courts of Appeal as to whether 49 C.F.R. §213.103 covers the subject of walkways adjacent to railroad tracks to preclude FELA causes of action based upon unsafe walking conditions.

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

Habeas Corpus: *Batson* Challenges

BIO 10/26. Reply 11/5. Dist. for 11/24. Re-listed for 12/4.
Record requested 12/7. Re-listed for 1/15.

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 preemptory 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 preemptory strike was not racially motivated, as required under AEDPA?

09-294 Unus v. Aarons (4th Cir.)

FTCA: Judgment Bar

BIO 12/18. Reply 12/30. Dist. for 1/15.

1. Does the Fourth Amendment categorically permit officers to detain occupants of a residence for several hours during the execution of a search warrant - without regard to the facts that the search is merely for financial records and that the individuals represent no threat but instead are dramatically outnumbered by the officers - as the Fourth Circuit held in conflict with the Ninth and Tenth Circuits?
2. When a claim against the United States under the Federal Tort Claims Act (FTCA) is dismissed, does the FTCA’s judgment bar, 28 U.S.C. § 2676 require dismissal of independent claims against individual federal officials in the same complaint, as the Fourth Circuit held in conflict with the Ninth Circuit?

09-310 Williams v. U.S. (7th Cir.)

BIO 12/14. Reply 12/29. Dist. for 1/15.

Criminal Law: Standard of Review

Whether a criminal defendant's claim that his jury trial waiver did not satisfy constitutional requirements, if raised for the first time on appeal, is subject to "plain error" review.

09-315 Busch v. Marple Newton School District (3rd Cir.)

BIO 11/12. Reply 11/24. Dist. for 12/11. Re-listed for 1/8.
Re-listed for 1/15.

First Amendment: Student Speech

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.

09-325 Aronov v. Napolitano (1st Cir.)

BIO 12/15. Reply 12/29. Dist. for 1/15.

Immigration Law: Attorney's Fees

Under 8 U.S.C. 1447(b), an applicant for naturalization may bring suit in federal district court to compel a determination on his application if United States Citizenship and Immigration Services (USCIS) fails to make a determination within 120 days of the applicant's examination. The question presented is as follows: Whether an applicant for naturalization who brings suit under 8 U.S.C. 1447(b) and obtains a court-ordered remand so that USCIS can grant his application is entitled to attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

09-329 Chase Bank v. McCoy (9th Cir.)

BIO 11/30. Reply 12/15. Dist. for 1/8. Re-listed for 1/15.

Truth in Lending Act: Regulation Z

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

The Federal Reserve Board's Regulation Z, which implements the Truth in Lending Act, requires creditors to provide an initial disclosure statement, before any transaction on an open-end credit plan takes place, containing "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires that when a creditor later changes any term that it was required to disclose in the initial disclosure statement, the creditor must "mail or deliver written notice" of that change in terms before the effective date of the change. 12 C.F.R. § 226.6(c). Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card amount. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate. The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.6(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

09-333 Garcia v. Vilsack (DC Circuit)
BIO 12/18. Reply 12/28. Dist. for 1/15.

Administrative Law: “Other Adequate Remedy”

Whether a statute, such as 5 U.S.C. § 741, that was enacted subsequent to the passage of the Administrative Procedure Act (“APA”) and that does not expressly displace APA remedies, precludes judicial review of unlawful agency action under the APA.

**09-343 Edison Electric Inst. v. Piedmont
Environmental Council (4th Cir.)**
BIO of F.E.R.C. 12/14. Reply 12/23. Dist. for 1/15.

Administrative Law: FERC

The question presented is whether - consistent with the Federal Energy Regulatory Commission’s (“FERC”) through notice-and-comment rulemaking - the phrase “withheld approval for more than 1 year” gives FERC the authority to issue permits to construct or modify transmission facilities in National Interest Corridors not only when state commissions fail to act on applications, but also when they deny them.

09-350 County of Los Angeles v. Humphries (9th Cir.)
BIO 11/23. Reply 12/4. Dist. for 1/8. Re-listed for 1/15.

Attorney’s Fees: § 1988

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?

09-359 Maldonado v. Iwasaki (9th Cir.)
CFR 11/16. BIO 12/16. Reply 12/28. Dist. for 1/15.

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?

09-379 Allmond v. Akal Security (11th Cir.)

ADA: Risks to Safety

BIO 12/18. Reply 12/29. Dist. 1/15.

Under the Americans with Disabilities Act and the Rehabilitation Act, is it lawful for an employer to dismiss a worker with a disability merely because a conceivable situation “may” occur in which that employee would pose a risk to safety, without regard to how unlikely that occurrence might be?

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

Habeas Corpus: Sufficient Evidence

BIO 11/4. Reply 11/13. Supp. brief of Respondent 11/19.
Dist. for 12/4. Re-listed for 12/11. Re-listed for 1/15.

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?

09-430 Wahi v. Charleston Area Medical Center (4th Cir.)

**Due Process: Health Care
Quality Improvement Act**

BIO 12/14. Reply 12/30. Dist. for 1/15.

1. Did the court below err in holding, in conflict with four other circuits, that a hospital can obtain immunity for disciplining a doctor immediately—before notice and a hearing—where the hospital concedes that it did not find or rely upon the possibility of imminent danger?
2. Under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, may an immunity determination be made by a jury, as the First and Tenth Circuits hold, or is a jury forbidden from making such a determination, as the Eleventh Circuit and Colorado Supreme Court hold, and as the Fourth Circuit effectively held here?

**09-438 Providence Hosp. and Medical Centers v. Moses
(6th Cir.)**

EMTALA: Stabilization Requirement

BIO 12/16. Dist. for 1/15.

1. Whether the Emergency Medical Treatment and Labor Act’s, 42 U.S.C. § 1395dd (“EMTALA”), requirement that any individual who comes to a hospital’s emergency department with an emergency medical condition be screened and stabilized should be expanded to continue indefinitely, after the individual has been admitted as an inpatient to the hospital for care or treatment?

2. Whether the CMS's regulation clarifying that EMTALA is inapplicable to hospital inpatients, 42 C.F.R. § 489.24(d)(2)(I), is valid, and applies retroactively?

09-447 Hecker v. Deere & Co. (7th Cir.)

ERISA: Fiduciary Duties

BIO 12/16. Reply 12/30. Dist. for 1/15.

1. Whether the court below erroneously held—despite a contrary decision of the Fourth Circuit and the authoritative interpretation of the Department of Labor (“DOL”)—that a plan fiduciary’s imprudent selection of investment options with excessive fees is exempt from liability under § 404(c) of ERISA, as long as the plan participants can choose from a sufficiently broad range of investment options.

2. Whether the court below erred in holding—contrary to numerous other circuit decisions and the considered views of the DOL—that petitioners’ allegations that a plan fiduciary selected retail mutual funds with excessive fees, without adequate investigation and without any effort to explore readily available, lower-cost options, failed to state a claim under § 404(a) of ERISA.

09-448 Hardt v. Reliance Standard Life Insurance Co. (4th Cir.)

ERISA: Attorney’s Fees

CFR 11/17. BIO 12/16. Reply 12/29. Dist. for 1/15.

Section 502(g)(1) of ERISA provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. 1132(g)(1).

The Fourth Circuit in the decision below held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action," while the Second, Fifth and Eleventh Circuits have declined to read a "prevailing party" requirement into 502(g)(1) and other circuits have issued conflicting authority. The Fourth Circuit also held that the "prevailing party" standard was not met and vacated an award of attorneys' fees to petitioner, even where the district court found "compelling evidence that [petitioner] is totally disabled," ruled that petitioner "did not get the kind of review to which she was entitled under applicable law" and remanded for a redetermination of benefits with an instruction that respondents "act on [petitioner's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" and petitioner obtained the requested long-term disability benefits upon remand. The questions presented are:

1. Whether the Fourth Circuit erred in holding that ERISA 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party?

2. Whether a party is entitled to attorney's fees pursuant to 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits, and subsequently receives the benefits sought on remand?

09-475 Monsanto v. Geertson Seed Farms (9th Cir.)
BIOs 12/23. Reply 12/30. Dist. for 1/15.

**Administrative Law: National
Environmental Policy Act**

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

1. Whether the Ninth Circuit erred in holding that National Environmental Policy Act (“NEPA”) plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.
2. Whether the Ninth Circuit erred in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.
3. Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court’s decision in *Winter v. NRDC*, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.

09-497 Rent-A-Center, West, Inc. v. Jackson (9th Cir.)
CFR 11/24. BIO 12/17. Dist. for 1/15.

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?

09-529 Virginia v. Reinhard (4th Cir.)
BIO 12/18. Reply 12/29. Dist. for 1/15.

Eleventh Amendment: *Ex Parte Young*

1. Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

09-549 U.S. v. Smith (10th Cir.)
BIO 12/17. Reply 12/30. Dist. for 1/15.

Inmate Accident Compensation Act: *Bivens* Suits

Whether the Inmate Accident Compensation Act, 18 U.S.C. 4126(c), which this Court has found provides the “exclusive” remedy for a federal prisoner suffering a work-related injury, see *United States v. Demko*, 385 U.S. 149, 152, 154 (1966), bars a suit against individual government employees based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

09-559 Doe v. Reed (9th Cir.)
BIO 12/7. Reply 12/16. Dist. for 1/15.

First Amendment: Petition Signatures

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.
2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

09-568 *Maremont v. St. John* (3rd Cir.)
BIO 12/10. Reply 12/22. Dist. for 1/15.

Civil Procedure: Removal

Whether the Third Circuit erred in holding that a defendant waived its right to remove a diversity case to federal court where the defendant filed a notice of removal less than six hours after the unexpected dismissal of the only non-diverse co-defendant and the brief delay was explained by defendant's need to confirm the removability of the case.

09-570 *Delaware v. Cooke* (Sup. Ct. Del.)
BIO 12/10. Reply 12/22. Dist. for 1/15.

Sixth Amendment: Defense Strategy

1. Whether a criminal defendant has a fundamental constitutional right to direct his counsel to present a "factual innocence-based defense" irrespective of counsel's professional judgment.
2. Whether an unresolved disagreement between counsel and defendant regarding pursuit of a "concession-of-guilt and mitigation" defense constitutes a conflict of interest that violates the defendant's Sixth Amendment right to counsel.

09-587 *Harrington v. Richter* (9th Cir.)
BIO 12/17. Reply 12/28. Dist. for 1/15.

Habeas Corpus: Expert Testimony

In granting *habeas corpus* relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissible enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

PENDING FOR UPCOMING CONFERENCES

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

Administrative 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.

09-419 Kentucky v. Cardine (Sup. Ct. Ky.)
CFR 12/8. BIO 1/7.

Criminal Law: Double Jeopardy

Whether the Double Jeopardy Clause bars the retrial of a defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury.

09-426 Eklund v. Wheatland County (Sup. Ct. Mt.)
CFR 12/7. BIO 1/5.

Due Process: Financial Conflicts

Whether the Plaintiff was denied due process of law when he was forced to accept a jury in his personal injury law suit all of whom were taxpayers of the Defendant county and who feared they personally would be required to participate in the payment of a very large verdict against the county. Due process is denied if either the Judge or the Jury have a significant financial interest in the outcome. *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 824 (1986). Here the average juror's share was \$1,241.63 and the jury foreman's share was \$7,334.42 out of his own pocket.

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

Criminal Law: Sentencing

BIO 11/19. Reply 12/1. Dist. for 1/8. Re-listed for 1/22.

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.

09-476 Patent Enforcement Team v. Dickson Industries (Fed. Cir.)

Patent Law: Abuse of Patents

BIO 12/23. Reply 1/5. Dist for 1/22.

1. Can a patentee be held liable for tortious interference without an appropriate finding that the patentee's pre-suit actions were objectively baseless?
2. What constitutes substantial evidence sufficient to invalidate a claim based on anticipation?

09-479 Abbott v. U.S. (3rd Cir.)

Criminal Law: Sentencing

BIO 12/22. Reply 12/31. Dist. for 1/22.

18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or * * * in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is * * * provided * * * by any other provision of law." The questions presented are:

1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?
2. If not, does it include another offense for possessing the same firearm in the same transaction?

09-480 Hensley v. U.S. (7th Cir.)

Criminal Law: Sentencing

BIO 12/22. Reply. 1/5. Dist. for 1/22.

Whether a sentencing judge may, consistent with the Ex Post Facto Clause, employ the version of the U.S. Sentencing Guidelines Manual in effect at the time of sentencing even though it produces a longer sentence calculation than the Guidelines Manual in effect at the time the offense was committed.

09-491 City of Long Beach v. Long Beach Area Peace Network (9th Cir.)

First Amendment: Time, Place, Manner

BIO 12/28.

1. Whether the First Amendment precludes a city from enacting a reasonable time, place and manner regulation in order to recoup the cost of city services required to remove litter and debris caused by special events conducted on public property.
2. Whether a time, place and manner regulation enacted to recoup the cost of city services provided for the purpose of “crowd control” and “construction” for a special event conducted on city property is not narrowly tailored to serve a substantial governmental interest.
3. Whether the First Amendment precludes a city from waiving otherwise permissible time, place and manner regulations absent a pattern of unlawful favoritism.
4. Whether the availability of streets and sidewalks provides ample alternative means of communication for persons unable to meet the permitting or notice requirements for a special event on public property.
5. Whether the First Amendment precludes a city from seeking indemnification for liability it may incur caused by the acts or omissions of a permittee conducting a special event on public property.

09-510 Dillon v. Mountain Coal Co. (10th Cir.)

ADA: Pretext

BIO 10/22. Dist. for 1/22.

1. May evidence of pretext be used to prove an employee is regarded as disabled under the Americans with Disabilities Act (“ADA”), and if so, do falsehoods regarding policies applicable to impaired individuals and about the ability to accommodate impaired individuals constitute such pretext evidence?
2. Under the ADA, when the major life activity under consideration is “working,” must the employee always present evidence of the geographic area to raise a question of fact with respect to being disabled, including in a regarded as disabled case?
3. Is evidence that the employer believes the employee is unable to perform any job in a facility with multiple jobs sufficient to raise a question of fact that the employer regards the employee as disabled under the Americans with Disabilities Act?
4. Under the Americans with Disabilities Act, is a “no restrictions” policy evidence that an employer regards a restricted employee as disabled?

09-533/09-547 CropLife America v. Baykeeper/American Farm Bureau Federation v. Baykeeper (6th Cir.) (vited)
BIO 1/7.

Administrative Law: Clean Water Act

Scott Nelson of Public Citizen is assisting respondent.

09-533:

1. Did the Sixth Circuit erroneously conclude—in conflict with the decisions of this Court and other circuits—that the Clean Water Act (“CWA”) unambiguously forecloses the EPA’s rule?
2. Did the Sixth Circuit improperly substitute its judgment for that of the expert agency charged with administering the CWA?
3. Should the court grant the petition, vacate the decision below, and remand for consideration in light of *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009)?

09-547:

1. Did the Sixth Circuit err in holding that the “plain language” of the Clean Water Act precludes an EPA rule, consistent with 35 years of agency practice, that the application of a useful pesticide for its intended purpose and in accordance with relevant requirements of EPA’s pesticide regulatory program is not a “discharge of a pollutant”?
2. In reviewing an agency regulation under *Chevron*, may a court reject the agency’s interpretation by declaring a “plain meaning” that departs from the common understanding of the controlling statutory provisions, without considering the statutory context, the simultaneous enactment of a different statute more specifically addressing the subject matter, or the agency’s contemporaneous interpretation, all of which support the agency’s interpretation?

09-539 Cardona-Lopez v. Holder (5th Cir.)
BIO 1/4.

Immigration Law: Felony Convictions

Whether a second conviction for simple drug possession under State law is a felony under the Controlled Substance Act, because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844(a).

09-564 City Council of the City of Albuquerque v. Albuquerque Commons Partnership (Ct. App. N.M.)
BIO 1/8.

Due Process: Zoning

1. When a local government seeks to rezone property, does ordinary legislative process violate the Due Process Clause of the 14th Amendment, and must the local government instead provide a quasi-judicial hearing, in which “*ex parte* communications” between legislators and constituents are prohibited?
2. May the owner of rezoned property assert a procedural due process claim for damages under 42 U.S.C. § 1983 without pursuing the remedies available under state law?

**09-657 Birmingham Bd. of Educ.
v. McCord-Baugh (Ala. Sup. Ct.)**
BIO 1/6.

Due Process: Retroactivity

This Court has consistently held that an appellate court, either federal or state, must apply the law in effect at the time it renders its decision. Specifically, this Court has stated that "[i]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule that governs, the law must be obeyed . . ." *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 282 (1935) (quoting Chief Justice Marshall). In an one page opinion, the Alabama Supreme Court, without any analysis, upheld the decision of the Alabama Court of Civil Appeals affirming the trial court's judgment against the Birmingham Board of Education ("Board") in a 42 U.S.C. § 1983 equal protection "class-of-one" claim brought by Cathy McCord-Baugh (plaintiff/respondent), an employee of the Board, despite the fact that this Court rendered its decision in *Engquist v. Oregon Dept. of Agriculture, et al.*, 128 S. Ct. 2146 (2008), which held that such actions cannot be brought against public entities, such as the Board.

The question presented is whether the Alabama Supreme Court should be reversed because it impermissibly ignored the controlling intervening United States Supreme Court decision in *Engquist*, as it decided the pending federal question of whether an employee of a public school district could sustain an equal protection "class-of-one" claim against a public school district.

09-658 Belleque v. Moore (9th Cir.)
BIO 1/6.

Habeas Corpus: Ineffective Assistance

1. This Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante*—a direct appellate review case—this Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless.

a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Fulminante* standard apply, even though no record of a trial is available for review?

b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1)?

2. In Moore's underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

**09-696 John J. Kane Regional Ctrs. -
Glen Hazel v. Grammar (3d Cir.)**
BIO 1/13.

Section 1983: Private Rights of Action

Allison Zieve of Public Citizen is assisting respondent.

1. Whether, in the absence of an express private right of action, Spending Clause legislation establishing requirements for federal-state cooperative programs can unambiguously confer "rights" enforceable by third-party beneficiaries under 42 U.S.C. § 1983.

2. Whether, if the answer to Question 1 “yes,” FNHRA unambiguously confers “rights” enforceable by Medicaid beneficiaries under 42 U.S.C. § 1983.

CALLS FOR RESPONSE

NEW CFR

09-604 *Nguyen v. California* (Sup. Ct. Cal.)
CFR 1/7, due 2/8.

Criminal Law: Sentencing

Whether a criminal defendant's right to a jury trial under the Sixth and Fourteenth Amendments is violated when a prior juryless juvenile adjudication is used by a judge to impose a longer sentence than otherwise would be permissible.

09-700 *Al-Turki v. Colorado* (Colo. Ct. App.)
CFR 1/7, due 2/8.

Criminal Law: *Voir Dire*

Pursuant to the Due Process Clause and the Sixth Amendment's guarantee of an impartial jury, a trial court must allow probing of a potential juror at *voir dire* for possible bias when there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); accord *Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973). In this case, petitioner, an Arab Muslim who eventually faced an ethnically and religiously infused prosecution on charges punishable by life in prison, sought to probe the views of a juror who stated during *voir dire* that he was "more likely to believe" a Muslim would commit a crime and that, "notwithstanding the facts presented, . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a.

The question presented is whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments "did not unequivocally express actual bias." App. 16a.

PENDING CFR

09-79 *Bellevue v. Holder* (4th Cir.)
CFR 9/17, due 1/19 (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 fault to depart, notwithstanding the fact that more than 10 years has already lapsed from the expiration of the voluntary departure period; and
3. Whether the Court of Appeals erred in holding that it had no jurisdiction to review the refusal of the Board of Immigration Appeals to exercise its sua sponte authority to re-open the case even if questions of law are involved and constitutional claims are raised.

09-293 Ozuna v. U.S. (7th Cir.)
CFR 9/29, due 1/13 (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.

09-347 Dutka v. AIG (5th Cir.)
CFR 11/4, due 1/22 (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.

09-392 Moran v. U.S. (11th Cir.)
CFR 10/19, due 1/19 (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?

09-451 Saulsberry v. Myers (10th Cir.)
CFR 12/17, due 1/19.

Fourth Amendment: Strip Searches

1. Whether the circuit courts that require reasonable suspicion prior to strip searches of pretrial detainees in a jail have contradicted this Court’s longstanding precedent stated in *Bell v. Wolfish*, 441 U.S. 520 (1979),

that probable cause is not required to conduct strip searches which further the overwhelmingly important interests of jail security and safety.

2. Whether the law surrounding visual, non-body cavity searches of jail detainees was sufficiently settled to be considered “clearly established” at the relevant time, when a split exists among the circuits’ interpretation of this Court’s precedent and a large number of the circuits set precedents that conflict with this Court’s decision in *Bell v. Wolfish*.

09-489 D’Jamoos v. Pilatus Aircraft (3rd Cir.)
CFR 12/16, due 2/16 (ext.).

Jurisdiction: “Purposeful Availment”

Does purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also create specific jurisdiction in a state in which harm occurs as a result of purposeful availment of the national market?

09-592 McUllen v. Coakley (1st Cir.)
CFR 12/3, due 2/4 (ext.).

First Amendment: Abortion Clinics

Massachusetts has imposed a criminal prohibition on “enter[ing] or remain[ing] on a public way or sidewalk . . . within a radius of 35 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility.” The law applies only at abortion clinics, not at hospitals or other medical facilities. The statute exempts passerby and municipal agents (such as law enforcement officials). It also exempts people entering or leaving the clinic, and clinic employees acting “within the scope of their employment.” For others, the statute makes it a crime to stand on the public sidewalk and display signs, distribute leaflets, pray in silence, or converse with willing listeners, even when there are no incoming patients in or near the zone. The questions presented are:

1. Whether the First Circuit erred in holding—contrary to *Hill v. Colorado*, 350 U.S. 703 (2000), applications of *Hill* by other courts, and well-established First Amendment principles—that Massachusetts’ establishment of unique speech-free zones around abortion clinics is consistent with the First and Fourteenth Amendments.
2. If *Hill* permits the establishment of such zones, whether it should be limited or overruled.

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

**09-233 Triple-S Management Corp. v. Municipal Revenue
Collection Center (Sup. Ct. P.R.)**

Due Process: Retroactivity

CFR 10/13. BIO 12/2. Reply. 12/14. Dist. for 1/8. CVSG 1/11.

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"?

**09-525 Janus Capital Group v. First Derivative
Traders (4th Cir.)**

Securities Fraud: Participatory Liability

BIO 12/2. Reply 12/17. Dist. for 1/8. CVSG 1/11.

1. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits—that a service provider can be held primarily liable in a private securities-fraud action for “help[ing]” or “participating in” another company’s misstatements.
2. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits—that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

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. (Cal. Ct. App.)
BIO 6/25. Dist. for 9/29. CVSG 10/5.

**Preemption: Motor Vehicle
Safety Standards**

Allison Zieve of Public Citizen is assisting counsel for petitioner.

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.)
BIO 7/17. Reply 7/28. Dist. for 9/29. CVSG 10/5.

Copyright Law: First-Sale Doctrine

Adina Rosenbaum and Greg Beck are counsel for amicus Public Citizen.
Amicus Brief in Support of the Petition

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 Ass’n v. San Francisco (9th Cir.)

ERISA: Preemption

BIO 8/24. Reply 9/8. 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).

09-291 Thompson v. North American Stainless, LP (6th Cir.) Title VII: Third-Party Retaliation

BIO 11/9. Reply 11/24. Dist. for 12/4. Re-listed for 12/11. CVSG 12/14.

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?

09-400 Staub v. Proctor Hospital (7th Cir.)

Employment Law: “Cat’s Paw”

BIO 10/5. Reply 10/16. Dist. for 11/6. CVSG 11/9.

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

07-1489 Trainer Wortham & Co. 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.
SG br. 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.

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

International Law: Child Abduction

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

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

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 America v. Barnes-Wallace (9th Cir.)

First Amendment: Standing

BIO 6/3. Reply 6/16. 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).

08-1307 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.

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.

08-1448 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 American Express Co. v. Italian Colors Rest. (2d Cir.) **Arbitration: Class Arbitration**
BIO 7/21. Reply 8/5. Dist. for 9/29.
(NOTE: Likely held for 08-1198, *Stolt-Nielsen S.A. v. Animalfeeds Int'l.*)

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. **Patent Law: “Business Methods”**
(Fed. Cir.)
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.

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

Habeas Corpus: Appealability

BIO 11/25. Reply 12/10. Dist. for 1/8.

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.

09-152 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?

09-167/09-182 Scrushy v. U.S./ Siegelman v. U.S. (11th Cir.) (vied)

**First Amendment:
Campaign Finance**

BIOs 11/13. Reply of Siegelman 11/20. Reply of Scrushy 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?

09-213 Northeastern Land Services v. NLRB (1st Cir.)

NLRB: Quorum Requirement

BIO 12/4. (NOTE: Likely held for 08-1457 *New Process Steel v. NLRB*). Dist. for 1/8.

1. Does the National Labor Relations Board (“Board”) have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that “three members of the Board shall, at all times, constitute a quorum of the Board”? If so, what deference should be afforded said decision on Appeal?
2. Assuming *arguendo* authority, did the two (2) member Board panel err in abandoning *sub silencio* a long standing precedent, *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), in favor of a rule of law, to determine a violation of 29 U.S.C. § 158(a)(1)?
3. In a matter involving no union or concerted activity, no anti-union animus, and no express violation of the National Labor Relations Act, did the Board have authority to order relief to an individual who engaged in no activity protected by the Act?

09-370 Lovely v. U.S. (6th Cir.)

FTCA: Feres Doctrine

BIO 12/4. Dist. for 1/8.

1. Whether the “incident to service” test provided by the jurisprudence of this Court in *Feres v. United States*, 340 U.S. 135 (1950) and its progeny require inquiry into the (1) duty status of the claimant, (2) the site of the injury, and (3) the activity being performed by the claimant to determine whether a claim under the Federal Tort Claims Act (“FTCA”) is barred by the *Feres* doctrine when the United States Court of Appeals for the Sixth Circuit extends the doctrine to *all* injuries suffered by any claimants that are even remotely related to the claimant’s *status, relationships or affiliation* with the military service and where the standard adopted by the Sixth Circuit effectively abolishes FTCA actions in the Sixth Circuit and is in conflict with a wealth of decisions of this Court and other circuit courts.
2. Whether the Sixth Circuit Court properly bars a FTCA claim under the “incident to service” test provided by the jurisprudence of this Court in *Feres v. United States* and its progeny when the Sixth Circuit’s analysis examines if the claim implicates military discipline and where the Sixth Circuit’s analysis conflicts with this Court’s most recent decision on the matter in *United States v. Stanley*, 483 U.S. 669 (1987).

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

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.

LAST CONFERENCE

View the [January 11th Order List](#) from the January 8th Conference.

CERTIORARI GRANTED

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

Restitution Orders: Time Limits

BIO 11/27. Reply 12/9. Dist. for 1/8. Cert. granted 1/8.

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

CERTIORARI DENIED

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

First Amendment: Employee Speech

CFR 9/22. BIO 11/20. Reply 12/4. Dist. for 1/8. Cert. denied 1/11.

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.)

First Amendment: Employee Speech

CFR 9/22. BIO 11/20. Reply 12/3. Dist. for 1/8. Cert. denied 1/11.

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?

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

First Amendment: Attorney Sanctions

CFR 9/24. BIO 11/25. Dist. for 1/8. Cert. denied 1/11.

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?

09-194 Gomis v. Holder (4th Cir.)

Immigration Law: Questions of Law

BIO 11/19. Reply 12/1. Dist. for 1/8. Cert. denied 1/11.

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.

09-229 Khan v. Holder (7th Cir.)

Immigration Law: Questions of Law

BIO 12/4. Reply 12/15. Dist. for 1/8. Cert. denied 1/11.

In the immigration field, Congress has enacted of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but which bar review of most discretionary claims and certain factual findings. The courts of appeals 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 Seventh 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 he challenged only the application of the statutory eligibility standards to the facts of his case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny an asylum application as untimely.

09-275 Rodis v. City and County of San Francisco (9th Cir.) **Section 1983: Counterfeit Money**
CFR 10/6. BIO 12/4. Reply 12/15. Dist. for 1/8. Cert. denied 1/11.

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?

09-277 Connecticut Dept. of Public Utility Control v. FERC **Federal Power Act: Jurisdiction**
(DC Cir.)

BIO 12/4. Reply 12/14. Dist. for 1/8. Cert. denied 1/11.

1. Should a court defer to Federal Energy Regulatory Commission’s (“FERC”) interpretation of its jurisdiction under the Federal Power Act (“FPA”) to set the amount of installed electric capacity that each State must provide for adequate, sufficient, reliable service?

2. Does FERC’s asserted jurisdiction to set the Installed Capacity Requirement (“ICR”) as a “practice . . . affecting” wholesale rates encroach impermissibly on the States’ traditional powers, which Congress preserved in the FPA, to determine the adequacy, sufficiency, and reliability of electric facilities or services to be furnished and to regulate generation facilities?

09-288 Puget Sound Energy, Inc. v. California (9th Cir.) **Federal Power Act: Judicial Review**

BIOs of F.E.R.C., City of Seattle, WA 11/30. Reply 12/16. Dist. for 1/8. Cert. denied 1/11.

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.

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

**First Amendment: Child Pornography
and Overbreadth**

CFR 10/5. BIO 12/4. Dist. for 1/8. Cert. denied 1/11.

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?

09-355 Treesh v. DirecTV (Sup. Ct. Ky.)

Preemption: Telecommunications Act

BIO 11/25. Reply 12/8. Dist. for 1/8. Cert. denied 1/11.

Whether a state statute mandating that school districts include the gross receipts of providers of direct satellite and wireless cable services (“DBS providers”) in the tax base of a tax on the gross receipts of certain utility service providers that is administered and collected by the State and is utilized by the school districts to raise a portion of their guaranteed State funding as required under the State’s system of funding its public schools is preempted by §602 of the Telecommunications Act of 1996.

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

ERISA: Standing

BIOS 11/25. Dist. for 1/8. Cert. denied 1/11.

Do participants in a pension plan trustee 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?

09-384 Alaska v. EEOC (9th Cir.)

First Amendment: GERA

BIO 12/4. Reply 12/16. Dist. for 1/8. Cert. denied 1/11.

1. Whether high-level policymaking, advisory, and personal staff chosen by a Governor can assert a First Amendment right to continued employment in such positions of trust and confidence after conducting press conferences criticizing the Governor and his actions.
2. Whether the Government Employee Rights Act of 1991 (“GERA”), 42 U.S.C. 2000e-16a *et seq.*, unequivocally abrogates the States’ sovereign immunity from suit in the absence of any explicit abrogation of immunity, textual specification of States as defendants, or express authorization of proceedings against States.
3. Whether, given the absence of any legislative or judicial record documenting a pattern of unconstitutional discrimination by States against the high-level policymaking and advisory staff of elected officials, GERA constitutes a proper exercise of Congress’s power under Section 5 of the Fourteenth Amendment.

09-409 Palmer v. Waxahachie Ind. Sch. Dist. (5th Cir.)
BIO 12/4. Reply 12/15. Dist. for 1/8. Cert. denied 1/11.

First Amendment: Student Speech

1. Whether, notwithstanding *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969), public schools may, consistent with the First Amendment, broadly impose content-neutral and viewpoint-neutral restrictions on student speech as long as the restrictions satisfy the lower standard of intermediate scrutiny normally applied to expressive conduct, and not to pure speech.
2. Whether the intermediate standard enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968) is satisfied when, contrary to *O'Brien*, the court does not require the government to demonstrate that the regulation at issue actually furthers an important government interest or that it is no greater than necessary to serve such an interest.

09-460 Milwaukee Deputy Sheriff's Ass'n v. Clark (7th Cir.) **First Amendment: Employee Speech**
BIO 11/18. Dist. for 1/8. Cert. denied 1/11.

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)?

09-474 Doroshov v. Hartford Life (3d Cir.)
BIO 11/23. Dist. for 1/8. Cert. denied 1/11.

ERISA: Pre-existing Conditions

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.

09-519 Alameida v. Phelps (9th Cir.)
BIO 11/30. Reply 12/18. Dist. for 1/8. Cert. denied 1/11.

Habeas Corpus: "Extraordinary Circumstance"

Whether, in light of *Gonzalez v. Crosby*, 545 U.S. 524, a court of appeal's alteration of circuit law on calculating the habeas corpus statute of limitations constitutes an "extraordinary circumstance" sufficient to vacate a final judgment pursuant to Federal Rule of Civil Procedure 60(b).

09-528 Bridgeport Port Authority v. Bridgeport and Port Jefferson Steamboat Co. (2nd Cir.) **Commerce Clause: “Fair Approximation”**

BIO 12/4. Reply 12/15. Dist. for 1/8. Cert. denied 1/11.

1. Whether the Commerce Clause requires a fee imposed for the use of government-owned facilities to have a dollar-for-dollar correspondence with the benefits conferred on the users under the “fair approximation” test of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).
2. Whether the Tonnage Clause requires governmental authorities to use all of the fees imposed on ferry passengers for services that directly benefit the passengers when the fees were kept low because the facilities used by the passengers were primarily financed by state and federal grants.

09-560 Carlson v. Bobadilla (8th Cir.) **Habeas Corpus: Testimonial Statements**

BIO 12/4. Reply 12/15. Dist. for 1/8. Cert. denied 1/11.

1. Whether the Eighth circuit exceeded its authority under 28 U.S.C. § 2254(d)(1) (AEDPA), when it held that the Minnesota Supreme Court’s ruling that the statement by an abused child to a child-protection worker was not testimonial was “an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.”
2. Whether the Eighth circuit exceeded its authority under AEDPA when it made factual determinations contrary to those made by the Minnesota Supreme Court, failed to review the actual interview of the child, and rejected the state supreme court’s interpretation of the state statute under which the interview was conducted.

GRANTED CASES INVOLVING PUBLIC CITIZEN - 2009 TERM

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 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. 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 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. Arued 12/9.

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

Public Citizen filed an amicus brief in support of respondent at the merits stage.

Amicus Brief in Support of Respondent

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 th 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 on 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. Argued 1/13.

Public Citizen filed an amicus brief in support of 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. Arg. 2/22.

Scott Nelson of Public Citizen is co-counsel for 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.