



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
JANUARY 16, 2009 CONFERENCE**

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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.

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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 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: http://www.usdoj.gov/osg/briefs/2008/2008brieftypes.html .
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 16TH CONFERENCE

Criminal Law: “Violent Felony”

07-61 Mathias v. United States (4th Cir.)

CFR 8/6. BIO 10/26, reply 11/2. Dist. for 1/4. Re-listed for 4/18. Held for 06-11206 *Chambers v. United States* (granted 4/21, arg. 11/10, decided 7-2 in favor of pet. 1/13). Re-listed for 1/16.

Whether a conviction under Va. Code Ann. § 18.2-479(B) for escape “other than by force or violence” is a “violent felony” for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e), when the defendant’s escape involved the failure to return from a work release program?

Criminal Law: “Violent Felony”

07-668 Taylor v. United States (11th Cir.)

BIO 1/22, reply 2/5. Dist. for 2/22. Re-listed for 4/18. Held for 06-11206 *Chambers v. United States* (granted 4/21, arg. 11/10, decided 7-2 in favor of pet. 1/13). Re-listed for 1/16.

Whether an escape conviction based on petitioner’s failure to return to a halfway house is categorically a “violent felony” for purposes of 18 U.S.C. § 924(e).

Habeas Corpus: Statute of Limitations

07-1008 McNeil v. Ferreira (11th Cir.)

CFR 3/17, filed 5/7. Dist. for 6/5. Held for 07-6984, *Jimenez v. Quarterman* (granted 3/17, arg. 11/4, decided 9-0 in favor of pet. 1/13). Re-listed for 1/16.

Whether a new one-year statute of limitations, applicable to the filing of a State prisoner’s 28 U.S.C. § 2254 petition, is created whenever a State prisoner is resentenced, even when the one year limitation period for his original conviction and sentence has already expired, thereby allowing the prisoner to raise only claims challenging his original conviction, which were previously time-barred?

Habeas Corpus: Statute of Limitations

07-1474 Pietrzak v. Quarterman (5th Cir.)

CFR 7/18. BIO 10/17. Dist. for 11/14. Held for 07-6984 *Jimenez v. Quarterman* (granted 3/17, arg. 11/4, decided 9-0 in favor of pet. 1/14). Re-listed for 1/16.

1. After Petitioner was convicted by a Texas jury, his counsel rendered ineffective assistance by failing to timely file a Notice of Appeal. The Court of Criminal Appeals of Texas granted post conviction *habeas corpus* relief and restored him to a procedural position that allowed him to seek review of his conviction via direct appeal, thereby by rendering his previously final conviction non-final for Texas law purposes. When petitioner ultimately sought relief from his conviction pursuant to 28 U.S.C. § 2254, the district court, based on the reasoning of the Fifth Circuit in *Salinas v. Dretke*, held that the statute of limitations under 28 U.S.C. § 2254(d)(1) began running when Petitioner’s counsel failed to timely file the Notice of Appeal rather than after Petitioner’s conviction became final for Texas law purposes (after it was affirmed on his out-of-time direct appeal). Did the Fifth Circuit err by denying the request for a certificate of appealability to determine when the statute of limitations began running and the validity and applicability of *Salinas* in this situation?

2. In granting post-conviction *habeas* relief, the Court of Criminal Appeals informed Petitioner that “all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues.” Petitioner then timely pursued his direct appeal and state *habeas corpus* remedies and filed this section 2254 petition within one year of the conviction becoming final for state law purposes, excluding the time when his subsequent state *habeas* petitions were pending. Did the Fifth Circuit err by denying the request for a certificate of appealability to determine if this case presents the circumstances required for application of the doctrine of equitable tolling to the statute of limitations under section 2254 (d)(1)?

Federal Jurisdiction: Copyright Infringement

08-103 Reed Elsevier, Inc. v. Munchnick (2d Cir.)

BIO of Pogrebin 8/8. CFR 9/18. BIO of Munchnick 10/16, reply 10/28. Dist. for 11/14. Re-listed for 11/25. Re-listed for 12/5. Re-listed for 12/12. Re-listed for 1/9. Re-listed for 1/16.

1. Whether the usual power of lower courts to approve a comprehensive settlement releasing claims that would be outside the courts’ subject matter jurisdiction to adjudicate, confirmed in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), was eliminated in copyright infringement actions by 17 U.S.C. § 411(a).
2. Whether the Second Circuit erred by ignoring the assurance in *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001), that the problem of compromised electronic news archives could be remedied by “[t]he Parties (Authors and Publishers) [entering] into an agreement allowing continued electronic reproduction of the Authors’ works . . . and remunerating the authors for their distribution.”

Criminal Law: Sentencing

08-118 Masferrer v. United States (11th Cir.)

CFR 9/8. BIO 12/8, reply 12/22. Dist. for 1/16.

Petitioner, chairman of a national bank, was convicted of engaging in a fraudulent swap transaction designed to conceal investment losses suffered by the bank. Petitioner was sentenced to thirty years in jail, based on two hotly contested sentencing facts that the district court found by a preponderance of the evidence: that Petitioner was legally responsible for false testimony given by two other individuals (increasing sentence range by seventeen years) and that Petitioners had caused losses exceeding \$20 million (increasing sentencing range by fourteen years). The questions presented are:

1. Whether the Eleventh Circuit, in conflict with the Eighth and Ninth Circuits, but consistent with the Third, Sixth, and Seventh Circuits, erroneously declined to apply a standard higher than preponderance of evidence in determining facts that have a disproportionately large impact on sentencing.
2. Whether the Eleventh Circuit, in conflict with the Second, Fifth, and Ninth Circuits but consistent with the Eighth Circuit, erroneously declined to apply the loss causation principles articulated in *Dura Pharmaceuticals, Inc. v. Broudo* in determining “loss” under the Sentencing Guidelines.

Special Education: Tuition Reimbursement

08-305 Forest Grove Sch. Dist. v. T.A. (9th Cir.)

CFR 10/2. *Amicus* Nat'l Sch. Bds. Ass'n 10/6. BIO 12/3, reply 12/16. Dist. for 1/9. Re-listed for 1/16.

Bonnie Robin-Vergeer of Public Citizen is co-counsel for the respondent.

Brief in Opposition

This case presents the question on which the Court granted certiorari, but was unable to resolve, in *Board of Education v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam): Whether the Individuals with Disabilities Education Act permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

Prisoners' Rights: Disclosure Statements

08-327 Arizona v. Tuzon (9th Cir.)

CFR 10/21, due 11/20. Dist. for 1/9. Re-listed for 1/16.

In suits filed pro se by inmates against prison employees and officials, judges of the United States District Court for the District of Arizona habitually issue orders requiring the Defendants, their attorneys, and unnamed prison officials to investigate the inmates' allegations and to file with the court and serve on the plaintiffs a verified report informing them of the facts learned from the investigation and identifying what responses the Department of Corrections would make to the allegations. The questions presented are:

1. A rule of civil procedure promulgated by this Court requires the parties in most suits to exchange disclosure statements, but it specifically exempts suits filed by pro se prison inmates. Do the district judges have the power to, in essence, enact their own rule—inconsistent with this Court's rule—requiring the defendants in pro-se inmate suits to unilaterally provide super disclosure statements?
2. The Prison Litigation Reform Act requires inmates to exhaust administrative remedies before filing suit. The district judges' orders require prison officials to respond to inmates' allegations, even when their claims would be barred because they failed to exhaust administrative remedies available under prison grievance procedures. Does the district court have the power to abrogate the PLRA?
3. Under separation-of-powers principles, the judicial branch cannot co-opt the executive branch involuntarily into performing tasks for it. Similarly, under federalism principles, a federal court cannot co-opt a state government agency to do its bidding. Do district judges exceed powers by ordering state prison officials to investigate and report to the court on inmates' unproven allegations?
4. Due process requires courts to act neutrally and fairly toward the parties; courts must have jurisdiction over the parties. The district court in these cases requires only the defendants—and related officials of the Arizona Department of Corrections, who are not parties to the suit—to conduct an investigation and disclose facts, with no similar requirement made of the inmates-Plaintiffs. Do these unilateral orders violate the due-process rights of the Defendants and associated persons?

Fourth Amendment: Seizure of Individual

08-362 Illinois v. Lopez (Ill.)

CFR 11/10. BIO 12/19, reply 12/29. Dist. for 1/16.

1. Whether a court may consider a defendant's age and experience with law enforcement when determining whether the defendant was seized for purposes of the Fourth Amendment or "in custody" for purposes of the Fifth Amendment.
2. Whether a person who voluntarily accompanies police to the station for questioning and is left in a closed interview room while the police attempt to verify the information provided is seized under the Fourth Amendment.
3. Whether a *de novo* or "clear error" standard of review applies to a trial court's determination regarding whether the police have deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda*.

Preemption: TILA

08-405 Cross Country Bank, Inc. v. Cuomo (N.Y.)

BIO 12/9, reply 12/18. Dist. for 1/16.

Did the New York Court of Appeals fail to abide by the dictates of the Supremacy Clause in holding that the federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, did not preempt the Attorney General of the State of New York from asserting a claim under state law that credit card solicitation disclosures were misleading and deception when: (i) for the explicit legislative purpose of establishing nationwide uniformity in credit card solicitation disclosures, Congress amended TILA in 1988 to include an express preemption provision, 15 U.S.C. § 1610(e), that barred the States from directly or indirectly regulating the content or format of disclosures in credit card solicitations and vested the Board of Governors of the Federal Reserve with exclusive authority to prescribe the content of all disclosures in credit card solicitations and the manner in which they are presented; (ii) the Court of Appeals allowed the Attorney General to assert a claim that the disclosures at issue were insufficient and should be presented in a different manner, even though they fully complied with the requirements set forth under TILA; and (iii) the New York Court of Appeals affirmed the issuance of an injunction barring the use of the disclosures that fully complied with the requirements established under TILA?

Preemption: National Bank Act

08-453 Cuomo v. Clearing House Ass'n, L.L.C. (2d Cir.)

BIOs 12/8, reply 12/22. *Amici* Nat'l Ass'n of Realtors, North Carolina, Conference of State Bank Supervisors, Cent. N.Y. Citizens in Action 11/6. Dist. for 1/16.

Public Citizen joined Central New York Citizens in Action's amicus brief in support of the petitioner.

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" as to national banks, except where those powers are authorized by federal law, vested in the courts of justice, or exercised by Congress or a House or a committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting section 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).
2. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

Privacy Act: Personal Knowledge

08-467 Doe v. Dep’t of Veterans Affairs (8th Cir.)

BIO 12/10, reply 12/22. Dist. for 1/16.

The Privacy Act prohibits any agency official from disclosing, to “any person,” by any means of communication,” any “item . . . of information” that “is contained in a system of records,” unless the disclosure is made pursuant to “the prior written consent of[] the individual to whom the record pertains.” 5 U.S.C. § 552a(a)(4), (b). The question presented is whether, as the court of appeals held below, in conflict with the Ninth Circuit and the D.C. Circuit, the Privacy Act permits an agency official to disclose personal information about an individual that the official acquired in the process of creating a record in a system of records as long as the official does not physically retrieve the record before disclosure.

Criminal Law: Sentencing

08-469 Toepfer v. United States (11th Cir.)

BIO 12/10, reply 12/22. Dist. for 1/16.

Prior to trial, the district court advised petitioner that the jury’s special verdict findings would bind the court for sentencing purposes. At sentencing, over petitioner’s objection, the district court calculated the guidelines on the basis of acquitted conduct. Thereafter, the court erroneously imposed sentence without considering statutory sentencing factors. Petitioner failed to object to the statutory error. The questions presented are:

1. Did the district court’s exclusive reliance on acquitted conduct in imposing a guideline-based sentence violate petitioner’s Sixth Amendment jury trial and Fifth Amendment due process rights?
2. Did the court of appeals err in employing—contrary to the majority of the circuits—a plain error sentencing prejudice test under which a defendant, in order to show the harmfulness of the violation of forfeited procedural rights at sentencing, must present evidence that the sentence would have been lower but for the violation?

Fourth Amendment: School Searches

08-479 Safford Unified Sch. Dist. No. 1 v. Redding (9th Cir.)

BIO 12/11, reply 12/24. Dist. for 1/16.

1. Whether the Fourth Amendment prohibits public school officials from conducting a search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.
2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public school administrator may be liable in a damages lawsuit under 42 U.S.C. § 1983 for conducting a search of a student suspected of possessing and distributing a prescription drug on campus.

Disability Rights: *Erie* Doctrine

08-480 Sicilia v. United Parcel Serv., Inc. (11th Cir.)

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

1. Should a federal appellate court exercising diversity jurisdiction in a removed civil action for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or a state test for determining whether epilepsy constitutes a “handicap” or a “developmental disability”?
2. Should a federal appellate court exercising diversity jurisdiction in a removed civil action solely for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or a state test for determining whether the former employer had in effect a seniority system which limited its statutory duty to “reasonably accommodate” a former employee’s “handicap” or “developmental disability”?
3. Should a federal appellate court exercising diversity jurisdiction in a removed civil action for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or state test for determining whether the former employer has unlawfully retaliated against the former employee for having filed the lawsuit?

Immigration Law: Aggravated Felony

08-495 Nijhawan v. Mukasey (3d Cir.)

BIO 12/17, reply 12/29. Dist. for 1/16.

1. Whether the penalty of lifetime banishment for conviction of an aggravated felony may be imposed upon a lawful permanent resident under section 101(a)(43)(M)(i) of the Immigration and Nationality Act of 1952 as amended, 8 U.S.C. § 1101(a)(43)(M)(i) when he was not convicted of the required loss.
2. Whether the rule of lenity or narrow construction should be applied to resolve an ambiguity in a deportation statute created by both the dissenting opinion below and well-reasoned decisions from other Circuits including the Circuit where the alien’s conviction occurred?

Fourth Amendment: Blood Samples

08-506 Shriner v. Minnesota (Minn.)

CFR 11/18. BIO 12/18. Dist. for 1/16.

Does probable cause to believe alcohol is in a person’s blood creates a “single-factor exigent circumstance” that justifies a warrantless, nonconsensual seizure of that blood without violating the Fourth Amendment?

Statutory Immunity: Medicare Carriers

08-511 United States, *ex rel.* Feingold v. Palmetto Gov’t Benefits Adm’rs (11th Cir.)

BIO 12/17. Dist. for 1/16.

Whether the Eleventh Circuit’s decision granting absolute immunity to Medicare Carriers, like the defendants in this case, was correctly decided in view of the flatly contrary conclusion reached by the Tenth Circuit in *United States, ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F.3d 702 (10th Cir. 2006).

Veterans Benefits: Naval Service

08-525 Haas v. Peake (Fed. Cir.)

Amicus Am. Legion 11/21. BIO 12/28, reply 12/29. Dist. for 1/16.

Veterans are entitled to benefits for disabilities connected with their military service. The Agent Orange Act requires a finding of service connection for specified diseases “manifest . . . in a veteran who, during the active military, *naval*, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962 and ending on May 7, 1975.” 38 U.S.C. § 1116(a)(1)(A) (emphasis added). Does this statute exclude veterans who performed naval service in the territorial seas of the Republic of Vietnam?

Fourth Amendment: Consent of Employer

08-528 Florida v. Young (Fla. Ct. App.)

BIO 12/19. Dist. for 1/16.

Whether the exclusionary rule requires evidence seized by law enforcement to be suppressed when the search is conducted at the request of, and with the consent of, the defendant’s private employer after the private employer has discovered illegal activity.

Separation of Powers: Nondelegation Doctrine

08-554 Mich. Gambling Opposition v. Kempthorne (D.C. Cir.)

BIOs 12/5, reply 12/26. Dist. for 1/9. Re-listed for 1/16.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, authorizes the Secretary of the Interior—“in his discretion”—to acquire lands “for Indians.” Two panel members below held that section 5 establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust, aligning the D.C. Circuit with the First, Eighth, and Tenth Circuits. Justice Brown dissented, agreeing with an earlier Eighth Circuit decision which held that Section 5 “does not delineate the circumstances under which exercise of [the Secretary’s] discretion is appropriate,” and agreeing with the twenty-four states that have asked this Court to hold Section 5 unconstitutional. The questions presented are:

1. Whether the standardless delegation by Congress of totally “discretion[ary]” authority to an Executive official to acquire land “for Indians” is an unconstitutional delegation of legislative power.
2. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934. (This petition will likely be held for 07-526 *Carcieri v. Kempthorne*, which was granted on 2/25 and argued on 11/3.)

Habeas Corpus: Sufficient Evidence

08-559 McDaniel v. Brown (9th Cir.)

BIO 11/28. Record req. 12/16, rec’d 12/22, 12/23. Dist. for 1/16.

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996?
2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979), under U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

First Amendment: Child Online Protection Act

08-565 Mukasey v. ACLU (3d Cir.)

BIO 11/25, reply 12/12. Dist. for 1/9. Re-listed for 1/16.

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

First Amendment: Free Exercise Clause

08-592 Schubert v. Pleasant Glade Assembly of God (Tex.)

BIO 12/15, reply 12/23. Dist. for 1/16.

Does the Free Exercise Clause of the First Amendment preclude the imposition of civil liability for the religiously motivated assault and false imprisonment of a non-consenting minor?

Criminal Law: Double Jeopardy

08-598 Bobby v. Bies (6th Cir.)

BIO 12/5, reply 12/15. Dist. for 1/9. Re-listed for 1/16.

1. Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of “acquittal” that conflicts with this Court’s decisions?
2. Do the Double Jeopardy Clause’s protections apply to a state post-conviction hearing on the question of a death-sentenced inmate’s mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does expose the inmate to the risk of any additional criminal punishment?
3. Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause’s collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate’s mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review? (This petition may be held for 08-67 *Yeager v. United States*, granted on 11/14.)

Fourth Amendment: Excessive Force

08-610 City of Las Cruces v. Vondrak (10th Cir.)

BIO 12/4. Dist. for 1/16.

1. Whether the Court of Appeals erred in holding that Officer McCants violated Dr. Vondrak’s constitutional right to be free from excessive force by the application of handcuffs during his arrest.
2. Whether the Court of Appeals erred in holding the right to be free from excessive force from the application of handcuffs was clearly established.

International Law: Child Abduction

08-645 Abbott v. Abbott (5th Cir.)

BIO 12/29, reply 12/31. Dist. for 1/16.

The Hague Convention on International Child Abduction requires a country to return a child who has been “wrongfully removed” from his country of habitual residence. Hague Convention art. 12. A “wrongful removal” is one that occurs “in breach of rights of custody.” *Id.* art. 3. The question presented is: Whether a *ne exeat* clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent’s consent) confers a “right of custody” within the meaning of the Hague Convention on International Child Abduction.

Fourth Amendment: Pat-Down Search

08-667 Johnston v. Tampa Sports Auth. (11th Cir.)

BIO 1/19. Dist. for 1/16.

1. Whether past consent to an unconstitutional search bars an individual’s right to object to unconstitutional searches in the future.
2. Whether a government can condition entry into an event at a publicly owned and operated stadium upon consent to a suspicionless pat-down search.

PENDING FOR UPCOMING CONFERENCES

Sixth Amendment: Confrontation Clause

[08-357 Hogsett v. United States \(7th Cir.\)](#)

CFR 10/7. BIO 1/7.

Whether the district court violated Petitioner's Sixth Amendment right to confront key witness against him when voir dire revealed the foundation for such questioning and where the district court, based on its in camera assessment that the witness's actual answers would not be favorable to Petitioner, prevented completely Petitioner's trial counsel from cross-examining a key witness in front of the jury regarding a particular source of the witness's potential pro-prosecution bias.

Criminal Law: Mail Fraud

[08-410 Sorich v. United States \(7th Cir.\)](#)

BIO 12/24, reply 1/2. Dist. for 1/23.

1. To establish honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 by a state or local public official, must the government prove that the official breached a fiduciary duty rooted in state law?
2. To establish honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 by a state or local public official, must the government prove that the official intended private gain to himself or a co-schemer?
3. If 18 U.S.C. § 1346 cannot be interpreted to include either a state law or a private gain limiting principle, should the statute be held unconstitutionally vague?

Sovereign Immunity: State-Created Entity

[08-457 Int'l Shipping Agency, Inc. v. P.R. Ports Auth. \(D.C. Cir.\)](#)

BIO of United States 1/7.

1. Whether a state-created entity can be an arm of the state entitled to sovereign immunity under the Eleventh Amendment for some purposes but not for others.
2. Is the Puerto Rico Ports Authority, a public corporation created by the Commonwealth of Puerto Rico, an arm of the Commonwealth for Eleventh Amendment purposes where the indicia of immunity point in different directions and the Commonwealth has no liability with respect to the claims being litigated?

Sixth Amendment: Confrontation Clause

[08-464 Ali v. United States \(4th Cir.\)](#)

BIO 1/7.

Can a Sixth Amendment violation involving the presentation of evidence to the jury in a criminal prosecution, which evidence the defendant is denied the right to see, ever constitute harmless error?

Fourth Amendment: Pat-Down Search

08-473 New Jersey v. Matthews (N.J.)

CFR 12/1. BIO 12/23, reply 1/7. Dist. for 1/23.

Florida v. J.L., 529 U.S. 266 (2000), held that an anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. Here, during a lawful detention of an automobile, the police conducted a protective search and secured a handgun they suspected of being in the vehicle due to the totality of threatening circumstances, which included an anonymous report that someone in the vehicle was flashing a gun. Does *J.L.* require suppression of the handgun? (This case may be held for 07-1122 *Arizona v. Johnson*, granted and set for oral argument on 12/9.)

First Amendment: Student Prayer

08-482 Borden v. Sch. Dist. of the Twp. of E. Brunswick (3d Cir.)

Amici Am. Football Coaches Ass'n 10/15, Se. Leg. Found. 11/14. BIO 12/29. Dist. for 2/20.

Do public school administrators, faculty, coaches, and staff violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts?

Immigration Law: *Chevron* Deference

08-552 Ali v. Mukasey (7th Cir.)

BIO 12/29. Dist. for 2/20.

1. Given the agency deference discussed in *Chevron v. Natural Resources Defense Council*, 467 U.S. 278 (1984), what level of deference must be granted to the Board of Immigration Appeals (BIA) when defining a crime involving moral turpitude when it deviates from its own well-settled analysis?
2. What documents or evidence can the BIA turn to when determining a crime involving moral turpitude, whether it can look to the elements and nature of the offense of conviction or rather must it be the particular facts relating to the crime?

First Amendment: Libel

08-595 Mann v. Abel (N.Y.)

BIO 1/5.

Paul Levy of Public Citizen is assisting the respondent.

1. Under what set of facts and conditions will the First Amendment freedom of press and free speech not be protected by the courts due to malicious publication of lies and false conclusions reaching the tort of libel without any basis whatsoever in fact?
2. One has a right to his own opinion, but not to his own facts; should a newspaper be permitted to wantonly and brazenly make libelous statements about an upstanding citizen and professional without punishment or reprimand?

Civil Procedure: Summary Judgment

[08-599](#) *Browning v. Sw. Research Inst.* (5th Cir.)

BIO 1/5.

1. Whether, in constructive discharge cases, specifically enumerated “relevant” or “aggravating” factors relied upon by the Third, Fifth, and Sixth Circuits may be the exclusive considerations in determining whether to grant judgment as a matter of law under Fed. R. Civ. Pro. 56 or whether, as in other circuits, district courts must review the evidence as a whole.
2. Does *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), holding that district courts must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence, apply to employment discrimination claims other than termination claims?

Fifth Amendment: Takings Clause

[08-600](#) *Atamirzayeva v. United States* (Fed. Cir.)

BIO 1/5.

Did the Federal Circuit err in adopting a categorical rule that bars foreign nationals from seeking compensation under the Takings Clause for property taken by the United States overseas unless that have some preexisting substantial connection with the United States?

Preemption: Medicaid

[08-603](#) *Vos v. Barg* (Minn.)

BIO 1/5.

Does 42 U.S.C. § 1396p(b)(4)(B) preempt a state law that requires recovery of Medicaid benefits from the value of the assets in a surviving spouse’s probate estate regardless of which spouse formally owned those assets when the recipient spouse died?

Federal Jurisdiction: Foreign Sovereign Immunities Act

[08-640](#) *Fed. Ins. Co. v. Kingdom of Saudi Arabia* (2d Cir.)

BIOs 12/30. Suppl. brief of individual respondents 1/12. Dist. for 2/20.

1. Whether, for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(a), a claim against an “agency or instrumentality” of a foreign state encompasses a claim against an individual foreign official.
2. Whether tort claims brought against foreign states and officials based on acts of terrorism committed in the United States must meet the conditions of the FSIA’s “state sponsor of terrorism” exception, 28 U.S.C. § 1695A, and cannot be brought under the FSIA’s exception for non-commercial tort claims, 28 U.S.C. § 1605(a)(5).
3. Whether the Due Process Clause precludes U.S. courts from exercising personal jurisdiction over individuals who provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist attacks in the United States.

Communications Regulation: Broadcast Indecency

08-653 *Fed. Commc'ns Comm'n v. CBS Corp.* (3d Cir.)
BIO 1/8.

Whether the court of appeals erred in holding that the Federal Communications Commission acted arbitrarily and capriciously under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, in determining that the most widely viewed broadcast of public nudity in television history fell within the federal prohibitions on broadcasting indecency.

American Indian Law: “Indian Lands”

08-655 *Harrah's Operating Co., Inc. v. NGV Gaming, Ltd.* (9th Cir.)
BIO 12/24, reply 1/7. Dist. for 1/23.

Does the term “Indian lands” as used in 25 U.S.C. §§ 2701–2721 include both land that “is held by the United States in trust for an Indian tribe” and land that “will be held in trust by the United States for an Indian tribe”?

RICO: Enterprise

08-677 *Dahlgren v. First Nat'l Bank of Holdrege* (8th Cir.)
BIO 12/24. Dist. for 1/23.

Does a bank that for its own benefit actively assists in carrying out a fraudulent scheme involving its customer, a RICO enterprise, “conduct or participate, directly or indirectly, the conduct of such enterprise’s affairs”?

Civil Procedure: Collateral Order Doctrine

08-678 *Mohawk Indus., Inc. v. Carpenter* (11th Cir.)
BIO 12/23, reply 1/6. Dist. for 1/23.

Whether a party has an immediate appeal under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), of a district court’s order finding waiver of the attorney-client privilege and compelling production of privileged materials.

Fifth Amendment: *Miranda* Rights

08-680 *Maryland v. Shatzer* (Md.)
BIO 12/23. Dist. for 1/23.

Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to *Miranda*?

Civil Procedure: Personal Jurisdiction

08-686 *Boschetto v. Hansing*

BIO 12/24. Dist. for 2/20.

1. Whether the sale of an item through an internet auction site such as eBay provides the requisite “minimum contacts” to support personal jurisdiction over a non-resident defendant in the buyer’s forum state.
2. Whether “purposeful availment” can be found utilizing the “effects test” enunciated in *Calder v. Jones*, 465 U.S. 783 (1984), to confer jurisdiction over the seller of merchandise through an internet auction site where it is alleged that the seller committed a tortious act in the forum state arising from the transaction.

ERISA: Dispute Resolution

08-699 *E.I. DuPont de Nemours & Co. v. Amthill Rayon Workers, Inc.* (4th Cir.)

BIO 12/24. Dist. for 1/23.

Whether the parties’ agreement to provide benefits to employees covered by a collective bargaining agreement “subject to” the terms of separate ERISA benefit plans that contain dispute resolution procedures for benefit eligibility constitutes forceful evidence that the parties intended to exclude from labor arbitration disputes involving eligibility for plan benefits?

First Amendment: Standing

08-701 *Morrison v. Bd. of Educ. of Boyd County* (6th Cir.)

BIO 12/29. Dist. for 2/20.

1. The Defendant School’s Speech Policies specifically restricted speech under threat of suspension and being turned over to the local or state police. Consequently, Plaintiff refrained from speaking rather than risk punishment. Did the Sixth Circuit err by holding, in conflict with this Court and the First, Second, and Eleventh Circuits, that the Plaintiff did not suffer an injury-in-fact when he refrained from speaking and this cannot seek relief from a federal court?
2. Did the Sixth Circuit err by holding, in conflict with every other circuit to have addressed the issue, that a request for nominal damages for past harm does not defeat a claim of mootness where the challenged restriction on free speech has been repealed?

Habeas Corpus: Deference

08-724 *Smith v. Spisak* (6th Cir.)

BIO 12/29. Dist. for 2/20.

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act (AEDPA) and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner’s favor questions that were not decided or addressed in *Mills*?
2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronin*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court’s reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Statute of Limitations: Section 1981

[08-736](#) Fonteneaux v. Shell Oil Co. (5th Cir.)

BIO 1/8.

Whether a Plaintiff's cause of action for denial of promotion which alleges violations of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, 105 Stat. 1071, should be governed exclusively by the four-year statute of limitations under 28 U.S.C. § 1658(a).

Preemption: Price-Anderson Act

[08-745](#) Dumontier v. Schlumberger Tech. Corp. (9th Cir.)

BIO 1/9.

1. Is the determination whether a member of the public sustained a "bodily injury" under 42 U.S.C. § 2014(q) of the Price-Anderson Act a "substantive rule of decision" under 42 U.S.C. § 2014(hh) that must be decided under the law of the state where the illegal radiation dose occurred when the Nuclear Regulatory Commission's public dose limit for members of the public was admittedly violated?
2. Whether the Price-Anderson Act preempts Plaintiffs' state law causes of action if their causes of action do not arise from a "nuclear incident" as defined under 42 U.S.C. § 2014(q) of the Price-Anderson Act.

Civil Procedure: Standard of Review

[08-768](#) Bashas', Inc. v. Parra (9th Cir.)

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

In reversing the denial of a class action certification, did the Ninth Circuit fail to comply with this Court's mandate in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), instructing the circuit courts to remand for clarification instead of presuming that the district court intended an obviously incorrect legal result when its order is susceptible of a legally correct reading?

CALLS FOR RESPONSE

NEW CFR

Habeas Corpus: Plea Agreements

08-763 Mabry v. United States (3d Cir.)

CFR 1/9, due 2/9.

In this case, the Third Circuit concluded that the holding of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)—that a criminal defense lawyer is constitutionally ineffective if he does not file a notice of appeal when his client instructs him to do so—does not apply when the client has entered into a plea agreement with a waiver of the right to appeal and to collaterally attack the sentence. The Third Circuit expressly rejected the contrary holdings of the Second, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits and announced that it “will part ways with the approach taken by the majority of the courts of appeals.” The Seventh Circuit has now agreed with the Third Circuit. The question presented is whether the holding in *Roe v. Flores-Ortega* is applicable in a *habeas* case where the defendant has entered into a plea agreement that includes a waiver of the right to take an appeal or to collaterally attack the sentence.

PENDING CFR

Due Process: Termination of Employment

08-159 Lee v. New Orleans Police Dep’t (La. Ct. App.)

CFR 9/30, due 1/12 (ext.).

1. Whether the failure to provide a pre-termination hearing pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), is no longer a violation of the Due Process Clause if the denial of the pre-termination/deprivation hearing is during a unique circumstance or extraordinary event such as a hurricane or flood.
2. Under what unique circumstance, extraordinary event, or emergency situation can the government suspend the Due Process Clause of the United States Constitution?
3. Can the government take a citizen’s property during an emergency or extraordinary event other than war?

Employee Benefits: Status of Contributions

08-263 Jackson v. United States (4th Cir.)

CFR 9/16, due 1/16 (ext.).

Whether an unpaid employer contribution to a company’s employee benefit plan, such as a pension or retirement plan, becomes an asset of the plan before it is paid into the plan such that an officer of such company can be convicted of embezzling from the plan when the company fails to timely fund the plan.

Due Process: Forfeiture

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

CFR 11/12, due 1/12 (ext.).

1. In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the “speedy trial” test employed in *United States v. \$8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?
2. In light of this Court’s holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs’ allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court?

Civil Procedure: FRCP 60(b)

08-514 Mitchell v. Rees (6th Cir.)

CFR 11/26, due 1/26 (ext.).

Federal Rule of Civil Procedure (FRCP) 60(b)(1) allows a party to seek relief from a final judgment for “mistake, inadvertence, surprise, or excusable neglect” and requires that parties move for relief within one year, while FRCP 60(b)(6) allows a party to seek such relief for “any other reason justifying relief from the operation of judgment” and requires parties to move for relief “within a reasonable time.” Here, the district court granted petitioner’s 60(b)(6) motion because the court of appeals had explicitly abrogated the legal rule on which the petitioner’s conviction had been sustained and this Court had abrogated the legal rule that had prevented the petitioner from seeking relief earlier. The court of appeals reversed, holding that because petitioner alleged legal error as part of the basis for his 60(b)(6) motion, he was required to move pursuant to FRCP 60(b)(1), under which his motion was untimely. May a federal court ever grant a motion under FRCP 60(b)(6) in a case involving legal error?

Sixth Amendment: Ineffective Assistance of Counsel

08-551 Branker v. Gray (4th Cir)

CFR 1/6, due 2/5.

1. Has the Fourth Circuit’s expansive interpretation of the Court’s opinions in *Wiggins v. Smith*, *Rompilla v. Beard*, and *Williams v. Taylor* denied the North Carolina state courts the deference their decisions are due under 28 U.S.C. § 2254(d) and (e) and supplanted the deference due counsel’s decisions under *Strickland* with an ABA Guidelines no-stone-untuned standard for investigations in every capital case?
2. Are a state court’s findings that an expert was not credible because of an insufficient factual basis and that trial counsel’s judgments that mental health defenses and a defense of accident might seem inconsistent to a jury the kind of reasonable decisions based upon the evidence before the state court that are entitled to deference under *Strickland* and 28 U.S.C. § 3354(d) and (e)?
3. Can a defendant who is able to and does retain counsel and who refuses to pay for mental health expert assistance subsequently claim ineffective assistance of counsel for failure to retain and employ such an expert?

First Amendment: Employee Speech

[08-608](#) **Flipping v. Reilly (3d Cir.)**

CFR 12/2, due 1/23 (ext.).

1. Whether the Third Circuit erred in holding that a public employee's in-court testimony, made pursuant to his official duties, is cloaked with First Amendment protection notwithstanding this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
2. Whether the Third Circuit ignored established principles of qualified immunity in holding that government employees are subject to suit under section 1983 when they discipline employees for speech that is made pursuant to their official duties, and in so doing, improperly affirmed the District Court's denial of qualified immunity.
3. Assuming the respondent's testimony was protected, whether the Third Circuit so far departed from the accepted and usual course of judicial proceedings involving claims of qualified immunity when it failed to abide by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which stands for the proposition that upon an employee's demonstration that his conduct is constitutionally protected and was a motivating factor in the employer's adverse employment decision, a reviewing court must go on to determine whether the employer would have reached the same decision even in the absence of the protected conduct?

Criminal Law: Aggravated Identity Theft

[08-622](#) **United States v. Villanueva-Sotelo (D.C. Cir.)**

CFR 12/31, due 1/30.

The federal aggravated identity theft statute prescribes a mandatory two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The question presented is whether, in order to obtain a conviction under section 1028A(a)(1), the government must establish that the defendant knew that the "means of identification" in question belonged to another person. (This petition will likely be held for 08-108 *Flores-Figueroa v. United States*, which was granted on 10/20 and set for argument on 2/25.)

First Amendment: Prior Restraint

[08-636](#) **Gen. Auto Serv. Station v. City of Chicago (7th Cir.)**

CFR 12/9, due 2/9 (ext.).

By ordinance, the City of Chicago grandfathers some, but not all, lawfully established but now nonconforming outdoor signs. The benefit of the grandfather status is predicated upon prior compliance with Chicago's former sign permitting requirement that, when it was in force, violated the First Amendment as an invalid prior restraint on speech. The questions presented are:

1. Whether a municipality violates the First Amendment when, by reason of an individual's past exercise of his First Amendment right to ignore an unconstitutional sign permitting requirement, it prohibits the continued display of a lawfully established but now non-conforming outdoor sign.
2. Whether a municipality's prohibition of future speech for some but not all speakers, in the form of non-conforming signs and billboards, otherwise violates the First Amendment, when such prohibition is imposed on the sign owner or operator for having in the past engaged in a certain kind of lawful speech, an issue upon which there is a direct conflict between federal circuit courts of appeal.

3. Whether an outdoor sign ordinance and a separate grandfathering provision modifying that sign ordinance are to be treated as a combined single regulation of speech for purposes of determining content-neutrality and constitutionality under the First Amendment, an issue upon which there is a circuit split.

First Amendment: Campaign Reform

08-648 Brewer v. Nader (9th Cir.)

CFR 1/6, due 2/5.

1. Did the Ninth Circuit err in holding—in conflict with the Eighth Circuit—that Arizona’s requirement that candidate nomination petition circulators be residents of the State was subject to strict scrutiny and failed to meet that standard under *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Court expressly left open the question?
2. Did the Ninth Circuit err in holding—in conflict with the Arizona Supreme Court—that Arizona’s nomination petition filing deadline for independent presidential candidates in subject to strict scrutiny review under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in absence of a showing that the filing deadline imposes any burden—severe or otherwise—on the candidate?

Sixth Amendment: Ineffective Assistance of Counsel

08-651 Padilla v. Kentucky (Ky.)

CFR 12/18, due 1/21.

Petitioner, a legal resident of the United States but not a citizen, was indicted for trafficking in marijuana—an offense designated as an “aggravated felony” under the Immigration and Naturalization Act (INA). Prior to entering a plea of guilty to that offense, Petitioner was incorrectly advised by counsel that the plea would not affect his immigration status. Because the offense was an aggravated felony, Petitioner’s deportation is mandatory. Petitioner then sought state post-conviction relief arguing that his attorney had improperly advised him. The Supreme Court of Kentucky denied post-conviction relief, holding the Petitioner was not entitled to accurate advice from his attorney on immigration consequences because he had no Sixth Amendment right to counsel in that proceeding. The questions presented are:

1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an “aggravated felony” under the INA, is a “collateral consequence” of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise.
2. Assuming immigration consequences are “collateral,” whether counsel’s gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.

Section 1983: Municipal Liability

08-704 Bolton v. City of Dallas (5th Cir.)

CFR 12/23, due 1/22.

1. In an action under 42 U.S.C. § 1983, may a city or other local government body be held liable for a constitutional violation because the official who committed that violation exercised the final authority to make the decision in question?
2. In an action under 42 U.S.C. § 1983, does the existence of a written government standard forbidding a constitutional violation preclude the imposition of liability on a city or other local government body for such a violation by its officials?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

PENDING CVSG

Statute of Limitations: Inquiry Notice

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

BIO 6/30, reply 7/10. Dist. for 9/29. CVSG 10/6.

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.

Petroleum Marketing Practices Act: Constructive Termination

08-240/08-372 Mac's Shell Serv. v. Shell Oil Prods. Co./Shell Oil Prods. Co. v. Mac's Shell Serv. (1st Cir.)

08-240: BIO 10/31. Dist. for 11/25. CVSG 12/1.

08-372: BIO 10/24, reply 11/7. *Amicus* Am. Petroleum Inst. 10/24. Dist. for 11/25. CVSG 12/1.

08-240:

Whether the Petroleum Marketing Practices Act encompasses a claim for “constructive” nonrenewal of the franchise relationship where: (1) the petitioner-franchisees filed suit prior to receiving new lease agreements that violated the Act; (2) the lease agreements were presented on a take-it-or-leave-it basis; (3) the respondent-franchisor stated it would terminate the franchises unless petitioners signed the lease agreements; and (4) the franchisees signed the lease agreements, under protest, and pursued their legal claims against the franchisor.

08-372:

Whether a service station operator that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was “constructively terminated” in violation of the Act.

False Claims Act: State Audits

08-304 Graham County Soil & Water Conservation Dist. v. United States *ex rel.* Wilson (4th Cir.)

BIO 11/7, reply 11/18. *Amici* Nat'l League of Cities, Pharm. Research & Mfrs. of Am., Chamber of Commerce of the U.S., Wash. Legal Found., Pennsylvania 10/8. Dist. for 12/5. CVSG 12/8.

Whether an audit and investigation performed by a State or its political subdivision constitutes an “administrative . . . report . . . audit, or investigation” within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

Held/Awaiting Action

Preemption: FDCA / State Consumer Remedy

07-822 Pa. Employees Benefit Trust Fund v. Zeneca (3d Cir.)

BIO 2/21, reply 3/4. Dist. for 3/21. Held for 06-1249 *Wyeth v. Levine* (granted 1/18/08, arg. 11/3/08).

Whether 21 U.S.C. § 352(n) and the regulations promulgated thereunder by the Food and Drug Administration preempt all state-law claims for unfair and deceptive marketing of a prescription drug even though Congress stated in the legislation that created § 502(n), P.L. 87-781 § 202, 76 Stat. 793 (Oct. 10, 1962), that “[n]othing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law.”

Pleading Requirements

07-827 Hasty v. Iqbal (2d Cir.)

CFR 3/17. BIO 4/16, reply 4/19. Dist. for 5/15. Re-listed for 6/12. Held for 07-1015 *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Whether a supervisory official sued as an individual defendant in a *Bivens* action is entitled to qualified immunity when the plaintiff pleads only generalized and conclusory allegations in his complaint and asserts no specific facts as to that supervisory official.

Prisoners’ Rights: Access to the Courts

07-897 Hust v. Phillips (9th Cir.)

CFR 2/29. BIO 5/30, reply 7/7. Dist. for 9/29.

1. Did a prison librarian violate a prisoner’s right of access to courts when she declined to let the prisoner use the library’s comb-binding machine to bind a petition for writ of certiorari, even though comb-binding is not required by this Court’s rules and is, in at least some circumstances, affirmatively discouraged?
2. Was the law imposing liability in this specific context so clearly established that a reasonable librarian would know that denying a prisoner’s request to comb-bind his petition was unlawful?

Pleading Requirements

07-958 Hunter v. Hydrick (9th Cir.)

BIO 4/11, reply 4/18. Dist. for 5/8. Re-listed for 6/12. Held for 07-1015 *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Does a civil rights complaint against government actors sued in their individual capacities state a claim under Federal Rule of Civil Procedure 8(a)(2) if it alleges only that “defendants’ policies, practices and customs” resulted in plaintiff’s constitutional deprivations, without pleading any facts regarding the form, manner, or content of the “policies, practices and customs,” or regarding the roles of the individual defendants in creating, promulgating or executing those “policies, practices, and customs?”

Pleading Requirements

07-1150 Sawyer v. Iqbal (2d Cir.)

BIO 5/12, reply 5/22. Dist. for 6/12. Held for 07-1015, *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. § 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pled directly under the relevant constitutional provisions.

Criminal Law: Evidence of Intent

07-1376 City of San Francisco v. Rodis (9th Cir.)

BIO 7/1, reply 7/28. Dist. for 9/29. Held for 07-751 *Pearson v. Callahan* (granted 5/24, arg. 10/14).

1. 18 U.S.C. § 472 makes it illegal to pass a counterfeit bill “with intent to defraud.” Is probable cause to arrest an individual for a suspected violation of this statute established once the individual attempts to pass a counterfeit bill, as the Eleventh and Fifth Circuits have concluded, or must the arresting officer develop additional, independent evidence of “intent to defraud,” above and beyond the intent inferred from the passing of the counterfeit bill, before arresting the suspect, as the Ninth Circuit held below in this case?
2. Did the Ninth Circuit err in denying qualified immunity to officers who arrested a suspect for violation of 18 U.S.C. § 472, based on their reasonable belief that he had attempted to pass a counterfeit bill – even without additional evidence of intent – was sufficient to establish probable cause and where no court had ever held that additional evidence of intent was required? (A similar question relating to qualified immunity is pending before the Court in *Pearson v. Callahan*, 07-751).
3. Should *Saucier v. Katz*, 533 U.S. 194 (2001) be overruled? (This question is pending before the Court in *Pearson v. Callahan*, 07-751).

Habeas Corpus: Sufficient Evidence

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

CFR 8/5. BIO 8/29, reply 9/11. Dist. for 9/29.

In a state trial of respondent 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 respondent. In federal habeas corpus proceedings, the Ninth Circuit Court of Appeals 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?

Antitrust: Competitor Fraud

07-1501 IKON Office Solutions, Inc. v. NewCal Indus., Inc. (9th Cir.)

BIO 8/1, reply 8/8. Dist. for 9/29. Likely held for 07-1309 *Boyle v. United States* (granted 10/1, arg. 1/14).

1. Whether a plaintiff can define a valid antitrust market or submarket as the class of customers who have term contracts with the plaintiff's business rival.
2. Whether a plaintiff can satisfy RICO's proximate-cause requirement by alleging that a business rival defrauded its own customers when those customers, who are not parties, are the ostensible victims of the alleged fraud.
3. Whether, to satisfy RICO's "enterprise" requirement, a plaintiff can allege an "association in fact" without alleging that this "association" had any discrete organizational structure.
4. Whether a plaintiff may invoke the Declaratory Judgment Act to void contracts between the plaintiff's business rival and the rival's customers when those customers are not parties to the suit.

Sixth Amendment: Confrontation Clause

07-1602 de la Cruz v. United States (1st Cir.)

CFR 7/18. BIO 9/17, reply 9/24. Dist. for 10/17. Held for 07-591 *Melendez-Diaz v. Massachusetts* (granted 3/17, arg. 11/10).

Whether expert testimony which is based on and describes the contents and conclusions of case-specific forensic analyses such as autopsy reports which have been prepared by other non-testifying medical examiners and forensic analysts violates a defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).

Fourth Amendment: Probable Cause

08-17 Mercier v. Ohio (Ohio)

BIO 8/12, reply 8/13. Dist. for 9/29. Likely held for 07-1122 *Arizona v. Johnson* (granted 6/23, arg. 12/9).

Whether the Fourth Amendment requires probable cause for the search of a purse being worn or held by an automobile passenger.

Criminal Law: Double Jeopardy

08-40 Hirko v. United States (5th Cir.)

BIO 10/15, reply 10/24. *Amicus* NACDL 8/5. Dist. for 11/14. Held for 08-67 *Yeager v. United States* (granted 11/14).

1. Whether the Fifth Circuit, in conflict with the Sixth, Seventh, Ninth, and Eleventh Circuits, but consistent with the First and D.C. Circuits, correctly refused to give collateral estoppel effect to an acquittal under *Ashe v. Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts.
2. Alternatively, whether the court of appeals' holding that an acquittal may have rested on the jury's *failure* to agree unanimously on the sole disputed element of the offence should be summarily reversed or certiorari granted to resolve the conflict between that decision and those by the Second and Ninth Circuits.

Sixth Amendment: Confrontation Clause

08-381 Sweet v. New Jersey (N.J.)

CFR 10/27. BIO 11/24. Dist. for 1/9. Held for 07-591 *Melendez-Diaz v. Massachusetts* (granted 3/17, arg. 11/10).

Is an individual's Sixth Amendment right to confront witnesses against him violated when the State establishes the accuracy of a machine's analysis of the accused's breath sample through a certification when the declarant who signed the certification is not subjected to cross-examination and when the results of the machine's analysis serve as the basis for the enhanced penalty?

Voting Rights Act: Vote Dilution

08-432 Thompson v. Glades County, Fla. Bd. of County Comm'rs (11th Cir.)

CFR 11/3. BIO 12/2, reply 12/12. Dist. for 1/9. Held for 07-689 *Bartlett v. Strickland* (granted 3/17, arg. 10/14).

1. Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the Fourteenth Amendment of the Constitution of the United States.
2. Are crossover votes properly considered in assessing a potential vote dilution remedy under Section 2 or the Fourteenth Amendment?
3. Whether the lower court erred in holding that petitioners' proposed district—with an African-American voting age population of 50.23%, or at least 47.58%, if adjusted to achieve absolute population equality across districts, a Hispanic voting age population of 15.23%, and a white voting age voting population of approximately 33%—failed to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Preemption: FDCA/State Consumer Remedy

08-437 Colacicco v. Apotex, Inc. (3d Cir.)

BIOs 12/3, reply 12/17. Dist. for 1/9. Held for 06-1249 *Wyeth v. Levine* (granted 1/18, arg. 11/3).

Whether prior approval of a pharmaceutical label by the Food and Drug Administration (FDA) preempts state-law failure-to-warn claims where FDA made no authoritative determination requiring or prohibiting a warning prior to the injury, but subsequently allowed warnings that parallel the state-law duty. (This case will likely be held for

LAST CONFERENCE

View the [January 9th](#) and [January 12th](#) order lists from the January 9th Conference.

CERTIORARI GRANTED

Federal Jurisdiction: Foreign Sovereign Immunities Act

[07-1090/08-539](#) **Republic of Iraq v. Beatty/Republic of Iraq v. Simon (D.C. Cir.)**

07-1090: BIO 4/23, reply 5/5. Dist. for 5/22. CVSG 5/27, filed 12/5 (urging the Court to grant cert.). Dist. for 1/9. Cert. granted 1/9.

08-539: BIO 11/24, reply 12/10. Supp. brief of Simon 12/19. Dist. for 1/9. Cert. granted 1/9.

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime and predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7).

Title VII: Racial Discrimination

[07-1428/08-328](#) **Ricci v. DeStefano (2d Cir.)**

07-1428: CFR 8/27. BIO of New Haven 11/13. Letter from DeStefano 11/17, reply 11/21. Dist. for 12/12. Re-listed for 1/9. Cert. granted 1/9.

08-328: *Amicus* Ctr. for Individual Rights 10/14. BIO of New Haven 11/13, reply 11/21. Dist. for 12/12. Re-listed for 1/9. Cert. granted 1/9.

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. § 2000e-2(I), which makes it unlawful for employers “to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race,” when it rejects the results of such tests because of the race of the successful candidates?

Equal Educational Opportunity Act: Injunction

[08-289/08-294](#) **Horne v. Flores/Speaker of the Ariz. House of Representatives v. Flores (9th Cir.)**

BIOs 12/1, replies 12/11, 12/16. *Amici* Wash. Leg. Found., Am. Legislative Exch. Council 10/6. Dist. for 1/9. Cert. granted 1/9.

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act (EEOA) because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act (NCLB). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with the decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction’s “basic premises” have not been “swept away.” The questions presented are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.
2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

Voting Rights Act: Preclearance Requirement

08-322 Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey (D.C. Cir.)

Motions to Affirm 11/26, reply 12/9. Dist. for 1/9. Probable jurisdiction noted 1/9.

1. Whether § 4(a) of the Voting Rights Act (VRA), which permits "political subdivisions" of a State covered by § 5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of § 5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to § 4(a).
2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the § 5 preclearance requirements can be applied as an exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting-rights guarantees in jurisdictions covered only on the basis of data thirty-five or more years old, or even when considered under a purportedly less stringent rational-basis standard.

CERTIORARI DENIED

ERISA: "Accrued Benefits"

07-663 AK Steel Corp. Retirement Accumulation Pension Plan v. West (6th Cir.)

BIO filed 12/20, reply 1/2. Dist. for 1/18. Re-listed for 6/5. CVSG 6/9, filed 12/2 (urging the Court to deny cert.). Supp. brief of AK Steel Corp. Retirement Accumulation Pension Plan 12/16. Dist. for 1/9. Cert. denied 1/12.

1. Whether the Sixth Circuit, in accord with the Seventh Circuit but in conflict with two other circuits and numerous state courts, was correct in holding that a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B), even though that provision authorizes relief only for violations of "the terms of the plan."
2. Whether the Sixth Circuit, in accord with the Fourth Circuit but in conflict with four other circuits, was correct in holding that a court may apply the rule of *contra proferentem* to override a plan administrator's reasonable interpretation of a pension plan.

Bankruptcy Law: Dischargeability

07-952 Denton v. Hyman (2d Cir.)

BIO 3/21. Dist. for 4/18. CVSG 4/21, filed 12/2 (urging the Court to deny cert.). Supp. brief of Denton 12/10. Dist. for 1/9. Cert. denied 1/12.

1. Whether a state court judgment holding a corporate fiduciary liable for the inherently willful misappropriation and exploitation of corporate assets for personal gain, without any additional finding of “intent,” is dischargeable in bankruptcy (as appears to be the law in the First, Fifth and Seventh Circuits), or is within the purview of the “fiduciary defalcation” exception to discharge of Bankruptcy Code § 523(a)(4) (as appears to be the law in the Fourth, Sixth, Eighth and Ninth Circuits).
2. Whether the express findings of a state court that a corporate officer and director has breached his fiduciary duty by “co-opting [a corporate] enterprise for... his own personal enrichment,” by... “exploiting the [corporations’] assets” and by “misappropriat[ing their] ... tangible assets and goodwill” for personal gain, are sufficient, under principles of collateral estoppel, held applicable to Bankruptcy Court proceedings in *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S. Ct. 654 (1991), to establish a “defalcation while acting in a fiduciary capacity” under Section 523(a)(4) of the Bankruptcy Code?

Sovereign Immunity: Patent Infringement

07-956 Biomedical Patent Mgmt. Corp. v. Cal. Dep’t of Health Servs. (Fed. Cir.)

BIO 3/21, reply 4/2. *Amicus* U.S. Chamber of Commerce, 2/22. Dist. for 4/18. CVSG 4/21, filed 12/2 (urging the Court to deny cert.). Supp. brief of Biomedical Patent Mgmt. Corp. 12/17. Dist. for 1/9. Cert. denied 1/12.

1. Whether a state’s waiver of Eleventh Amendment immunity in one action extends to a subsequent action involving the same parties and the same underlying transaction or occurrence.
2. Whether a state waives its Eleventh Amendment immunity in patent actions by regularly and voluntarily invoking federal jurisdiction to enforce its own patent rights.

Preemption: State-Court Filing Requirements

07-1152 Weldon v. Norfolk S. Ry. Co. (Ohio)

BIO 5/12, reply 5/27. Dist. for 6/12. CVSG 6/16, filed 12/5 (urging the Court to deny cert.). Dist. for 1/9. Cert. denied 1/12.

Whether a state law may impose on plaintiffs bringing asbestos claims preliminary evidentiary medical requirements in cases brought in state court as a condition precedent to the exercise of rights under the Federal Employers’ Liability Act and the Locomotive Boiler Inspection Act.

Preemption: FDCA/State Consumer Remedy

07-1327 Albertson’s, Inc. v. Kanter (Cal.)

Amici Food Mktg. Inst., Rexall Sundown, Inc. 5/22. BIO 6/20, reply 7/2. Dist. for 9/29. CVSG 10/6, filed 12/5 (urging the Court to deny cert.). Supp. brief of Albertson’s, Inc. 12/16. Dist. for 1/9. Cert. denied 1/12.

Are private parties’ state law claims to enforce Food, Drug, and Cosmetic Act requirements preempted by Congress’s mandate that the Act be enforced only by the federal or state governments?

Environmental Law: Clean Water Act

07-1524 *Carlota Copper Co. v. Friends of Pinto Creek* (9th Cir.)

BIO of EPA 9/5 (opposing cert.), reply 9/15. CFR 9/22. BIO 11/21, reply 12/1. Dist. for 1/9. Cert. denied 1/12.

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

Brief in Opposition

Whether the court of appeals erred in setting aside the United States Environmental Protection Agency's issuance of a National Pollution Discharge Elimination System permit on the ground that it was inconsistent with 40 C.F.R. 122.4(i), an EPA regulation implementing the Clean Water Act.

Criminal Law: Double Jeopardy

08-58 *Shelby v. United States* (5th Cir.)

BIO 10/15, reply 10/27. *Amicus* NACDL 8/5. Dist. for 11/14. Cert. denied 11/17. Pet. for reh'g 12/10. Dist. for 1/9. Reh'g denied 1/12.

1. Whether the Fifth Circuit, in conflict with the Sixth, Seventh, Ninth, and Eleventh Circuits, but consistent with the First and D.C. Circuits, correctly refused to give collateral estoppel effect to an acquittal under *Ashe v. Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts.
2. Alternatively, whether the court of appeals' holding that an acquittal may have rested on the jury's *failure* to agree unanimously on the sole disputed element of the offence should be summarily reversed or certiorari granted to resolve the conflict between that decision and those by the Second and Ninth Circuits.

Tax Exemptions: Section 501(c)(4)

08-164 *Vision Serv. Plan v. United States* (9th Cir.)

BIO 11/17, reply 12/2. *Amici* Prevent Blindness Am., Nat'l Taxpayers Union 9/10. Dist. for 1/9. Cert. denied 1/12.

Consistent with the IRS's longstanding position and Congress's intent, whether a nonprofit health care organization that provides benefits to a broad and substantial class of subscribers qualifies for tax exemption as a "social welfare" organization pursuant to section 501(c)(4) of the Internal Revenue Code of 1986.

EMTALA

08-169 *Sociedad Española de Auxilio Mutuo y Beneficencia v. Morales* (1st Cir.)

CFR 9/22. BIO 11/21. Dist. for 1/9. Cert. denied 1/12.

Greg Beck and Brian Wolfman of Public Citizen are co-counsel for the respondent.

Brief in Opposition

One of the requirements for the application of the Emergency Medical Treatment and Active Labor Act (EMTALA) is that the individual must "come to" the emergency department. The question presented is: Whether physical presence is required by the "comes to" language contained in the statute.

State as Plaintiff: Standing

08-199 Georgia v. Florida (D.C. Cir.)

BIO of federal respondents 11/14. BIO of state respondents 12/5, reply 12/16. Dist. for 1/9. Cert. denied 1/12.

1. If the district court has not addressed the issue, may the court of appeals make factual findings in the first instance on the kind and degree of “operational changes” that the Army Corps of Engineers would make to implement certain reservoir storage contracts under the Water Supply Act, and on the basis of those findings rule on whether implementing those contracts would “involve major structural or operational changes” under the Water Supply Act?
2. Whether the “special solicitude” accorded states under *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), excuses a state from establishing the elements of standing required under previously established precedent of this Court, including *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Eighth Amendment: Administrative Fines

08-221 Meadowlake Corp. v. Ohio (Ohio Ct. App.)

CFR 10/7. BIO 12/5, reply 12/16. Dist. for 1/9. Cert. denied 1/12.

1. Whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution applies to a civil, administrative fine assessed in a non-forfeiture case.
2. Whether the emphasis on the “punitive” nature of a fine as set forth in *Austin* or the distinction between remedial fines and punitive fines as delineated in *Bajakajian* applies when analyzing the constitutionality of a civil, administrative fine under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.
3. If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the “grossly disproportionate” standard apply to a non-forfeiture case?
4. If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the U.S. Civil Penalty Policy apply, and what role, if any, does the ability to pay of the one on whom the fine is imposed play?
5. Whether the due process rights of Petitioners were violated when Petitioners were denied the opportunity to present evidence, cross-examine witnesses, and otherwise participate in an evidentiary hearing.
6. Whether the due process rights of Petitioners were violated where a court denies a continuance knowing that the corporation (that has a right to counsel in a quasi-criminal case) will be forced to proceed unrepresented.

Civil Procedure: RCFC 60(b)(4)

08-231 South Fork Band v. United States (Fed. Cir.)

BIO 11/21. Dist. for 1/9. Cert. denied 1/12.

1. Does Rule 60(b)(4) of the Rules of the United States Court of Federal Claims (RCFC), providing for relief from a void judgment, require that it be raised within a “reasonable time,” contrary to other Courts of Appeals’ decisions construing identical Federal Rule of Civil Procedure 60(b)(4) and holding that there is no timeliness requirement?
2. Can the Treaty of Ruby Valley be construed under RCFC 12(b)(6) as a matter of law to not confer treaty-recognized title, without regard to the established tenets for interpretation of Indian treaties?

3. Was the statutory “finality” bar of the Indian Claims Commission Act, § 22, 25 U.S.C. § 70u (1976), in effect after the termination of the Indian Claims Commission (ICC) on September 30, 1978, such that it could then attach to an ICC judgment even though the conditions of the Statute had not been met at the time of the ICC’s termination?

Due Process: Class-Action Choice of Law

08-349 Gen. Motors Corp. v. Bryant (Ark.)

BIO 11/20, reply 12/2. Dist. for 1/9. Cert. denied 1/12.

Whether a state court’s refusal to consider choice of law before certifying a nationwide class action that is predicated upon varying state laws fails to give full faith and credit to the laws of sister states and deprives litigations of due process by injecting arbitrariness into the proceedings.

First Amendment: Heckler’s Veto

08-424/08-431 L.A. County Sheriff’s Dep’t v. Ctr. for Bioethical Reform/Roberts v. Ctr. for Bioethical Reform (9th Cir.)

08-424: CFR 11/3. BIO 11/18. Dist. for 1/9. Cert. denied 1/12.

08-431: CFR 11/7. BIO 11/18. Dist. for 1/9. Cert. denied 1/12.

08-424:

1. Can school and law enforcement officials restrict speech that causes a substantial disturbance at a school even if the manner in which the speech is presented is not in and of itself disruptive?
2. Is there an exception for schools with regard to the ban on the heckler’s veto?
3. Did the sheriff’s deputies violate the First Amendment by instructing anti-abortion protestors with large, graphic photographs of aborted fetuses to leave the perimeter of a middle school when their presence created a substantial disruption?
4. Where an appellate court, such as the Ninth Circuit, admits that the application of a law to a particular circumstance is unclear, does qualified immunity shield police officers from liability for the length of the detention while the officers investigate the application of the unclear law?

08-431:

1. Whether graphic, blown-up photographs of aborted fetuses constitute a *manner* of expression which can reasonably be regulated by a time, place, and manner of restriction on speech adjacent to a public middle school.
2. Whether a captive audience of public school children can constitutionally exercise a heckler’s veto over disturbing speech which interferes with the order of that public school.

Habeas Corpus: Ineffective Assistance of Counsel

08-430 Schriro v. Correll (9th Cir.)

BIO 12/3. Dist. for 1/9. Cert. denied 1/12.

1. Pursuant to a remand to address a claim of ineffective assistance of counsel, the district court held a nine-day evidentiary hearing. In a detailed 109-page report, the district court found that Correll was not prejudiced due to any deficient performance on counsel’s part. The Ninth Circuit reversed. Did the Ninth Circuit fail to appropriately afford deference to the district court’s factual findings?

2. Did the Ninth Circuit essentially eliminate the prejudice prong of the *Strickland* analysis by presuming prejudice, and by failing to consider the facts and circumstances of the offense, the death-qualifying aggravating factors found at trial, Arizona law, and the rebuttal evidence the state would have presented had the alleged omitted mitigation been offered?

Pleading Requirements

08-435 Hall v. Back (6th Cir.)

BIO 12/3. Dist. for 1/9. Cert. denied 1/12.

Whether the raising of an affirmative defense of qualified immunity in an unlawful termination for political affiliation cases based on the First and Fourteenth Amendments of the U.S. Constitution and 42 U.S.C. § 1983 require the plaintiff to provide specific, non-conclusory allegations to survive a motion to dismiss in such an intent-based constitutional tort; and, whether the Court should now reject the emasculating of qualified immunity that has resulted from the decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998)?

Civil Procedure: *Forum Non Conveniens*

08-439 Windt v. Qwest Commc'ns Int'l, Inc. (3d Cir.)

BIO 12/2, reply 12/16. *Amici* INSOL Eur. 10/31, Kingdom of the Netherlands 11/3. Dist. for 1/9. Cert. denied 1/12.

For purpose's of a federal court's application of *forum non conveniens*, where the alternative to pursuing the case in the United States is pursuing the case in another country, is the relevant *domestic* forum the United States (as the First, Eighth, and Eleventh Circuits have held) or merely the specific judicial district in which the district court sits (as the Third Circuit held below)?

Criminal Law: Sentencing

08-444 Cruzado-Laureano v. United States (1st Cir.)

BIO 12/5, reply 12/15. Dist. for 1/9. Cert. denied 1/12.

When a court of appeals reverses a criminal sentence, it remands the case to the district court for further sentencing proceedings because the district court is best situated to hear and decide in the first instance issues that bear on the appropriate sentence. The court of appeals has the option of explicitly restricting the scope of the district court's inquiry on resentencing, but in this case it did not. The question presented is whether a district court on remand for resentencing retains the discretion to hear issues and take evidence beyond the scope of the error addressed by the appellate court, where the appellate court has not expressly limited the district court's authority on remand.

Mineral Leasing Act: Right of Action

08-499 Cuba Soil & Water Conservation Dist. v. Lewis (10th Cir.)

BIO 11/17. Dist. for 1/9. Cert. denied 1/12.

The 1976 amendments to the Mineral Leasing Act provide that when spending its portion of federal royalties, states must give “priority” to state government subdivisions impacted by federal mining development for planning, public services, and infrastructure. 30 U.S.C. § 191. In New Mexico, nearly all of the royalties are targeted for Albuquerque, and no funds are provided to petitioner state subdivisions within whose largely rural boundaries widespread federal oil and gas development occurs. Does Congress’s directive that New Mexico give “priority” to impacted state subdivisions establish a right of action for the subdivisions to establish a “priority” distribution plan for those communities which are adversely impacted from federal mining development?

Section 1983: Privacy Rights

08-500 Lambert v. Hartmann (6th Cir.)

BIO 11/17, reply 12/2. Dist. for 1/9. Cert. denied 1/12.

Petitioner filed a lawsuit under section 1983 for violation of her right to privacy when a public official intentionally published her personal information, including her Social Security number and signature, on a publicly available governmental website. The publication of this personal information enabled thieves to steal Petitioner’s identity, causing her economic harm and damaging her credit. Did the Court of Appeals err in concluding that Petitioner failed to state a claim for violation of her constitutional right to privacy merely because the economic harm resulting from the theft of her identity did not implicate a fundamental liberty interest?

First Amendment: Viewpoint Discrimination

08-518 Turner v. City Council of the City of Fredericksburg, Va. (4th Cir.)

Supp. brief of petitioner 11/3. BIO 11/20, reply 12/5. Dist. for 1/9. Cert. denied 1/12.

1. Does a city council engage in viewpoint discrimination under the Free Speech and Free Exercise Clauses when it promulgates and enforces a “non-denominational” prayer policy specifically to prevent a city council member from closing a council meeting opening prayer in the name of Jesus Christ, but permits prayer by other council members referring to other deities?
2. Does prayer offered by an individual city council member at the opening of a council meeting constitute “government speech”?
3. Is a policy permitting only “non-denominational” prayers at city council meetings unconstitutionally vague and overbroad?
4. Does a city council policy that proscribes (and prescribes) the content of prayers offered at council meetings violate the Establishment Clause?

Section 1983: Qualified Immunity

08-521 Abrams v. Jones (6th Cir.)

BIO 11/19, reply 12/1. Dist. for 1/9. Cert. denied 1/12.

Brian Wolfman and Leah Nicholls of Public Citizen are assisting the respondents.

1. Whether the “for all purposes” mandate of Federal Rule of Civil Procedure 10(c) requires that federal courts accept as true the facts stated in exhibits to a complaint for purposes of evaluating a motion to dismiss.
2. Whether the rule of *Scott v. Harris*, 550 U.S. 372 (2007) (requiring summary judgment reliance on incontrovertible facts established by a public record videotape), also applies to Rule 12(b)(6) motions to dismiss asserting public employees’ qualified immunity defense.
3. Whether the substantive due process “malice and intent to harm” standard, rather than the “deliberate indifference” standard, governs judicial review of police officers’ on-the-scene immediate reaction to a suspect’s need for medical care.

Civil Procedure: FRCP 60(b)

08-532 Cranmer v. Tucson Police Dep’t (9th Cir.)

BIO 11/21. Dist. for 1/9. Cert. denied 1/12.

Should a civil litigant, innocent of wrongdoing or bad faith, have relief under Federal Rule of Civil Procedure 60(b)(6) from the misconduct or neglect of his attorney when the attorney has, through gross negligence and disability, abandoned his representation of the client, failing to conduct discovery, meet deadlines, or respond to a motion for summary judgment, and that misconduct or neglect has resulted in an adverse ruling on a motion for summary judgment against the client?

Fourth Amendment: Probable Cause

08-568 Rothhaupt v. Dickow (6th Cir.)

BIO 11/25. Dist. for 1/9. Cert. denied 1/12.

Whether the Sixth Circuit’s opinion is in conflict with this Court’s holding and decisions in other circuits which would allow the introduction of state law (e.g. whether an officer had the right to arrest under state law) to prove interference with a constitutional right.

Preemption: Utility Ratemaking

08-573 Mich. Env’tl. Council v. Mich. Pub. Serv. Comm’n (Mich. Ct. App.)

BIO 12/1, reply 12/15. Dist. for 1/9. Cert. denied 1/12.

Whether federal law preempts the Michigan Public Service Commission from exercising its historic police powers to protect the public interest and to regulate electric utility retail rates by adopting ratemaking remedies with respect to a utility’s continued payment of spent nuclear fuel fees under the Standard Contract that is in long-term default?

Equal Protection: Contractor Bidding

08-580/08-601 City of Cincinnati v. Cleveland Constr., Inc./Cleveland Constr., Inc. v. City of Cincinnati (Ohio)

BIO of City of Cincinnati 12/1. BIO of Cleveland Constr., Inc. 12/3, reply 12/19. *Amicus* Pac. Leg. Found. 12/3. Dist. for 1/9. Cert. denied 1/12.

08-580:

1. Whether a contractor bidding for a municipal construction contract on equal footing with other bidders can state a facial equal protection claim against the municipality's discretionary procurement system where contracts are awarded to the lowest and best bidder based on evaluating a non-exhaustive list of factors that may include the bidder's compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.
2. Whether strict or other heightened scrutiny applies to a contractor's facial equal protection claim against a municipality's discretionary procurement system providing that bidders compete *ex ante* on equal footing but allowing the municipality to consider, as part of a non-exhaustive list of factors, the bidders' compliance with equal opportunity and non-discrimination protections for minority- and women-owned subcontractors.

08-601:

1. Whether a state scheme of competitive bidding that contains substantive limitations and particularized standards which restrict the discretion of the decisionmaker may give rise to a property interest protected by due process.
2. Whether the City of Cincinnati could deny Cleveland Construction, Inc., the award of a competitively bid contract for the sole purpose of implementing unconstitutional racial requirements and to achieve unconstitutional racial goals.

Criminal Law: Double Jeopardy

08-585 Ohio v. Wade (Ohio Ct. App.)

BIO 12/3. Dist. for 1/9. Cert. denied 1/12.

1. Does the collateral estoppel recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970), bar or limit the trier of fact in a second trial from considering evidence that is relevant to the remaining charges?
2. Does an acquittal on issues of whether a gun was "deadly" or "operable" create a collateral estoppel bar to the consideration of evidence indicated that the defendant wielded the gun, when the gun need not be "deadly" or "operable to the retried counts?"

GRANTED CASES INVOLVING PUBLIC CITIZEN 2008 TERM

Preemption: FDCA/State Consumer Remedy

06-1249 Wyeth v. Levine (Vt.)

BIO filed 4/20, reply 4/30. *Amici Pharm. Research and Mfrs. of Am., Prod. Liability Advisory Council, Inc.*, filed 4/20. CVSG 5/21, filed 12/21 (urging that the case be held for resolution of 06-179 *Riegel v. Medtronic* (arg. 12/4) and 06-1498 *Warner-Lambert v. Kent* (arg. 2/25)). Dist. for 1/18. Cert. granted 1/18. Arg. 11/3.

Brian Wolfman and Allison Zieve of Public Citizen assisted the respondent at the cert. stage.

Brief in Opposition

Whether the prescription drug labeling judgments imposed on manufacturers by the Food and Drug Administration (“FDA”) pursuant to FDA’s comprehensive safety and efficacy authority under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use.

Environmental Law: Standing/Nationwide Injunction

07-463 Summers v. Earth Island Inst. (9th Cir.)

BIO filed 12/5, reply 12/21. Dist. for 1/11. Re-listed for 1/18. Cert. granted 1/18. Arg. 10/8.

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

Brief in Opposition

Respondent’s Brief on the Merits

1. Did the Court of Appeals err in allowing a facial challenge to one set of regulatory provisions and dismissing challenges to seven others on ripeness grounds, where there is no dispute that the one set of rules allowed to be reviewed had been applied countless times by the Forest Service, including an application of the rules to a site-specific action challenged in the district court?
2. Did the respondents have standing, where it is undisputed that the challenged regulations had been applied to them countless times, including an application of the rules to a site-specific action challenged in the district court for which standing was not challenged?
3. Did the facial rule challenge become moot, where the site-specific action was preliminarily enjoined and then the challenges to it were settled, but there is no dispute that the agency continued to apply the regulations to countless other site-specific actions that adversely affected respondents?
4. Did the Ninth Circuit err in finding that the district court did not abuse its discretion in completely setting aside the challenged regulations instead of limiting relief to the Eastern District of California, where respondents are organizations affected by the challenged regulations throughout the country?

Preemption: Cigarette Labeling

[07-562](#) **Altria Group, Inc. v. Good (1st Cir.)**

BIO filed 12/28, reply 1/2. *Amici* R.J. Reynolds Tobacco Co. and U.S. Chamber of Commerce, 11/28. Dist. for 1/18. Cert. granted 1/18. Arg. 10/6. Decided 5-4 in favor of Respondents 12/15.

Brian Wolfman and Allison Zieve of Public Citizen assisted the respondents.

1. Does the Federal Cigarette Labeling and Advertising Act (“FCLAA”) expressly preempt state law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its product to the public when: (a) the predicate state-law duty of such claims is the duty not to deceive; and (b) the Federal Trade Commission (“FTC”) has not only refused to approve or authorize the alleged misrepresentations, but has prohibited their use in a consent decree with a third party?
2. Are such claims impliedly preempted even though: (a) no court has ever held such claims impliedly preempted; (b) this Court has held that there is no implied preemption under FCLAA; (c) the FTC has never exercised its rule making power to address the conduct at issue; and (d) the FTC prohibited the challenged conduct in a consent decree with a third party?

Environmental Law: Clean Water Act

[07-588/07-589/07-597](#) **Entergy Corp. v. EPA/PSEG Fossil LLC v. Riverkeeper/Util. Water Act Group v. Riverkeeper (2d Cir.)**

Riverkeeper BIO filed 2/29, Federal respondents, State of Rhode Island BIOs filed 3/3. Dist. for 4/11. Cert. granted 4/14. Arg. 12/2.

Scott Nelson of Public Citizen is assisting respondents Riverkeeper, et al.

Whether Section 316(b) of the Clean Water Act, 33 U.S.C. 1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures.

Environmental Law: Clean Water Act

[07-984/07-990](#) **Coeur Alaska v. Se. Alaska Conservation Council/Alaska v. Se. Alaska Conservation Council (9th Cir.)**

BIOs 5/14, reply 5/27. *Amici* Nat’l Mining Ass’n, Mountain States Legal Found. 2/28. Brief of respondent Goldbelt, Inc. in support, 2/11. Dist. for 6/12. Re-listed for 6/19. Re-listed for 6/26. Cert. granted 6/27. Arg. 1/12.

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

[Brief in Opposition](#)

Did the Army Corps of Engineers have authority under section 404 of the Clean Water Act to grant a “fill material” permit for an industrial process waste-water discharge that is prohibited by the Environmental Protection Agency’s effluent limitations.

Fourth Amendment: Pat-Down Search of Passenger

[07-1122](#) *Arizona v. Johnson* (Ariz.)

CFR 5/13. BIO 5/22, reply 6/3. Dist. for 6/19. Cert. granted 6/23. Arg. 12/9.

Bonnie Robin-Vergeer of Public Citizen assisted the respondent at the cert. stage.

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, an offense?

Due Process: Recusal

[08-22](#) *Caperton v. A.T. Massey Coal Co., Inc.* (W. Va.)

BIO 9/3, reply 9/16. *Amici* Public Citizen, Brennan Ctr., ABA 8/1, 8/4. Dist. for 10/10. Re-listed for 10/17. Re-listed for 10/31. Re-listed for 11/7. Re-listed for 11/14. Cert. granted 11/14. Arg. 3/3.

Allison Zieve and Brian Wolfman filed an amicus brief on behalf of Public Citizen, urging a grant.

[Amicus Brief \(Cert. Stage\)](#)

Allison Zieve and Leah Nicholls filed an amicus brief on the merits on behalf of Public Citizen in Support of Petitioner.

[Amicus Brief \(Merits Stage\)](#)

Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the \$50 million jury verdict in this case, even though the CEO of the lead defendant spent \$3 million supporting his campaign for seats on the court—more than sixty percent of the *total* amount spent to support Justice Benjamin’s campaign—while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court’s 3-2 decision overturning the verdict. The question presented is whether Justice Benjamin’s failure to recuse himself from participation in his principal financial supporter’s case violated the Due Process Clause of the Fourteenth Amendment.