



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
MARCH 6, 2009 CONFERENCE**

Prepared by Leah Nicholls, 2008–2009 SCAP Fellow

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

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

[Subscribe to the S.Ct. Watch List](#) to receive an update before each Supreme Court conference. Past conference watch lists are available in the [Watch List Archives](#). For more information, contact Leah Nicholls, 2008–2009 Supreme Court Assistance Project Fellow, at (202) 588-1000 or supremecourt@citizen.org.

WATCH LIST CONTENTS

Issue Index.	<u>3</u>
Resources.	<u>5</u>
Links for More Information.	<u>5</u>
Key Terms & Abbreviations.	<u>6</u>
March 6th Conference.	<u>7</u>
Pending for Upcoming Conferences.	<u>11</u>
Calls For Response.	<u>20</u>
New CFR.	<u>20</u>
Pending CFR.	<u>20</u>
Calls for the Views of the Solicitor General.	<u>26</u>
New CVSG.	<u>26</u>
Pending CVSG.	<u>27</u>
Held/Awaiting Action.	<u>29</u>
Last Conference.	<u>32</u>
Certiorari Granted.	<u>32</u>
Certiorari Denied.	<u>32</u>
Granted Cases Involving Public Citizen 2008 Term.	<u>37</u>

ISSUE INDEX

American Indian Law	<i>Clean Water Act</i>	<u>38</u>
<i>IGRA</i>	<i>Standing</i>	<u>11</u>
Antitrust	<i>Standing / Nationwide</i>	
<i>Competitor Fraud</i>	<i>Injunction</i>	<u>37</u>
<i>Sports Leagues</i>	ERISA	
Arbitration	<i>Administrator Deference</i>	<u>26</u>
<i>Appellate Jurisdiction</i>	<i>Preemption</i>	<u>15</u>
<i>Public Policy Defense</i>	False Claims Act	
Attorney's Fees	<i>Medicare Cost Reports</i>	<u>34</u>
<i>"Prevailing Party"</i>	<i>State Audits</i>	<u>27</u>
Civil Procedure	Federal Jurisdiction	
<i>FRCP 60(b)</i>	<i>Copyright Infringement</i>	<u>32</u>
<i>Removal</i>	<i>Foreign Sovereign</i>	
Communications Regulation	<i>Immunities Act</i>	<u>28</u>
<i>Broadcast Indecency</i>	Fifth Amendment	
Criminal Law	<i>Takings Clause</i>	<u>11, 19</u>
<i>Aggravated Identity Theft</i>	First Amendment	
<i>Batson Challenges</i>	<i>Campaign Reform</i>	<u>9</u>
<i>Double Jeopardy</i>	<i>E-Mail Spam</i>	<u>15</u>
<i>Firearm Discharge</i>	<i>Employee Speech</i>	<u>21</u>
<i>Mootness</i>	<i>Prior Restraint</i>	<u>20</u>
<i>Sentencing</i>	<i>Standing</i>	<u>16</u>
<i>Speedy Trial Act</i>	<i>Student Dress</i>	<u>35</u>
<i>Taft-Hartley Act</i>	<i>Student Prayer</i>	<u>33</u>
<i>Venue</i>	Fourth Amendment	
DPPA	<i>Consensual Searches</i>	<u>18</u>
<i>Permitted Uses</i>	<i>Pat-Down Search</i>	<u>39</u>
Due Process	<i>Probable Cause</i>	<u>30</u>
<i>Civil Commitment</i>	<i>Wiretapping</i>	<u>23</u>
<i>Foreclosure</i>	Gov't Contractor Defense	<u>33</u>
<i>Forfeiture</i>	Habeas Corpus	
<i>Prison Conditions</i>	<i>"Clearly Established"</i>	<u>11</u>
<i>Recusal</i>	<i>Plea Agreements</i>	<u>21</u>
Employee Benefits	<i>Sufficient Evidence</i>	<u>29</u>
<i>Employer Contributions</i>	Immigration Law	
<i>Workers' Compensation</i>	<i>Due Process</i>	<u>23</u>
Environmental Law	<i>Judicial Review</i>	<u>11, 13</u>
<i>CERCLA</i>	<i>Stay of Removal</i>	<u>31</u>
	International Law	

<i>Child Abduction</i>	22 , 28	RLUIPA	
<i>Customary Law</i>	33	<i>Strict Scrutiny</i>	10
Pleading Requirements	16 , 29	Section 1983	
PLRA		<i>Gender Discrimination</i>	12
<i>Exhaustion</i>	17	<i>Malicious Prosecution</i>	35
PMPA		<i>Municipal Liability</i>	13
<i>Constructive Termination</i>	27	Sixth Amendment	
Preemption		<i>Confrontation Clause</i>	30 , 31
<i>Cigarette Labeling</i>	38	<i>Ineffective Assistance</i>	8 , 35
<i>Commerce Clause Powers</i>	8	Special Education	
<i>FCRA</i>	9	<i>Standard of Review</i>	10
<i>FDCA / State Consumer</i>		<i>Tuition Reimbursement</i>	39
<i>Remedy</i>	7 , 8 , 25 , 37	Statute of Limitations	
<i>Medicaid</i>	26	<i>Inquiry Notice</i>	27
<i>Medical Marijuana</i>	25	Statutory Interpretation	
<i>Medicare</i>	17	<i>Clarifying Amendments</i>	34
<i>National Bank Act</i>	40	TILA	
Prisoners' Rights		<i>Pleading Requirements</i>	14
<i>Disclosure Statements</i>	7	Title VII	
Public Citizen		<i>Race Discrimination</i>	9
<i>Cert. Denied</i>	32 , 33	Voting Rights Act	
<i>Cert. Granted</i>	37-40	<i>Vote Dilution</i>	31
<i>Cert. Pending</i>	15 , 16 , 25		
RFRA			
<i>Religious Marijuana</i>	22		

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.

MARCH 6TH CONFERENCE

Preemption: FDCA / State Consumer Remedy

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

BIO 2/21/08, reply 3/4/08. Dist. for 3/21/08. Held for 06-1249 *Wyeth v. Levine* (granted 1/18/08, arg. 11/3/08, aff'd 3/4/09). Dist. for 3/6.

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.”

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. Re-listed for 1/23. Re-listed for 2/20. Re-listed for 2/27. Re-listed for 3/6.

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 suits to exchange disclosure statements, but it specifically exempts suits filed by pro se prison inmates. Do the district judges have the power to enact their own rule requiring defendants in pro-se inmate suits to provide 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. Similarly, under federalism principles, a federal court cannot co-opt a state government agency. 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. 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?

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, aff'd 3/4). Dist. for 3/6.

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

Preemption: Commerce Clause Powers

08-530/08-545 City of New York v. Beretta U.S.A. Corp./Lawson v. Beretta U.S.A. Corp. (2d Cir.)

08-530: BIOs 2/4, reply 2/17. Dist. for 3/6.

08-545: BIO of Colt Mfg. Co., LLC 12/23, BIO of Fed. respondents 2/6, reply 2/19. Dist. for 3/6.

08-530:

1. Section 4(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(A)(iii), bars certain lawsuits against the firearms industry when based on state common law, but allows the same claims if they allege the defendant violated a state statute “applicable to the sale or marketing” of firearms. Does the Tenth Amendment prohibit Congress from telling the states which branch of their governments may impose legal duties on the firearms industry?

2. The Second Circuit determined that § 7903(5)(A)(iii) was ambiguous when considering whether a statute is “applicable” to firearms within the meaning of that subparagraph. Did the court misapply the “plain statement rule” of statutory construction when it interpreted § 7903(5)(A)(iii) in a way that broadens federal intrusion into state lawmaking beyond the concededly reasonable construction offered by petitioners?

08-545:

May Congress, relying solely on its Commerce Clause power, retroactively eliminate a claim for money damages that has already accrued under applicable local law without providing any remedy or offsetting benefits for the harms suffered by the plaintiffs?

Sixth Amendment: Ineffective Assistance of Counsel

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

CFR 1/6. BIO 2/5. Dist. for 3/6.

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-unturned 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 such an expert?

Due Process: Prison Conditions

[08-596](#) **Wilson v. Hogsten (3d Cir.)**

BIO 2/3, reply 2/13. Dist. for 3/6.

Whether a federal inmate's confinement in highly restrictive conditions of administrative segregation for almost ten months creates a liberty interest requiring appropriate procedural protections, not afforded here, under the Due Process Clause of the United States Constitution?

First Amendment: Campaign Reform

[08-648](#) **Brewer v. Nader (9th Cir.)**

CFR 1/6. BIO 2/5, reply 2/16. Dist. for 3/6.

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?

Preemption: Fair Credit Reporting Act

[08-730](#) **Am. Bankers Ass'n v. Brown (9th Cir.)**

BIO 2/4, reply 2/18. Dist. for 3/6.

In 1996, Congress established a uniform federal regime for the sharing of customer information among affiliated financial institutions by amending the Fair Credit Reporting Act (FCRA) to remove the statute's barriers to such sharing and to bar states from imposing any "requirement or prohibition" with respect to the "exchange of information" by such institutions. 15 U.S.C. § 1681t(b)(2). The California Financial Information Privacy Act (SB1) imposes requirements and prohibitions on the sharing among affiliated financial institutions of a customer's "nonpublic personal information." Cal. Fin. Code § 4053(b)(1). The question presented is whether the requirements and prohibitions in SB1 imposed on the sharing of customer information among affiliated financial institutions are expressly preempted by the FCRA.

Title VII: Race Discrimination

[08-744](#) **Oakley v. City of Memphis (6th Cir.)**

Amicus Pac. Legal Found. 1/6. BIO 2/5, reply 2/17. Dist. for 3/6.

1. When a content-valid civil-service examination and race-neutral selection process yields unintended disproportionate results as to race and gender, does a municipality illegally discriminate in violation of Title VII when they reject the results to achieve racial proportionality in candidates selected?

2. Does a government employer, faced with evidence of adverse impact but not evidence of illegal discrimination, violate Title VII by rejecting the results of a competitive, content-valid, job-related promotional examination in an attempt to avoid Title VII litigation by unsuccessful participants? (This petition will likely be held for 07-1428/08-328 *Ricco v. DeStefano*, granted 1/9, set for argument 4/22.)

Special Education: Standard of Review

08-841 M.H. v. Monroe-Woodbury Cent. Sch. Dist. (2d Cir.)

BIO 2/4. Dist. for 3/6.

1. Whether the standard employed by the Court of Appeals for the Second Circuit is inconsistent with the IDEA and accords too much deference to a state system which inherently favors state interests over those of classified children and their families.
2. Whether the highly deferential standard of review employed by the Court of Appeals for the Second Circuit is inconsistent with the standard employed by other Circuits, creating a significant conflict which this Court should resolve.

RLUIPA: Strict Scrutiny

08-855 Fowler v. Crawford (8th Cir.)

BIO 2/6, reply 2/24.. Dist. for 3/6.

1. Whether the strict-scrutiny standard embodied in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, requires the government to demonstrate that it seriously considered less-restrictive alternatives to the challenged policy.
2. Whether, particularly at summary judgment, RLUIPA's text—requiring that it “be construed in favor of a broad protection of religious exercise, to maximum extent permitted by the terms of [the] Act and the Constitution”—can be reconciled with this Court's instruction that “due deference” be given to prison officials.

PENDING FOR UPCOMING CONFERENCES

Fifth Amendment: Takings Clause

08-497 Amerisource Corp. v. United States (Fed. Cir.)

BIO 2/13. Dist. for 3/20.

Whether it is a compensable taking under the Fifth Amendment for the Government to seize (and not return) an innocent third party's property for use as evidence in a criminal prosecution, if the property is not itself contraband, is not the fruits of criminal activity, and has not been used in criminal activity.

Environmental Law: Standing

08-571 Elko County v. Wilderness Soc'y (9th Cir.)

BIO 2/13. Dist. for 3/20.

1. Is a proposed intervenor of right required to have independent Article III and prudential standing to intervene as a defendant aligned with the United States in a quiet title action under 28 U.S.C. § 2409?
2. Is an environmental interest sufficient to confer Article III and prudential standing on a proposed intervenor in a quiet title action under 28 U.S.C. § 2409?
3. Is a circuit court of appeals required to decide whether a case in a district court is moot as between the original parties before it decides whether a proposed intervenor of right needs Article III and prudential standing to support intervention?

Habeas Corpus: "Clearly Established"

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

BIO 2/13. Dist. for 3/20.

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

Immigration Law: Judicial Review

08-656 Jezierski v. Holder (7th Cir.)

BIO 2/17. Dist. for 3/20.

1. Does the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), which bars judicial review of "any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. § 1252(a)(2)(B)(ii), permit the Attorney General himself to preclude judicial review by declaring certain decisions discretionary by administrative regulation?
2. If so, does the INA's jurisdiction-restoring provision, which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding [judicial] review of constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D), allow the courts of appeals to review mixed questions of law and fact or only questions of law?

Section 1983: Gender Discrimination

08-672 Equity in Athletics, Inc. v. Dep't of Educ. (4th Cir.)

BIO 2/4, reply 2/20. Dist. for 3/20.

1. Whether the implied private right of action under Title IX preempts or otherwise displaces the rights of action under 42 U.S.C. § 1983 and *Ex parte Young*?
2. Whether Title IX, § 844 of the Education Amendments of 1974, and the Department of Education Organization Act delegated interpretive authority to the Department of Health, Education & Welfare and transferred that authority to respondent Department of Education?
3. Whether the Fourth Circuit's *Blackwelder* and *Quince Orchard* tests apply the proper standard for entitlement to preliminary injunctive relief?
4. Whether petitioner Equity in Athletics, Inc. has demonstrated entitlement to preliminary injunctive relief? (This petition may be granted, vacated, and remanded in light of 07-1125 *Fitzgerald v. Barnstable School Committee*, which was decided 1/21).

Criminal Law: Sentencing

08-673 Clark v. United States (7th Cir.)

BIO 2/20. *Amicus* NACDL 12/22. Dist. for 3/20.

1. Whether a criminal defendant can be sentenced to a mandatory minimum and exposed to an increased maximum under 21 U.S.C. §§ 841(b)(1)(A) or (b)(1)(B) based upon facts the government is unable to prove beyond a reasonable doubt. As the Seventh Circuit acknowledged in this case, the courts of appeals are divided on this question.
2. Whether the holding of *Harris v. United States*, 536 U.S. 545 (2002), that facts triggering a mandatory minimum may be found by the trial judge by a preponderance of the evidence, remains good law.

Environmental Law: CERCLA

08-683 Cannon v. Gates (10th Cir.)

BIO 2/27.

1. Whether the federal government may assert that it has selected a removal or remedial action under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9604, by relying upon decades of on-and-off preliminary investigations without finalizing a response plan.
2. Whether section 113(h) of CERCLA, 42 U.S.C. § 9313(h), strips federal courts of jurisdiction in suits that are directed merely toward compelling the party responsible for contaminating a site with hazardous waste, in this case the federal government, to timely clean up the hazardous waste it generated, and do not attempt to delay the cleanup of the site.

Immigration Law: Judicial Review

[08-697](#) *Gjidoda v. Baker* (6th Cir.)

BIO 2/27.

1. Did Congress intend to provide for federal court review of deportation orders entered before the enactment of the REAL ID Act of 2005 where such challenges were not brought until after the enactment of the Act?
2. Does the retroactive elimination of habeas review of Petitioner's deportation order without providing an adequate, or any, substitute violate the Suspension Clause?

Section 1983: Municipal Liability

[08-704](#) *Bolton v. City of Dallas* (5th Cir.)

CFR 12/23. *Amicus* Nat'l Employment Lawyers Ass'n 1/22. BIO 2/23.

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?

Criminal Law: Speedy Trial Act

[08-728](#) *Bloate v. United States* (8th Cir.)

BIO 2/4, reply 2/18. Record req. 2/23.

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" (emphasis added). The question presented, on which the courts of appeals are divided, is whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1).

Civil Procedure: Removal

[08-742](#) *Jesensky v. Duquesne Light Co.* (3d Cir.)

BIO 2/9. Dist. for 3/20.

1. Whether a private contractor whose contract performance is closely supervised by an officer or agency of the United States may invoke the federal officer removal statute with respect to a state law action based upon conduct not specifically directed by the government.
2. Whether a Court of Appeals may affirm a grant of summary judgment in a case removed from state court without addressing a substantial question as to the existence of federal subject matter jurisdiction.

Criminal Law: *Batson* Challenges

08-750 Flores v. United States (5th Cir.)

BIO 2/11, reply 2/20. Dist. for 3/20.

Petitioner is indigent and Hispanic. At his trial, the Government used its peremptory challenges to strike all three Hispanic panel members who mathematically could have been empaneled, though they said nothing that could provide a race-neutral basis for doing so. Appointed counsel did not object to this obvious *Batson* violation. Did appointed counsel's failure to object waive petitioner's *Batson* claim, or was it a forfeiture so that the *Batson* issue is reviewable under the plain error standard?

Criminal Law: Firearm Discharge

08-755/08-756 Compean v. United States/Ramos v. United States (5th Cir.)

BIO 2/11. Dist. for 3/20.

1. Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, provides fair notice and thus applies to a law enforcement agent who discharges his weapon while on duty and in the course of the of attempting to stop and apprehend a fleeing felon who had attempted to avoid arrest by flight and who actively resisted arrest?
2. Whether the balancing test mandated by the Court in *Graham v. Connor*, 490 U.S. 386 (1989) for determining the "reasonableness" of the use of force must integrate the fact that this was an illegal border entry by an illegal alien who entered the country strictly to smuggle drugs and was therefore not entitled to any Fourth Amendment protections and who also had attempted to avoid arrest by high speed vehicular flight and by actively resisting arrest? (These petitions may be held for 08-5274 *Dean v. United States*, which was granted 11/14 and set for oral argument 3/4.)

TILA: Pleading Requirements

08-764 Porter v. NationsCredit Consumer Discount Co. (3d Cir.)

BIO 2/13. Dist. for 3/20.

1. Whether the Court below properly dismissed Petitioner's claim for actual damages under the Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(1), because she did not plead detrimental reliance.
2. Whether the Court below should have examined the substance of charges labeled as "premiums for credit life insurance" to determine whether these "premiums" are legitimate insurance charges or rather "finance charges" under TILS and under the Home Ownership Equity Protection provisions of TILA, as required by this Court's precedent and holdings of other Circuit Courts of Appeal.

First Amendment: E-Mail Spam

08-765 Virginia v. Jaynes (Va.)

Amici Am. Ctr. for Law & Justice 1/12, Crim. Justice Legal Found. 1/12, Alabama 1/13, U.S. Internet Serv. Provider Ass'n 1/14. BIO 2/23.

Paul Levy of Public Citizen is assisting the respondent.

Virginia Code § 18.2-152.3:1(A) prohibits an individual from falsifying his identity to circumvent e-mail security measures and send unsolicited bulk e-mail. Although the statute is constitutional as applied to commercial e-mail spam, the Supreme Court of Virginia found that it was unconstitutional as applied to hypothetical political and religious e-mail spam. Without comparing the constitutional applications to the unconstitutional applications, Virginia's highest court declared that the statute was substantially overbroad and, thus, facially unconstitutional. The question presented is:

When confronted with a claim that a statute is substantially overbroad and, thus, facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

Criminal Law: Mootness

08-773 Swindle v. Arkansas (Ark.)

CFR 1/21. BIO 2/20. Dist. for 3/20.

Do Fourteenth Amendment guarantees of Due Process and Equal Protection forbid a state to deny a criminal defendant's right to direct appeal on the ground of mootness because he had already served his sentence?

ERISA: Preemption

08-774 Associated Builders & Contractor, Saginaw Valley Area Chapter v. Mich. Dep't of Labor & Econ. Growth (6th Cir.)

BIO 2/17. Dist. for 3/20.

1. Whether the Sixth Circuit erred in ruling that amendments to the Michigan Electrical Administrative Act are not preempted by the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, despite the fact that the statute mandates benefit levels and the manner of administration of an employee benefit plan without any legitimate alternative, thus furthering the split among the circuit courts between those that find preemption and those that fail to recognize that such state statutes necessarily interfere with ERISA's goal of national uniformity of employee benefit laws.

2. Whether the Sixth Circuit erred and added to the confusion in the circuit courts of appeals concerning the use of a flexible standard for modifying judicial orders Fed. R. Civ. P. 60(b)(5) as the Sixth Circuit's decision to allow Michigan an inexplicable nine-year filing delay in this case joins a handful of other circuit courts impermissibly relieving moving parties of their obligation to produce reasonable explanations for delays in filing 60(b)(5) motions.

Pleading Requirements

08-814 Ellis v. Bradley County (6th Cir.)

BIO 2/16, reply 3/4. Dist. for 3/20.

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

1. Whether the Sixth Circuit incorrectly affirmed the dismissal of Petitioner’s complaint exclusively under Federal Rule of Civil Procedure 12(b)(6) “for failure to state a claim for relief” where the complaint plainly exceeding the pleading requirements of Federal Rule of Civil Procedure 8(a) such that this Court should exercise its supervisory authority and reverse the judgment of the court of appeals.
2. Alternatively, whether the Sixth Circuit improperly decided an important and unsettled question of state law where Petitioner had requested that it certify the question to the Supreme Court of Tennessee and where the district court had acknowledged that the applicable authority was “conflicting” and “split” such that this Court should certify the question to the Supreme Court of Tennessee or direct the Sixth Circuit to do so.

First Amendment: Standing

08-858 Caldwell v. Caldwell (9th Cir.)

BIO 2/9, reply 2/25. Dist. for 3/20.

Jeanne Caldwell, a California resident, is the mother of three children who study science in public school, and is herself an active participant in public debates on science education. California authors a website whose ostensible purpose is to educate the public on science. Caldwell uses the website for that purpose. The website proclaims California’s religious position on a theological debate within Christianity, and describes Caldwell’s religious position as “divisive” and “incorrect.” California’s website is endorsed by the United States. Does Caldwell have standing to bring an Establishment Clause claim, or are government websites immune from Establishment Clause claims?

DPPA: Permitted Uses

08-862 Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Pichler (3d Cir.)

BIO 2/9, reply 2/24. Dist. for 3/20.

The Driver’s Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721–2725, allows a person to use motor vehicle records (MVR) information for any of fourteen permitted purposes but imposes both civil and criminal liability on a person who “knowingly” uses MVR information “for a purpose not permitted.” The questions presented are:

1. Does a party who obtains MVR information for two purposes—a DPPA permitted purpose and a purpose not permitted by the DPPA but otherwise legal—violate the DPPA?
2. Does the permitted use in connection with litigation set forth at 18 U.S.C. § 2721(b)(4), which includes an “investigation in anticipation of litigation,” require that the MVR information be of use to the decision-maker in the litigation or is the permitted use satisfied by a person’s use of the information to investigate contemplated or pending litigation?
3. Is a defendant civilly liable for “knowingly” violating the DPPA when it obtained MVR information without an appreciation that such conduct was wrongful?
4. Is a plaintiff who neither pled nor suffered any harm or injury as a result of the alleged statutory violation entitled to an award of \$2,500 under the DPPA’s remedies provision that allows for an award of “actual damages, but not less than liquidated damages in the amount of \$2,500”?

Preemption: Medicare

08-869 Wogan v. Kunze (S.C.)

BIO 2/9. Dist. for 3/20.

A Medicare beneficiary brought state law claims of negligence and breach of fiduciary duty against a private physician claiming, in part, that the physician breached the standard of care by refusing to submit Medicare claims for Medicare covered injections the physician prescribed and administered to the beneficiary. Medicare regulations *required* the Respondents to submit claims for the beneficiary and *prohibited* the beneficiary from submitting his own claims to Medicare for the cost of the medication. Because the physician refused to submit claims, the beneficiary could not obtain his Medicare benefits and personally incurred substantial medical expenses. The questions presented are:

1. Does 42 U.S.C. § 405(h) preempt the Medicare beneficiary's state law claims?
2. Has the ruling of the South Carolina Supreme Court, which found that § 405(h) preempts the Medicare beneficiary's state law claims, caused the Medicare beneficiary to suffer a denial of Medicare benefits with due process of law by denying access to the courts?
3. If it is argued that the ruling of the South Carolina Supreme Court is based on independent state law grounds, which is denied, does the ruling of the court deny the Medicare beneficiary and those similarly situated Medicare beneficiaries equal protection of the law by denying access to the courts?

PLRA: Exhaustion

08-886 Pavey v. Conley (7th Cir.)

BIO 2/13, reply 2/25. *Amicus* Uptown People's Law Ctr. 2/13. Dist. for 3/20.

When the defendant in an action for damages governed by the Prison Litigation Reform Act invokes the statutory affirmative defense of exhaustion, is the defense to be litigation under the usual rules of procedure applicable to affirmative defenses, including trial by jury to resolve disputed factual issues underlying the defense?

Due Process: Foreclosure

08-915 Miner v. Clinton County (2d Cir.)

BIO 2/16. Dist. for 3/20.

1. Did the decision of the Second Circuit allow the unlawful taking of private property by the government by property tax foreclosure without due process and equal protection? The holding in *Nelson v. City of New York*, 352 U.S. 103 (1956), *only* allows a profit over the amount of taxes owed when: 1) there is adequate notice of the tax foreclosure; 2) the state tax foreclosure law allows a property owner to make a claim for any profit realized at a tax foreclosure sale; and, in dicta, 3) there is an opportunity to redeem the property prior to the tax sale. Here, Petitioners were not allowed by Clinton County to make a claim for the surplus, were not given an opportunity to redeem prior to the tax sale, and the Tupazes did not received notice of the foreclosure action. In addition, the New York statute allowing local governments to keep the profit after a tax sale of private property violates equal protection because in all private foreclosures, the property owner gets any excess money paid, while the government is allowed to keep the surplus after a tax sale.
2. Did the decision of the Second Circuit conflict with the Supreme Court holding in *Jones v. Flowers* because Clinton County was on actual notice that the Tupazes did not sign for the certified letter containing the notice of foreclosure and Clinton County took no further reasonable measures to provide notice to them?

Criminal Law: Sentencing

08-948 Anderson v. Louisiana (La.)

BIO 2/23.

Louisiana law provides that after jury finds that an aggravating circumstance exists, “[a] sentence of death shall not be imposed unless the jury . . . after consideration of any mitigating circumstances, determines that the sentence of death should be imposed.” La. Code Crim. Pro. art. 905.3. In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), this Court held that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . submitted to a jury and proven beyond a reasonable doubt.” The Louisiana Supreme Court rejected petitioner’s claim that *Apprendi* applies to the culpability determination, holding instead the jurors need not employ any standard for determining which defendants convicted of first-degree murder and an aggravating circumstance are culpable enough to receive a death verdict. The question presented is:

Whether the jury’s determination that death should be imposed must be made beyond a reasonable doubt.

Fourth Amendment: Consensual Searches

08-949 Hillman v. Ohio (Ohio Ct. App.)

BIO 2/17.

1. Once a consensual search conducted in the wake of an investigative stop has concluded, is probable cause required to justify any further detention?
2. Once consent is given to allow a search, can it be revoked at any time before the search commences?

Employee Benefits: Employer Contributions

08-962 Cent. States, Se. & Sw. Areas Pension Fund v. Gen. Materials, Inc. (6th Cir.)

BIO 2/27.

1. Whether the Court of Appeals committed an error by disregarding this Court’s determination in *Central State Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), that the decisions of the Trustees, such as their decision in this case that the Participation Agreement they drafted obligates an employer to remit contributions until 2005 even though the collective bargaining agreement had terminated in 1993, must be reviewed under the deferential arbitrary or capricious standard.
2. Whether the Court of Appeals committed error by ignoring the conflicting holding of the Seventh Circuit in *Central States Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005), which established that the Trustees’ Participation Agreement does require contributions after collective bargaining agreement termination.

Fifth Amendment: Takings Clause

08-966 Ohio Midland, Inc. v. Proctor (6th Cir.)

BIO of Norfolk S. Ry. 2/24.

1. Does a cause of action for a *per se* permanent physical taking of private property by the government, without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, accrue when government first temporarily takes the property, or when the owner is “reasonably on notice” the taking may be permanent, or when the taking actually becomes permanent and the owner knows or should know it is permanent?
2. Where Congress reserved to itself the authority to “alter, amend, or repeal” an act granting its consent to “construct, maintain and operate” a bridge over navigable waters of the United States and later delegated all of its reserved authority to an administrative agency of the executive branch, and where Congress further provided that any deviation from approved bridge plans is unlawful “unless the modification of such plans has previously been submitted to and received the approval of” the administrative agency, does the adjudication of a private contract claim that the bridge must be removed require a prior determination of whether the bridge must be removed, by the administrative agency to which Congress delegated all of its reserved authority?

CALLS FOR RESPONSE

NEW CFR

Attorney's Fees: "Prevailing Party"

08-853 Zessar v. Keith (7th Cir.)

CFR 2/26, due 3/30.

Whether a plaintiff's achievement of summary judgment on the merits is a sufficient "alteration of legal relationship" under this Court's decision in *Buckhannon Board & Car Home, Inc. v. West Virginia Department of Health*, 532 U.S. 598 (2001), to entitle the plaintiff to "prevailing party" status, and attorney's fees, under the Civil Rights Attorneys Fees Awards Act of 1976, codified as 42 U.S.C. § 1988, despite the defendants' subsequently mooting the case by enacting corrective legislation explicitly attributed to the litigation, prior to the entry of a Fed. R. Civ. P. 58 final judgment.

PENDING CFR

Criminal Law: Aggravated Identity Theft

08-622 United States v. Villanueva-Sotelo (D.C. Cir.)

CFR 12/31, due 3/2 (ext.).

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 3/11 (ext.).

The City of Chicago grandfathers some, but not all, lawfully established but now nonconforming outdoor signs. The grandfather status is predicated upon prior compliance with Chicago's former sign permitting requirement, which violated the First Amendment as an invalid prior restraint on speech.

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 speakers 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 conflict between federal 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.

Criminal Law: Sentencing

08-712 *McElroy v. Texas* (Tex. Ct. Crim. App.)

CFR 1/21, due 3/23 (ext.).

1. Whether *United States v. Ruiz*, 536 U.S. 622 (2002), authorizes the prosecution to suppress favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment.
2. Whether undisclosed evidence that would have impeached the complainant's statements contained in the pre-sentence report is material to punishment.

First Amendment: Employee Speech

08-720 *Callahan v. Fermon* (7th Cir.)

CFR 1/21, due 5/1 (ext.).

In *Garcetti v. Cellabos*, 547 U.S. 410 (2006), this Court concluded that the First Amendment does not protect a government employee from discipline when speech is made pursuant to his "official duties," but did not outline how the scope of the duties was to be ascertained. The questions presented are:

1. In reasonably disputed cases, is the question of whether the speech of an employee is made pursuant to his employment duties a pure question of law or is it a mixed question of law and fact that should be considered by a finder of fact?
2. What are the proper criteria to consider when analyzing whether speech is made pursuant to an employee's "official duties"?
3. When a governmental employer has a standard policy suggesting that an employee should report wrongdoing, is an employee necessarily acting pursuant to his job duties when he reports the criminal wrongdoing of a supervisor to an independent entity?

Habeas Corpus: Plea Agreements

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

CFR 1/9, due 3/11 (ext.).

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.

International Law: Child Abduction

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

CFR 2/11, due 3/13.

1. Should the Supreme Court resolve the circuit split between the Second Circuit, on one hand, and the Fourth and Tenth Circuits, on the other hand, regarding whether a foreign sovereign's statement of its own law, provided pursuant to a duly-ratified treaty, is entitled to deference?
2. Is Supreme Court review warranted to correct the Second Circuit's disregard of this Court's precedents requiring deference to a foreign sovereign's authoritative interpretation of its own domestic law?
3. Is Supreme Court review warranted because the uncertainty caused by the circuit split could hamper international efforts to combat inter-county child abduction? (This petition may be held for 08-645 *Abbott v. Abbott*, in which the Court requested the views of the Solicitor General on 1/21.)

RFRA: Religious Marijuana

08-777 **Olsen v. Holder (8th Cir.)**

CFR 1/29, due 4/1 (ext.).

Petitioner Olsen brought this action after this Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), seeking a declaration that he is allowed, under the Religious Freedom Restoration Act (RFRA) and the United States Constitution, to use marijuana in the course of his religious worship and for appropriate injunctive relief against law enforcement officials of the United States and Iowa. The courts below dismissed Petitioner's claims on the basis of collateral estoppel. The questions presented are:

1. Did the lower courts err in applying collateral estoppel to Petitioner's claims under RFRA and the Equal Protection Clause where the prior decisions relied upon for the estoppel were decided before the enactment of RFRA and applied legal principles that conflict with this Court's decision in *O Centro Espirita*?
2. Did the lower courts err in ruling that the state and federal Controlled Substances Acts are "generally applicable" laws for purposes of the First Amendment's Free Exercise Clause, even though those laws provide exemptions for particular religious and non-religious uses?

Criminal Law: Sentencing

08-779 **Wittig v. United States (10th Cir.)**

CFR 1/14, due 3/16 (ext.).

1. Whether, as the Court left unresolved in *Kimbrough v. United States*, appellate courts should engage in "closer review . . . when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." ___ U.S. ___, 128, S.Ct. 558, 575 (2007) (internal quotation marks omitted).
2. Whether the directive in 18 U.S.C. § 3553(a)(6) for district courts to avoid unwarranted sentencing disparities is applicable to codefendants within the same case or confined to disparities between similarly situated defendants nationwide. (This case may be granted, vacated, and remanded in light of 08-5721 *Spears v. United States*, in which a *per curiam* opinion was issued 1/21.)

Immigration Law: Due Process

08-785 Agasino v. Holder (9th Cir.)

CFR 2/11, due 3/13.

1. Whether the Ninth Circuit Court of Appeals violated Due Process of Law under the Fifth Amendment in failing to consider arguments respecting Equal Protection in rehearing Petitioner's case when those arguments had been the basis for its original decision.
2. Whether it violates Equal Protection of law guaranteed through the Fifth Amendment's due process clause to preclude an individual from seeking relief under Immigration and Nationality Act § 212(c) [8 U.S.C. § 1182(c)] because that individual was not deportable when she plead guilty, even if she later became deportable and similarly situated individuals were permitted to obtain that relief.

Fourth Amendment: Wiretapping

08-792 Gray v. United States (6th Cir.)

CFR 1/15, due 3/19 (ext.). *Amicus* NACDL 2/17.

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specifically designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and does such a refusal to suppress affect the fulfillment of the reviewing or approval functions required by Congress?
2. Does the Hobbs Act prohibition on "extortion under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider or abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

Arbitration: Public Policy Defense

08-805 SSC Odin Operating Co. LLC v. Carter (Ill. Ct. App.)

CFR 2/9, due 4/10 (ext.).

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Illinois Nursing Home Care Act (INHCA) renders "null and void" any "waiver by a resident [of a nursing facility] or his legal representative of the right to commence an action" to enforce INHCA and any "waiver of the right to a trial by jury" executed prior to the commencement of any such action. 210 Ill. Comp. State 45/3-606, -607. The court below held that section 2 of the FAA does not preempt INHCA's anti-waiver provisions because (1) a violation of public policy is a generally applicable contract defense in Illinois and (2) the "emphatically stated public policy" expressed in INHCA's anti-waiver provisions "concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements." The questions presented are:

1. Whether the emphatically stated public policy of a State precluding the enforcement of arbitration agreements related to a single category of disputes may supercede Congress's declared policy requiring enforcement of arbitration agreements.
2. Whether a state statute must specifically target arbitration agreements in order to be preempted by section 2 of the FAA or whether it is sufficient if the state statute as applied precludes any and all arbitration of disputes between private parties.

Due Process: Civil Commitment

08-807 Lieberman v. Illinois (Ill. Ct. App.)

CFR 1/21, due 3/23 (ext.).

Does the post-incarceration civil commitment of a convicted sex offender under a state civil commitment statute violate the former offender's rights under the Due Process Clause of the Fourteenth Amendment, when he presented undisputed evidence that at the time of his civil commitment, he possessed full volitional control over his behavior?

Arbitration: Appellate Jurisdiction

08-816 Renasant Bank v. Kimberlin (6th Cir.)

CFR 2/5, due 3/9.

Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, provides that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement may petition any United States district court . . . for an order directing that such arbitration proceed . . . in accordance with the terms of the agreement.” Section 16(a)(1)(B) of the FAA, 9 U.S.C. § 16(a)(1)(B), provides that “an appeal may be taken from an order” of a district court “denying a petition under section 4 of this title to order arbitration to proceed.” The questions presented are:

1. Whether section 16(a)(1)(B) of the FAA provides appellate jurisdiction over an appeal from an order denying a petition under section 4 to compel arbitration of claims involving non-signatories to an arbitration agreement.
2. Whether section 4 of the FAA allows a district court to issue an order compelling arbitration of claims against a non-signatory to an arbitration agreement where the non-signatory can otherwise enforce the arbitration agreement under principles of contract or agency law, including equitable estoppel. (This petition will likely be held for 08-146 *Arthur Andersen LLP v. Carlisle*, which was granted on 11/7 and set for argument on 3/3.)

Criminal Law: Sentencing

08-820 Bain v. United States (8th Cir.)

CFR 2/2, due 4/3 (ext.).

1. Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule.
2. Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure.

Preemption: Medical Marijuana

08-887/08-897 County of San Diego v. San Diego NORML/County of San Bernardino v. California (Cal. Ct. App.)

CFR 2/12, due 4/15 (ext.).

1. Whether California's Compassionate Use Act and Medical Marijuana Program, which authorize individuals to use, possess, and cultivate marijuana for medical purposes, are preempted under the Supremacy Clause by the federal Controlled Substances Act (CSA), which prohibits the same conduct.
2. Whether the CSA's express preemption clause precludes a court from considering whether California's Compassionate Use Act and Medical Marijuana Program are obstacles to the accomplishment of the purposes and objectives of the federal law in deciding whether the California law is preempted.

Preemption: FDCA/State Consumer Remedy

08-889 Tri-Union Seafoods, LLC v. Fellner (3d Cir.)

CFR 2/2, due 3/20 (ext.).

Adina Rosenbaum and Brian Wolfman of Public Citizen are counsel for the respondent.

1. Whether state-law tort claims based upon failure to warn of the risks of methylmercury in tuna fish products are preempted by the Federal Food, Drug, and Cosmetics Act and regulatory actions of the Food and Drug Administration, including a written determination that state-law warning requirements concerning methylmercury in tuna products are preempted by federal law and denial of a petition to require such warnings.
2. Whether a "presumption against preemption" applies in conflict preemption cases.

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

Preemption: Medicaid

08-603 Vos v. Barg (Minn.)

BIO 1/5, reply 1/22. Dist. for 2/20. Re-listed for 2/27. CVSG 3/2.

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?

ERISA: Administrator Deference

08-803/08-810/08-826 Frommert v. Conkright/Conkright v. Frommert/Pietrowski v. Conkright (2d Cir.)

BIOs 1/29, replies 2/10. Dist. for 2/27. CVSG 3/2.

08-803:

1. Whether reversal by the United States Court of Appeals for the Second Circuit of the trial court's holding that Xerox Corporation's general release form, the execution of which is required for an employee to obtain severance pay, was unenforceable to bar the petitioners' claims under the Employee Retirement Income Security Act (ERISA) contravenes principles of contract interpretation under federal common law.
2. Should legal standards which apply pursuant to the Older Workers Benefit Protection Act to determine whether a release form constitutes a "knowing and voluntary" waiver of claims under the Age Discrimination in Employment Act also apply to determine whether a release form executed as a condition to the receipt of severance pay constitutes a "knowing and voluntary" waiver of ERISA claims?

08-810:

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.
2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

08-826:

In determining whether an individual has "knowingly and voluntarily" waived a claim to pension benefits by signing a boilerplate release, does ERISA require consideration of the specific circumstances under which the individual signed the release?

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).

Federal Jurisdiction: Foreign Sovereign Immunities Act

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

BIOs 12/30, reply 1/13. Suppl. brief of individual respondents 1/12. Dist. for 2/20. CVSG 2/23.

1. Whether, for purposes of the Foreign Sovereign Immunities Act (FSIA), 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.

International Law: Child Abduction

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

BIO 12/29, reply 12/31. Dist. for 1/16. CVSG 1/21.

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.

Antitrust: Sports Leagues

08-661 Am. Needle, Inc. v. Nat’l Football League (7th Cir.)

BIO 1/21. *Amici* NBA, NHL 1/21. Dist. for 2/20. CVSG 2/23.

1. Are the National Football League (NFL) and its member teams a single entity that is exempt from rule of reason claims under section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?
2. Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams’ respective logos and trademarks, and not to permit any licenses to be granted to Reebok’s competitors for a period of ten years, subject to a rule of reason claim under section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?

Held/Awaiting Action

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.

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.

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

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.

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, arg. 3/23).

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).

Communications Regulation: Broadcast Indecency

08-653 Fed. Comm'ns Comm'n v. CBS Corp. (3d Cir.)

BIO 1/8, reply 1/16. Dist. for 2/20.

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.

Immigration Law: Stay of Removal

08-693 Tesfagaber v. Holder (4th Cir.)

BIO 1/28. Dist. for 2/27. Held for 08-681 *Nken v. Holder* (granted 11/25, arg. 1/21).

Whether a circuit court's decision to stay an alien's removal pending consideration of the alien's petition for review is governed by section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)—which provides that no court shall "enjoin" the removal of an alien unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law—as the court below and one other court of appeals have held, or whether that determination is instead governed by the traditional (and substantially less demanding) multifactor balancing test for stays and preliminary injunctive relief, as eight other courts of appeal have held.

LAST CONFERENCE

View the [March 2nd Orders List](#) from the February 27th Conference.

CERTIORARI GRANTED

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. Re-listed for 1/23. Re-listed for 2/20. Re-listed for 2/27. Cert. granted 3/2.

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."

CERTIORARI DENIED

Criminal Law: Taft-Hartley Act

08-409 *Mabry v. United States* (6th Cir.)

BIO 1/29, reply 2/9. Dist. for 2/27. Cert. denied 3/2.

1. Whether the settlement of a bona fide commercial dispute, in the absence of fraud or duress, between a labor official and a union employer must contain "some level of structure or formality . . . to evidence the legitimacy of the ensuing payment" in order to qualify for the exception to the Taft-Hartley Act's prohibition against seeking or receiving anything of value.
2. Whether the Court of Appeals can deem a statute to be ambiguous in violation of *Watson v. United States*, ignore the rule of lenity in contravention of *United States v. Santos*, and then step into the shoes of the jury and make a factual determination that a criminal defendant's conduct is not exempted by the newly interpreted statutory language.

Civil Procedural: Removal

08-460 *Isaacson v. Dow Chem. Co.* (2d Cir.)

BIO 1/26, reply 2/10. Dist. for 2/27. Cert. denied 3/2.

Scott Nelson of Public Citizen is assisting the petitioners.

Whether a private corporation that was performing under a federal government contract but is sued for actions neither addressed in the contract nor otherwise directed or controlled by the government may nevertheless remove a state court civil action to federal court under 28 U.S.C. § 1442(a)(1) based on the mere fact that it is a government contractor.

Government Contractor Defense

08-461 Stephenson v. Dow Chem. Co. (2d Cir.)

BIO 1/26, reply 2/10. *Amicus* Veterans' Groups 11/7. Dist for 2/27. Cert. denied 3/2.

Scott Nelson of Public Citizen is assisting the petitioners.

Whether the federal government contractor defense is available to manufacturers whose defective products injured U.S. servicemen and women when: 1) the claimed defect resulted solely from manufacturing processes of the contractors' own choosing and exclusive control; 2) neither the defect nor the health consequences of the defect were disclosed to the government; and 3) the contractors could have complied with both their federal contracts and their state-law duties to the plaintiffs.

International Law: Customary Law

08-470 Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co. (2d Cir.)

BIO 1/26, reply 2/17. Dist. for 2/27. Cert. denied 3/2.

1. Whether, at the time of the Vietnam War, the use of herbicide that contained an excessive, avoidable, and unnecessary poison violated customary international law?
2. Whether the decision by the Court of Appeals in affirming the grant of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure was such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers to reverse the granting of the motion to dismiss in this case?
3. Whether the Court of Appeals' unwarranted expansion of *Boyle* involves a question of exceptional importance and should be reviewed by this Court?

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. Legal Found. 11/14. BIO 12/29, reply 1/13. Dist. for 2/20. Re-listed for 2/27. Cert. denied 3/2.

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?

Civil Procedure: FRCP 60(b)

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

CFR 11/26. BIO 1/26, reply 2/13. Dist. for 2/27. Cert. denied 3/2.

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." May a federal court ever grant a motion under FRCP 60(b)(6) in a case involving legal error?

False Claims Act: Medicare Cost Reports

08-558 Bourseau v. United States (9th Cir.)

BIO 1/28. Dist. for 2/27. Cert. denied 3/2.

1. Whether the Court of Appeals, in conflict with the Eighth Circuit, but consistent with the Fourth and Sixth Circuits, correctly concluded that the “natural tendency test,” rather than the “outcome materiality test,” should be used to determine if the false Medicare cost reports at issue were material to a payment decision of the government under the Federal False Claims Act (FCA), 31 U.S.C. § 3729-3733.
2. Whether the Court of Appeals in conflict with the Third, Fifth and District of Columbia Circuits, correctly concluded that the government sustained damages even though the government failed to prove it relied on the false representations in the Medicare cost reports.
3. Whether the Court of Appeals in conflict with an earlier Ninth Circuit decision and relevant decisions of this Court correctly concluded that there is “no law” requiring a district court to award less than treble damages and the maximum amount of allowable civil penalties under the FCA to satisfy the excessive fines clause of the Eighth Amendment and the due process clause of the Fifth Amendment.

Statutory Interpretation: Clarifying Amendments

08-564 Cookeville Reg'l Med. Ctr. v. Leavitt (D.C. Cir.)

BIO 1/28, reply 2/9. Dist. for 2/27. Cert. denied 3/2.

1. Whether a court may avoid the presumption against retroactivity and the due process analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), based on its own view that a statutory amendment is a “clarification” of an existing law.
2. Whether reliance on a pre-amendment statute is a necessary element of a challenge to the retroactive application of the amended statute under *Landgraf*?

Criminal Law: Venue

08-569 Knox v. United States (7th Cir.)

BIO 1/30. Dist. for 2/27. Cert. denied 3/2.

Petitioner faced a four-count indictment and trial in the Northern District of Illinois. One of the counts pled that the offense occurred in Abidjan, Ivory Coast, and no where else, and a second alleged that the offense occurred both in the Eastern District of Missouri and the Northern District of Illinois because Petitioner allegedly made false statements by telephone to a government agent in the Northern District of Illinois. Petitioner’s trial lawyer never objected to venue, and the Seventh Circuit considered venue objections waived on appeal. The questions presented are:

1. By mere failure to object to venue, may a party enlarge the jurisdiction that the United States Constitution gives federal courts under Article III, § 2, and permit a prosecution otherwise outside the territorial and statutory jurisdiction of a United States court?
2. Where the accused is silent and uninformed, does a lawyer’s mere failure to object to improper venue effect an adequate waiver of a criminal defendant’s Sixth Amendment constitutional right to face prosecution in the correct venue, under this Court’s waiver decisions dating back at least to *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)?

First Amendment: Student Dress

08-716 Watson Chapel Sch. Dist. v. Lowry (8th Cir.)

BIO 1/29. Dist. for 2/27. Cert. denied 3/2.

1. Did the Eighth Circuit improperly apply *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to a case involving a school dress code that was sufficiently specific to prescribe a uniform?
2. Is there a split among the Eighth, Fifth, and Ninth Circuit Courts of Appeals concerning the application of *Tinker* to school dress codes?

American Indian Law: Indian Gaming Regulatory Act

08-746 Seminole Tribe of Fla. v. Fla. House of Representatives (Fla.)

BIO 1/26. Dist. for 2/27. Cert. denied 3/2.

Whether the Florida Supreme Court violated the Indian Commerce Clause and the Supremacy Clause by ruling, based on Florida “policy” and contrary to the express language of the Indian Gaming Regulatory Act and the decisions of a number of United States Circuit Court of Appeal, that the Governor of Florida lacked authority to agree to tribal operation of banked card games in a tribal-state compact.

Section 1983: Malicious Prosecution

08-762 DeReyes v. Wilkins (10th Cir.)

BIO 1/26, reply 2/4. Dist. for 2/27. Cert. denied 3/2.

1. Is a section 1983 Fourth Amendment unlawful detention claim governed by the tort of malicious prosecution?
2. Where a section 1983 Fourth Amendment “malicious prosecution” claim is based on unlawful detention pursuant to an arrest warrant, is there a favorable termination requirement?
3. Does this Court’s accrual decision in *Wallace v. Kato*, 127 S.Ct. 1091 (2007), apply to a section 1983 Fourth Amendment “malicious prosecution” claim based on unlawful detention pursuant to an arrest warrant?

Sixth Amendment: Ineffective Assistance of Counsel

08-808 Texas v. Haley (Tex. Ct. App.)

BIO 1/30. Dist. for 2/27. Cert. denied 3/2.

1. May counsel be deemed ineffective for acting in accord with the truth and an applicable ethical canon?
2. Does the Constitution of the United States countenance that a guilty plea may be rendered involuntary by counsel’s performance that is in accord with the truth and an applicable ethical canon?
3. When counsel acts based on what his client has admitted to him is the truth and in harmony with an ethical canon applicable to attorneys as officers of the court/members of the bar, may an appellate court properly conclude that counsel rendered ineffective assistance under the United States Constitution despite the express language from this Court’s opinions in *Nix v. Whiteside*, 475 U.S. 157 (1986); *Strickland v. Washington*, 466 U.S. 668 (1984); and *United States v. Cronin*, 466 U.S. 648 (1984)?

4. When counsel has acted based on his client's admission of the truth and in accord with an applicable ethical canon, may a state appellate court considering a claim of ineffective assistance under the United States Constitution properly conclude that counsel rendered ineffective assistance while completely ignoring the expressly cited language of this Court's aforementioned binding precedent that would at least support a conclusion to the contrary?

5. May counsel's having acted based on his client's admission of the truth and in accord with an applicable ethical canon properly constitute grounds for a successful claim that the client's guilty plea was rendered involuntary by the allegedly ineffective assistance provided by counsel?

Employee Benefits: Workers' Compensation

08-815 Deupree v. Workers' Comp. App. Bd. (Cal. Ct. App.)

BIO of Doe 1/27, reply 2/6. Dist. for 2/27.

After an adult film star was diagnosed with HIV, she filed a workers' compensation claim. At trial, she testified that she subjectively believed her injury was industrial in nature because her friend told her that one of her co-stars tested HIV positive. Despite a lack of any substantial evidence whatsoever, the administrative law judge found the injury industrial in nature. Does an administrative adjudicatory system that allows large awards of money to be made based solely on unsubstantiated double and triple hearsay, unsupported by any other evidence, comport with the fundamental constitutional requirements of due process and equal protection?

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. Decided 6-3 in favor of the respondent 3/4.

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. Decided 5-4 in favor of the petitioner 3/3.

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. Decided 9-0 in favor of the state 1/26.

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.

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. Cert. granted 1/16.

Bonnie Robin-Vergeer of Public Citizen was co-counsel for the respondent at the cert. stage.

[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.

Due Process: Forfeiture

[08-351](#) *Alvarez v. Smith* (7th Cir.)

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

Brian Wolfman of Public Citizen is assisting the respondents.

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)?

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, N.C., Conference of State Bank Supervisors, Cent. N.Y. Citizens in Action 11/6. Dist. for 1/16. Cert. granted 1/16. Arg. 4/28.

Public Citizen joined an 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).