



**ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT**

**CERT. PETITIONS OF PUBLIC INTEREST  
MARCH 20, 2009 CONFERENCE**

Prepared by Leah Nicholls, 2008–2009 SCAP Fellow

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

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## RESOURCES

### LINKS FOR MORE INFORMATION

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- ✓ **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**

<b>Petition for Certiorari</b> <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.
<b>Petitioner</b>	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.
<b>Respondent</b>	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.
<b>BIO</b> <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.
<b>CFR</b> <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.
<b>Conf.</b> <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 <a href="#">Supreme Court calendar</a> .
<b>CVSG</b> <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 <a href="#">Solicitor General</a> 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: <a href="http://www.usdoj.gov/osg/briefs/2008/2008brieftypes.html">http://www.usdoj.gov/osg/briefs/2008/2008brieftypes.html</a> .
<b>Dist.</b> <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.
<b>GVR</b> <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.
<b>Held</b>	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.
<b>QP</b> <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.
<b>Vide</b>	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 20TH CONFERENCE

### 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, aff'd 3/9). Dist. for 3/20.

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).

### Fifth Amendment: Takings Clause

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

BIO 2/13, reply 2/25. 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 of United States 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, reply 3/2. 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](#) *Jeziarski v. Holder* (7th Cir.)

BIO 2/17, reply 3/2. 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, reply 3/4. *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.

## 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 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 TILA 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.

## 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 litigated 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?

### **Fourth Amendment: Consensual Searches**

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

BIO 2/17, reply 3/13. Dist. for 3/20.

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?

## PENDING FOR UPCOMING CONFERENCES

### Fifth Amendment: Takings Clause

#### **08-567 Agripost, LLC v. Miami-Dade County (11th Cir.)**

BIO 2/26, reply 3/9. *Amici* Nat'l Ass'n of Home Builders 11/21, Pac. Legal Found. 11/24, Mich. State Bar 11/28. Dist. for 3/27.

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank* insofar as it denies property owners the right to litigate their *federal* causes of action in *federal* court, the same as all other constitutionally aggrieved citizens, and forces them to seek compensation in state court ostensibly to ripen their federal constitutional takings claims, where four Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that the *Williamson County* rule is “mistaken” due to its lack of doctrinal underpinning and incoherent effect on federal jurisdiction?
2. Where settled Eleventh Circuit law has for decades provided that a property owner following the *Williamson County* rule of state court ripening litigation may “reserve” federal issues for federal court trial, and in fact the Eleventh Circuit expressly so ordered in an earlier appeal of this case, can the property owner be punished for obeying such an order by having its eventual federal court suit dismissed on the basis of issue preclusion?

### Immigration Law: Waiver of Deportation

#### **08-605 Gonzáles-Mesías v. Holder (1st Cir.)**

BIO 3/9.

Petitioner, a lawful permanent resident, was deported for a crime he committed 23 years ago. He sought a waiver of deportation under § 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (repealed 1996). All the courts of appeals agree that equal protection demands that Petitioner be eligible for a waiver of deportation if a similarly situated alien would be eligible for a waiver of *exclusion*, had he left the country and returned. If Petitioner had been convicted of exactly the same crime under exactly the same circumstances, and subsequently left the country and returned, he would have been eligible for a waiver of exclusion. Should he, therefore, be eligible for a waiver of deportation, on the ground that it is irrational to treat him more harshly just because he never left the country?

### Criminal Law: Aggravated Identity Theft

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

CFR 12/31. BIO 3/2.

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. BIO 3/11.

*Bonnie Robin-Vergeer of Public Citizen is assisting the petitioner.*

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.

## Environmental Law: CERCLA

**08-683 Cannon v. Gates (10th Cir.)**  
BIO 2/27, reply 3/9. Dist. for 3/27.

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. Dist. for 3/27.

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, reply 3/6. Dist. for 3/27.

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).

## Separation of Powers: Non-Delegation Doctrine

### **08-751 County of El Paso v. Napolitano (W.D. Tex.)**

*Amicus* City of Eagle Pass 1/12. BIO 3/13.

On April 3, 2008, the Secretary of Homeland Security waived the application of thirty-seven federal statutes to activities relating to the construction of the border fence along nearly 500 miles of the United States' border with Mexico. The Secretary's orders also purported to preempt "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the waived federal statutes. The Secretary claimed authority for these orders under section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act, as amended, which grants the Secretary "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determined necessary to ensure expeditious construction of the barriers and roads" along the United States' border. 8 U.S.C. § 1103 note. Section 102(c) forecloses judicial review of the Secretary's waivers except for actions brought in federal district court alleging violations of the Constitution of the United States. A district court's decision may be reviewed only through a petition for writ of certiorari to this Court. The questions presented are:

1. Whether the grant of authority to the Secretary of Homeland Security to "waive all legal requirements" necessary" to ensure rapid construction of a border fence, with no provision for judicial review to test the statutory and factual basis of the Secretary's waiver orders, is an unconstitutional delegation of legislative power.
2. Whether a general delegation of authority to "waive all legal requirements" is sufficient to permit the Secretary of Homeland Security to declare preempted every state and local law "related to" the thirty-seven waived federal statutes.

## First Amendment: True Threat Doctrine

### [08-757](#) *Parr v. United States* (7th Cir.)

BIO 3/13.

1. Whether the “true threat” doctrine, as articulated in *Virginia v. Black*, 538 U.S. 343 (2003), requires a speaker to have a subjective intent to threaten in order for the speech to be constitutionally proscribable under the First Amendment, or whether the speech need only be objectively threatening.
2. Whether, under the First Amendment, the government may introduce testimonial evidence of prior statements and actions unknown to the recipient of the alleged threat in order to establish a subjective intent to “threaten”?

## 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, reply 3/10. Dist. for 3/27.

*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?

## Employment Law: WARN Act

### [08-812](#) *APA Transp. Corp. v. Teamsters Local Union No. 560* (3d Cir.)

BIO 2/27. Dist. for 3/27.

1. Whether the Third Circuit’s erroneous construction of the “faltering company” exception under the Workers Adjustment Retraining Notification Act, 29 U.S.C. § 2102(b)(1), renders the exception illusory, thereby precluding employers from obtaining essential financing, and requiring premature business closings that damage the economy and precipitate job loss.
2. Whether the Third Circuit’s granting of summary judgment without considering evidence of “actively seeking . . . business” expunges statutory language and fundamentally misconstrues the breadth of the statutory exception.
3. Whether the Third Circuit’s summary judgment determination usurps the factfinder’s function and forecloses Petitioner’s right to present material facts in its defense.

## Arbitration: Interlocutory Appeal

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

CFR 2/5. BIO 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.)

## Medicare: DSH Adjustment

### **08-818 *Adena Reg'l Med. Ctr. v. Johnson* (D.C. Cir.)**

BIO 3/2.

In calculating the Medicare disproportionate share hospital (DSH) adjustment, the Medicare statute directs the Secretary of Health and Human Services to count days attributable to patients who are “eligible for medical assistance under a State plan approved under [Title XIX of the Social Security Act, which establishes the Medicaid program].” 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) (the “Medicaid Low Income Proxy”). The question presented, on which the federal courts of appeals are in conflict, is whether the Medicaid Low Income Proxy requires the inclusion of all patient days attributable to patients who are eligible for medical treatment under an approved State Medicaid plan or only those patient days for which a hospital actually receives payment from the Medicaid program (*i.e.* Medicaid “paid” days).

## Criminal Law: Sentencing

### **08-822 *McLaughlin v. Missouri* (Mo.)**

BIO 3/6.

Missouri law requires the sentencing jury to determine that mitigating evidence weighs less than aggravating evidence *before* a person convicted of first-degree murder can be eligible for a possible death sentence. Nonetheless, in petitioner’s case, the Missouri Supreme Court held that the defendant must bear the burden of persuasion at the weighing step. Missouri is the only state in the country that requires the defendant to demonstrate the sufficiency of the mitigating evidence to a unanimous jury. This gives rise to the following two questions:

1. Whether the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt,” applies to the weighing of aggravating and mitigating evidence at the penalty phase of a capital trial.
2. Whether Missouri law violates the Eighth and Fourteenth Amendments by requiring the defendant to carry the burden of demonstrating to a unanimous jury that mitigating evidence outweighs aggravating evidence.

### Civil Procedure: Class Actions

#### **08-934 Columbia Iron & Metal Co. v. Lincoln Elec. Co. (6th Cir.)**

BIO 2/26, reply 3/5. Dist. for 3/27.

1. Where a jury is instructed on two different bases for tolling the statute of limitations, one of which is clearly erroneous and the other of which is deemed acceptable, may the verdict stand because the jury “could have” followed the acceptable instruction even though the court is unable to find that the jury did not instead follow only the erroneous instruction?
2. May a trial court omit a Rule 23(c)(2)(B) notice to absent class members in a Rule 23(b)(3) class action and thereafter substitute a partial settlement notice under rule 23(e)(1)(B) without including the admonition specified in Rule 23(c)(2)(B) that a subsequent judgment in the continuing litigation against the non-settling defendants would be binding on the class members?

### Arbitration: Interlocutory Appeal

#### **08-947 Bander Family P’ship, LP v. TowerHill Wealth Mgmt., LLC (Del.)**

BIO 2/27, reply 3/9. Dist. for 3/27.

Does section 16(a)(2) of the Federal Arbitration Act (FAA), read in conjunction with the Supremacy Clause, give Petitioner a right of interlocutory appeal from a state trial court’s preliminary injunction against continuing an arbitration previously and properly commenced pursuant to an agreement that is subject to the FAA?

### Criminal Law: Sentencing

#### **08-948 Anderson v. Louisiana (La.)**

BIO 2/23, reply 3/4. Dist. for 3/27.

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.

## Employment Law: Employee Benefits

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

BIO 2/27. Dist. for 3/27.

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.

## Employment Law: USERRA

### **08-965 Metro. Gov't of Nashville & Davidson County v. Petty (6th Cir.)**

BIO 3/2.

1. Whether the Sixth Circuit erred in holding that the Uniform Services Employment and Reemployment Rights Act (USERRA) prohibits employers—even employers in safety-sensitive fields like local law enforcement—from taking steps to ensure that returning veterans are qualified to resume their jobs before returning them to work.
2. Whether a returning veteran is “qualified” for a particular position if he or she is physically capable of performing the applicable job duties, as the Sixth Circuit held in the instant case, or whether “qualified” means mentally, physically, and temperamentally capable of performing the essential job functions, as the First and Second Circuits have held?

## 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?

## Attorney's Fees: Fee Enhancements

### [08-970](#) *Perdue v. Kenny A.* (11th Cir.)

BIO 3/4.

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

## Employment Law: USERRA

### [08-973](#) *Townsend v. Univ. of Alaska* (9th Cir.)

BIO 3/3.

The Ninth Circuit dismissed the Appellant's claim for lack of subject matter jurisdiction. The Court held that reading the provision in 38 U.S.C. § 4323(b)(2) that "[a USERRA] action *may* be brought in a State court of competent jurisdiction in accordance with the laws of the State" in conjunction with the Eleventh Amendment's sovereign immunity provisions effectively limited such an action to State court. The question presented is whether the Ninth Circuit erred in concluding that Congress did *not* intend to provide an optional right of action in federal district court for USERRA actions brought by private individuals against state employers and that such actions by private individuals against state employers are thus barred by the Eleventh Amendment's sovereign immunity provisions.

## American Indian Law: Tribal Courts

### [08-985](#) *Coushatta Tribe of La. v. Meyer & Assocs., Inc.* (La.)

BIO 3/5.

Dicta from this Court's previous decisions suggest that state courts are required to defer to tribal courts for an original determination of jurisdiction, yet there has been no explicit holding from this Court on the issue. The state courts have split on whether they are bound to follow the same analysis as the federal courts when Indian tribes appear before them with issues of tribal law, and therefore these are the questions presented:

1. Are state courts required to apply and follow the Tribal Exhaustion Doctrine, and, in this case, should that Louisiana Supreme Court have given the Coushatta Tribal Court the first opportunity to interpret Coushatta law?
2. Can a Native American Tribe be forced to litigate claims in a state court when an ostensible waiver of sovereign immunity is not valid under that tribe's law?

## ERISA: Judicial Review

### **08-989 Leonard v. Educators Mut. Life Ins. Co. (3d Cir.)**

BIO 3/6.

Where the administrator of an ERISA benefit plan fails to exercise discretion in an eligibility determination, must the district court review a claim brought pursuant to 29 U.S.C. § 1132 *de novo*, in light of this Court's holdings in *Firestone Tire & Rubber Co. v. Bruch* and *Aetna Health Inc. v. Davila*?

## Employment Law: Employee Benefits

### **08-991 White v. Coca-Cola Co. (11th Cir.)**

BIO 3/6.

1. Whether an employer has a conflict of interest when it both funds a welfare plan and has discretionary authority to interpret the plan if the employer periodically funds an irrevocable trust and funding is optional (not fixed as to amount or time of payment), or when the employer retains liability (if the trust has insufficient assets)?
2. In interpreting a welfare plan's ambiguous language, do administrators act unreasonably by ignoring choice of law provisions?

## ADA: Major Life Activities

### **08-1013 Kellogg v. Energy Safety Servs., Inc. (10th Cir.)**

BIO 3/4.

In Wyoming, a rural state, is driving a major life activity under the Americans with Disabilities Act and the ADA Amendments Act of 2008, 42 U.S.C. § 12101 *et seq.*? The Tenth Circuit's decision that driving is not a major life activity is inconsistent with the developing law in this Court, other circuits, and the ADA Amendments Act of 2008.

## Statute of Limitations: Choice of Law

### **08-1019 Hilao v. Revelstoke Investment Corp., Inc. (9th Cir.)**

BIO 3/10.

1. Whether federal law, not state law, determines when a federal judgment on a federal cause of action accrues so as to commence the running of a state law limitations period for enforcement where:
  - (a) the Court of Appeals' interpretation is directly contrary to this Court's opinion in *Borer v. Chapman*, 119 U.S. 587 (1887); and
  - (b) the Court of Appeals' interpretation directly conflicts with the ruling of two other circuits.
2. Whether, since the question of the proper interpretation of the Hawai'i statute has now been certified to and accepted for decision by the Hawai'i Supreme Court (and briefing is almost complete), this Court should defer or hold consideration of this Petition until the Hawai'i Supreme Court issues its opinion on that critical question of law?
3. Whether this Court should vacate and remand this action to the Court of Appeals since that Court plainly erred in not finding that the Class's final judgment was not entered in the District Court pursuant to FRCP 58 until December 6, 1995, less than ten years before the judgment was transferred to Texas?

## Section 1983: Qualified Immunity

### [08-1037](#) **Roberts v. Torres (9th Cir.)**

BIO 3/10.

In *Hunter v. Bryant*, 502 U.S. 224 (1991), this Court held the “reasonable jury” standard traditionally applicable in a Rule 56 motion for summary judgment had no bearing on a qualified immunity determination because “it routinely placed qualified immunity in the hands of the jury” and with qualified immunity “the court should ask whether the agents acted reasonably under settled in the circumstance, not whether another reasonable, or more reasonable interpretation of the events could be constructed five years after the fact.” *Id.* at 227–28. “The relevant, dispositive inquiry in determining whether it would be clear to a reasonable officer that his conduct was unlawful in the situation . . . .” *Saucier v. Katz*, 533 U.S. 194, 202 (2001), rev’d in part *Pearson v. Callahan*, \_\_\_ S. Ct. \_\_\_ (2009). When qualified immunity is asserted in a Rule 50 motion for judgment as a matter of law, does the “reasonable jury” standard called for by Rule 50 trump the legal inquiry called for by qualified immunity?

## CALLS FOR RESPONSE

### NEW CFR

#### 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. CFR from the D.C. Ariz. 3/9, due 4/8.

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?

#### Due Process: Prejudgment Remedies

##### **08-890 Diaz v. Paterson (2d Cir.)**

CFR 3/11, due 4/10.

This Court, in *Connecticut v. Doehr*, 501 U.S. 1 (1991), established that standard to evaluate prejudgment remedies used by private claimants to restrict homeowners' property rights. The decision below, in conflict with other courts applying *Doehr*, sustained New York's *lis pendens* law, permitting restraint of property without any of the safeguards required by *Doehr*, on the ground that the filer of the *lis pendens* claims some interest, sometimes merely an unsecured interest, in the real property. The questions presented are:

1. Does the New York law deny due process by impairing the alienability of real property without providing (a) notice of the *lis pendens* or the procedures available to challenge it, (b) an opportunity for a probably cause hearing, (c) a bond procedure affording the homeowner some protection from an improper *lis pendens*, and (d) protection for co-owners of the property?
2. Do the limitations on litigable issues when individuals seek to have a *lis pendens* cancelled violate the First Amendment right of access to judicial redress, including the right to raise constitutional challenges to the *lis pendens* law itself?

### Fourth Amendment: Taser Shocks

**08-996 Buckley v. Rackard (11th Cir.)**

CFR 3/13, due 4/13.

1. Whether a deputy sheriff violated the Fourth Amendment by administering three separate five-second-long direct contact “drive-stun” Taser shocks, over a two-minute period, to a handcuffed, nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer, or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.
2. Whether a reasonable officer had fair notice in 2004 sufficient to deprive him of qualified immunity that it violated the Fourth Amendment to administer three separate five-second-long direct contact “drive-stun” Taser shocks, over a two-minute period, to a handcuffed, nonviolent misdemeanor traffic arrestee who had already collapsed to the ground sobbing, who never actively resisted arrest or attempted to flee, and who never posed any danger to himself, the officer, or the public, when the sole purpose of the Taser shocks was to administer pain to prompt the arrestee to stand up.

### Civil Procedure: Class Actions

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

CFR 3/6, due 4/6.

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

### **PENDING CFR**

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### 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 4/10 (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 4/13 (ext.).

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 4/20 (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?

## 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.

### **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 mooted the case by enacting corrective legislation explicitly attributed to the litigation, prior to the entry of a Fed. R. Civ. P. 58 final judgment.

### **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.). *Amicus* Nat’l Fisheries Inst. 2/17.

*Adina Rosenbaum, Brian Wolfman, and Allison Zieve 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

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#### **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. CVSG 3/9.

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.

### PENDING CVSG

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#### **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) 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) 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 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).

### **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?

### **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 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, section 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 licencing and sale of Team Products?

## 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?

## 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?

## Communications Regulation: Broadcast Indecency

### [08-653](#) *Fed. 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.

## 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. Held for 07-1428/08-328 *Ricco v. DeStefano* (granted 1/9, arg. 4/22).

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?

## LAST CONFERENCE

View the [March 9th Orders List](#) from the March 6th Conference.

### CERTIORARI GRANTED

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#### 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. GVR 3/9.

Whether 21 U.S.C. § 352(n) and its regulations 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.”

#### 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. GVR 3/9.

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.

### CERTIORARI DENIED

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#### 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. Cert. denied 3/9.

08-545: BIO of Colt Mfg. Co., LLC 12/23, BIO of Fed. respondents 2/6, reply 2/19. Dist. for 3/6. Cert. denied 3/9.

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. Cert. denied 3/9.

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. Cert. denied 3/9.

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. Cert. denied 3/9.

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 is 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?

## Special Education: Standard of Review

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

BIO 2/4. Dist. for 3/6. Cert. denied 3/9.

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. Cert. denied 3/9.

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.

## 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).