ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

CERT. PETITIONS OF PUBLIC INTEREST
APRIL 24, 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.

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

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RESOURCES

LINKS FOR MORE INFORMATION

- ✓ **Supreme Court's Website:**
  http://www.supremecourtus.gov. For info or status updates on a particular petition, click on the Docket Number included on this list for that petition. View the Orders List which comes out after each conference for news on all petitions here: **http://www.supremecourtus.gov/orders/08ordersofthecourt.html**

- ✓ **Alan Morrison Supreme Court Assistance Project of Public Citizen:**
  http://www.citizen.org/litigation/SupremeCourt. SCAP Information.

- ✓ **SCOTUS Blog:**
  http://www.scotusblog.com. Frequent Supreme Court Updates.

- ✓ **Office of Solicitor General:**
  http://www.usdoj.gov/osg. Briefs Filed by the United States.

KEY TERMS & ABBREVIATIONS

Term	Definition
Petition for Certiorari *"Cert" Petition*	The brief filed at the Supreme Court by a party who lost in a lower federal or state court, asking the Supreme Court to grant certiorari and review the decision of the lower court. If cert is granted, the Court will hear the case. If cert is denied, the decision below stands.
Petitioner	The party petitioning the Supreme Court for a *grant* of certiorari—who lost in the lower court and is asking the Supreme Court to overturn the lower court decision.
Respondent	Any party other than the petitioner, but generally the party opposing a grant of certiorari. These parties usually want the Court to *deny* cert.
BIO *Brief in Opposition*	The brief in opposition to certiorari is the brief filed by a respondent in response to the petitioner's petition for certiorari ("cert petition"). This is the brief in which the respondent may explain why the Court should not hear the case.
CFR *Call For a Response*	Where the respondent has initially waived filing a response, after reading the petition for certiorari but before deciding whether to hear the case, the Court sometimes issues a CFR, or asks the respondent to file a brief in opposition.
Conf. *Conference*	This is the term for the meeting the Justices regularly hold regarding pending cert petitions and cases. Conference dates are listed on the current **Supreme Court calendar**.
CVSG *Call for the Views of the Solicitor General*	Before deciding whether to hear a case, the Court sometimes chooses to CVSG the petition. This means the Court is inviting the **Solicitor General** to file a brief providing the views of the United States regarding the question presented by the petition. The brief eventually filed is called an "invitation brief." Briefs filed this term are available here: **http://www.usdoj.gov/osg/briefs/2008/2008brieftypes.html**.
Dist. *Distributed*	This provides the date of the Conference for which this petition and related filings were distributed to the Justices, and the date when the Court may take action on the petition.
GVR *Granted, Vacated, and Remanded*	The Supreme Court granted, vacated, and remanded the petition, usually in light of an intervening case. Essentially, this means the Supreme Court has cancelled out the lower court's decision and sent the case back to that court for reconsideration.
Held	The Court frequently holds petitions for later consideration if they raise the same or similar questions as those presented by other petitions or granted cases. The Court will consider these petitions again later, usually after announcing a decision in another case.
QP *Question/s Presented*	The question or questions presented in a petition for the Supreme Court to decide. The Court usually does not address issues not included in the QP.
Vide	Occasionally, more than one party will ask the Supreme Court to hear the same case. Marking a petition "Vide" recognizes that it comes from the same lower court opinion as another pending petition.

APRIL 24TH CONFERENCE

Criminal Law: Sentencing

08-712 McElroy v. Texas (Tex. Ct. Crim. App.)
CFR 1/21. BIO 3/23. Dist. for 4/24.

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.

Criminal Law: Double Jeopardy

08-731 Magluta v. United States (11th Cir.)
BIO 3/23, reply 4/7. Dist. for 4/24.

1. Does *Ashe v. Swenson*, 397 U.S. 436 (1970), allow the government to use a hypothetical factual explanation for a second trial verdict in order to avoid the collateral estoppel effect of a prior acquittal?
2. May a federal court sentence a defendant for conduct which the government tried and fail a valid jury verdict? (This petition may be held for 08-67 *Yeager v. United States*, which granted 11/14 and argued 3/23.)

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, reply 3/24. Dist. for 4/17. Re-listed for 4/24.

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 thrity-seven waived federal statutes.

Due Process: Civil Commitment

08-807 Lieberman v. Illinois (Ill. Ct. App.)
CFR 1/21. BIO 3/23, reply 4/2. Dist. for 4/24.

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?

Statute of Limitations: Inquiry Notice

08-905 Merck & Co., Inc. v. Reynolds (3d Cir.)
BIO 3/23, reply 4/7. Dist. for 4/24.

Did the Third Circuit err in holding, in accord with the Ninth Circuit but in contract to nine other Courts of Appeals, that under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation? (This petition may he held for 07-1489 *Trainer Wortham & Co., Inc. v. Betz*, in which the Court called for the views of the Solicitor General on 10/6.)

Immigration Law: Judicial Review

08-911 Kucana v. Holder (7th Cir.)
BIO 3/25, reply 4/8. Dist. for 4/24.

1. What is the scope of the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii)?
2. Whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals.

Fourth Amendment: Probable Cause

08-919 Andros v. Deshields (3d Cir.)
BIO 3/24. Dist. for 4/24.

1. Whether the Third Circuit's holding that probably cause exists so long as it was not "logically impossible" that Petitioner could have committed a crime is fatally inconsistent with this Court's probable cause jurisprudence.
2. Whether the Third Circuit's decision affirmative summary judgment in favor of Respondent prosecutors and investigators on official immunity grounds is inconsistent with the Federal Rules of Civil Procedure and this Court's precedent, because:
    (a) the Court viewed the evidence in the light most favorable to the Respondents, the moving party,; and
    (b) genuine issues of material fact existed regarding the existence of probable cause.

Fourth Amendment: Student Searches

08-927 S.E. v. Grant County Bd. of Educ. (6th Cir.)
BIO 3/24. Dist. for 4/24.

1. Whether the reasonableness standards set forth in *New Jersey v. T.L.O.* apply to seizures of the student's person in the public school context.
2. How states' mandatory reporting requirements for suspected criminal activity impact Fourth Amendment protections for students in public schools.
3. What Fourth Amendment protections are required for students in public schools when a school administrator seizes a student for the purpose of extracting an incriminating statement to be used for law enforcement purposes?
4. Whether school children should be afforded immunity for statements made to school officials in the school discipline context.
5. What Fifth Amendment protections are required for students in public schools when school officials require students to provide incriminating statements for law enforcement purposes?
6. What Fifth Amendment protections are required for students when a school administrator is required to report suspected criminal activity to law enforcement and then requires a student to provide an incriminating statement to be used for law enforcement purposes?

ERISA: Remedies

08-953 Rolland v. Textron, Inc. (11th Cir.)
BIO 3/27, reply 4/2. Dist. for 4/24.

1. In an action under the Employee Retirement Income Security Act (ERISA) for breach of fiduciary duty by willful and intentional misrepresentation by the fiduciary of the contents of an ERISA welfare plan, is the plaintiff-participant entitled to a jury trial?
2. If an employee has no remedy under ERISA for willful and intentional misrepresentation by his employer of the contents of an ERISA welfare plan, because it is found that the employer in making the misrepresentation was not acting in a fiduciary capacity, does ERISA preempt a state law fraud claim by the employee against his employer, leaving him with no remedy in any forum?

Antitrust: Standard-Setting

08-1072 Golden Bridge Techs. Inc. v. Motorola, Inc. (5th Cir.)
BIO 3/25, reply 4/6. Dist. for 4/24.

Whether deceptive and joint conduct which violates mandates governing the consensus process of a standard setting organization results in antitrust liability where such conduct removes a member's product from the standard.

First Amendment: Ballot Descriptions

08-1076 Clark v. Pawlenty (Minn.)
BIO 3/24. Dist. for 4/24.

Does a state ballot for judicial officer that includes "incumbent" next to the name of the current office holder violate the First Amendment rights of other candidates for that office, or the rights of the voters?

PENDING FOR UPCOMING CONFERENCES

Immigration Law: Waiver of Deportation

08-771 Morgorichev v. Holder (2d Cir.)
BIO 4/16.

Petitioner is a permanent resident alien who was found removable on the basis of his 1993 conviction at trial of an aggravated felony. Petitioner attempted to apply for a waiver of deportation under former Section 212() of the Immigration and Nationality Act (INA). The immigration judge held that he was ineligible to apply for relief due to the Antiterrorism and Effective Death Penalty Act (AEDPA), which made aliens convicted of aggravated felonies ineligible for § 212(c) relief. Petitioner sought habeas relief, arguing that the application of § 449(d) to care him from eligibility for § 212(c) gave the an impermissibly retroactive effect. The questions presented are:

1. Whether AEDPA § 440(d), as applied to Petitioner to deny him eligibility for § 212(c) relief due to his pre-enactment conviction, has an impermissible retroactive effect.
2. Whether the denial of § 212(c) relief to Petitioner because he was convicted at trial while such relief remains available to aliens convicted on a guilty plea violates equal protection.
3. Whether the denial of § 212(c) relief to Petitioner based on the date that the government commenced removal proceedings against him violates equal protection.
4. Whether the denial of § 212(c) relief to Petitioner on the basis that he was convicted at trial impermissibly penalizes him for exercising his Sixth Amendment right to be tried by jury.

RFRA: Religious Marijuana

08-777 Olsen v. Holder (8th Cir.)
CFR 1/29. BIO 3/30. Dist. for 5/1.

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

08-820 Bain v. United States (8th Cir.)
CFR 2/2. BIO 4/3. Dist. for 5/1.

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.

Separation of Powers: Appointments Clause

08-861 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (D.C. Cir.)
BIO 4/10.

1. Whether the Sarbanes-Oxley Act of 2002 violated the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board (PCAOB) with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public itnerest."
2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission (SEC), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.
3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violated the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are the "Head" of SEC.

Criminal Law: Felony-Murder Rule

08-866 Nevada v. Harte (Nev.)
BIO 4/10.

1. Does the United States Constitution demand the conclusion that "it is unconstitutional to base an aggravating circumstance in a capital prosecution on a felony that was used to obtain first-degree murder conviction"?
2. Does the United States Constitution support the conclusion of the Nevada Supreme Court that prohibits "basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony-murder"?
3. When evaluating the question of whether a statutory scheme genuinely narrows the class of murderers eligible for the death penalty, does the United States Constitutional call for an objective or qualitative analysis or should the reviewing court determine whether the scheme "sufficiently" narrows the class?

Civil Procedure: "Pending" Cases

08-871 Can. Pac. Ry. Co. v. Lundeen (8th Cir.)
BIO of United States 4/2. BIO of Lundeen 4/8.

1. Whether, consistent with *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and related cases, Congress can overturn a final federal court of appeals judgment simply because other claims not addressed by that judgment remain pending on remand from the initial decision.
2. Whether, consistent with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and related cases, Congress can employ a "clarification statement" to direct a federal court to set aside prior statutory interpretation (including by this Court) to reach a particular, different result in the pending case.

Criminal Law: Scienter

08-872 Dedman v. United States (6th Cir.)
BIO 4/10.

1. Whether the scienter requirement of 18 U.S.C. § 286, where the defendant has been charged with conspiracy to make false claims to obtain military benefits based on a "sham" marriage, may be satisfied by a general showing of bad faith based on the totality of the defendant's conduct rather than specific knowledge or deliberate ignorance of the claim's falsity, fictitiousness, or fraudulence.
2. Whether a state statute which prohibits the marriage of a grandparent to an adult adopted grandchild, which is the sole basis of the alleged falsity of the claim at issue in this case, violates the constitutional right to marry.

Criminal Law: Honest Services Fraud

08-876 Black v. United States (7th Cir.)
BIO 4/13.

1. Whether the honest services mail fraud statute, 18 U.S.C. § 1346, applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services wee owed.
2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

Immigration Law: Waiver of Deportation

08-878 Cruz-Garcia v. Holder (9th Cir.)
BIO 4/13.

Whether a lawful permanent resident, who is removable based on a conviction by jury trial, and who remained, even after the conviction, statutorily eligible for relief from removal under the then-existing 8 U.S.C. § 1182(), and who now faces removal proceeding initiated after the repeal of the statute, continues to remain eligible for that relief.

American Indian Law: Housing

08-881 Marceau v. Blackfeet Housing Auth. (9th Cir.)
BIO 4/15.

Whether the statutes, regulations, and HUD requirements were so pervasive that federal control over Indian housing construction created a trust responsibility towards Indians which the Complaint alleges was violated in this case.

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. BIO 4/15.

Brian Wolfman of Public Citizen is co-counsel for the respondents.

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.

American Indian Law: Sovereign Immunity

08-929 Cook v. Avi Casino Enters., Inc. (9th Cir.)
BIO 3/26. Dist. for 5/1.

Congress authorizes Indian tribes and their corporations to provide alcoholic beverages in Indian country, subject to complying with state laws ans with verified, published tribal ordinances. And in this area, no tradition of tribal sovereignty exists. A tribal-incorporated casino over-served its own employee, who caused a motor-vehicle collision resulting in amuptation of a motorcyclist's leg and other life-threatening injuries. Does the tribal sovereign-immunity bar a dram-shop lawsuit against the tribal corporation and its employees?

Employment Law: Union Membership

08-939 Mackay v. Aircraft Mechs. Fraternal Ass'n (9th Cir.)
BIO 3/30. Dist. for 5/1.

Federal labor law allows each employee to freely choose or reject union membership. Here, Petitioner did not sign a union membership card, take the union's membership oath, attend a union meeting, or otherwise give affirmative consent to joining. Nevertheless, the Ninth Circuit held that he became a union member bu silence and acquiescence, and thereby waived his rights under *Teachers Loal 1 v. Hudson*, 475 U.S. 292 (1986). The questions presented are:

1. Consistent with the federal labor policy of "voluntary unionism" and the First Amendment right of non-association, may a labor union conscript employees into union membership based solely on their silence or acquiescence?

2. Does an employee's payment of compulsory union dues, after being warned that nonpayment will result in termination from employment, constitute "acceptance" of a union's "offer of membership"?
3. If an employee becomes a union "member" by the simple act of paying compulsory union dues, does that employee also waive his rights under *Teachers Local 1 v. Hudson*?

Fifth Amendment: Takings Clause

08-945 Empress Casino Joliet Corp. v. Giannoulias (Ill.)
BIO 4/9.

In this case, the Illinois Supreme Court held that a state law transferring the revenues of four Illinois casinos to five Illinois horse-racing tracks is categorically not susceptible to challenge under the Takings Clause of the Fifth Amendment because, in that court's view, "regulatory actions requiring the payment of money are not takings. The question presented is whether the State's taking of money from private parties is wholly outside the scope of the Takings Clause.

Title VII: Race Discrimination

08-960 Baxter Healthcare Corp. v. White (6th Cir.)
BIO 4/1. Dist. for 5/1.

Adina Rosenbaum of Public Citizen is assisting the respondent.

1. To what extent may an employment discrimination plaintiff survive a motion for judgement as a matter of law based on nothing (or little) more than a comparison of his or her qualifications to that of the person selected for the position?
2. Whether an employment discrimination plaintiff proceeding under the mixed-motive theory may overcome summary judgment without establishing a *prima facie* case of discrimination, and by merely producing "some" evidence of discriminatory intent?

RICO: Standing

08-969 Hemi Group, LLC v. City of New York (2d Cir.)
BIO 4/3, reply 4/13. Dist. for 5/1.

Whether city government meets the Racketeer Influences and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging noncommercial injury resulting from nonpayment of taxes by non-litigant third parties.

Title VII: Race Discrimination

08-974 Lewis v. Chicago (7th Cir.)
BIO 4/10.

Under Title VII, a plaintiff bringing a suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days of the unlawful employment practice. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file within 300 days after the employer's use of the discriminatory practice?

Civil Procedure: Appellate Review

08-978 Hendley v. Dominguez (7th Cir.)
BIO 4/6.

Whether a plaintiff's general verdict may be properly affirmed on appeal when the reviewing court has, contrary to the *Baldwin* principle, found that some, though not all, of the theories of recovery submitted to the jury are supported by the law and evidentiary record.

Fourth Amendment: Taser Shocks

08-996 Buckley v. Rackard (11th Cir.)
CFR 3/13. BIO 4/14.

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. BIO 4/3, reply 4/14. Dist. for 5/1.

Scott Nelson of Public Citizen assisted the petitioner.

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?

Sixth Amendment: Confrontation Clause

08-1011 Reid v. United States (2d Cir.)
BIO 4/13.

1. There is a split in the courts of appeal as to the following question: Whether a defendant's Confrontation Clause rights are violated when the trial court bars the defendant from cross-examining accomplice witnesses about the mandatory minimum sentences they avoided by cooperating with the government because of the court's concerns that such cross-examination would alert the jury to the mandatory minimum sentences faced by the defendant.

2. Whether the separation of powers doctrine and Fifth Amendment Due Process Clause place any limits on prosecutorial discretion to charge one defendant with multiple counts pursuant to 18 U.S.C. § 924(c)—effectively imposing a life sentence against the defendant if convicted—while not so charging his more culpable co-defendants, resulting in a sentencing discrepancy of over one hundred years for similarly situated offenders who committed the same crimes.

Fifth Amendment: Takings Clause

08-1016 MCA Assocs., LP v. Twp. of Montville (N.J. Ct. App.)
BIO of N.J. Dep't of Env't Prot. 4/8. BIO of Twp. of Montville 4/13.

Whether the dismissal of Petitioner's inverse condemnation action, for lack of standing, was a deprivation of Petitioner's Fifth Amendment right to just compensation.

Due Process: Recusal

08-1017 Bd. of Comm'rs for the Orleans Levee Dist., Parish of Orleans v. Laurendine (Civ. Dist. Ct. Orleans Parish)
CFR 3/18. BIO 4/13.

Respondents brought this litigation against the Orleans Levee District (OLD), alleging design, construction, and maintenance failures in levees that were breached during Hurricane Katrina and sought class certification in state district court for all area residents and property owners who were damaged by flooding caused by these levee failures. The wife and two sons of the allotted judge, Judge Reese, each filed complaints against OLD in the U.S. District Court, alleging that OLD was negligent in various respects for the levee failures, and that the home occupied by Judge and Mrs. Reese, as well as each son's individual home, was flooded as a result thereof. OLD filed a motion to recuse Judge Reese, which was re-allotted to Judge Bagneris for hearing. Judge Bageris and his wife similarly filed a complaint against OLD in the U.S. District Court, seeking compensation for property damage to their New Orleans home as a result of levee failures. OLD sought Judge Bagneris's recusal from deciding its motion to recuse judge Reese. Judge Bengeris refused to recuse himself and denied the motion to recuse Judge Reese. The question presented is:
Whether Judge Bagneris's failure to recuse Judge Reese violated the Due Process Clause of the United States Constitution, when Judge Reese was directly an substantially impacted by the flooding, and the outcome of this case will have a significant influence over Judge Reese's wife's and sons' cases against OLD.

Section 1983: First Amendment Retaliation

08-1023 Lashway v. CarePartners, LLC (9th Cir.)
BIO 4/15.

1. Should a plaintiff seeking damages for First Amendment retaliation under 42 U.S.C. § 1983 for enforcement of fire safety regulations in an adult assisted-living facility be required to plead and prove the absence of probable cause, as required in prosecutorial retaliation under this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), in order to accommodate and avoid undermining the important interest in the safety of residents of those facilities?
2. In denying qualified immunity on a First Amendment claim of regulatory retaliation, did the Ninth Circuit err it was clearly established that no accommodation should be afforded to the government's important interest in enforcing compliance with safety standards by a closely regulated business when the federal courts are still divided over whether and how to accommodate the government's interest in this context?

FELA: Fear of Cancer

08-1034 CSX Transp., Inc. v. Hensley (Ct. App. Tenn.)
BIO 3/16, reply 3/31. Dist. for 4/17. Record Req. 4/17.

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), the Court held that, under the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60, plaintiff may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages," with the "important" qualification that the plaintiff must "prove that his alleged fear is genuine and serious." 538 U.S. at 157. The Court also identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The question presented is whether the Tennessee Court of Appeals erred in holding that a defendant is *not* entitled to a jury instruction that the plaintiff must prove his alleged fear of cancer to be "genuine and serious."

Privilege: Speech or Debate Clause

08-1059 Jefferson v. United States (4th Cir.)
BIO 4/16.

Whether the indictment of a member of Congress, although facially valid, should be dismissed when evidence privileged under the Speech or Debate Clause was used in the grand jury to obtain the indictment.

Preemption: ISTEA

08-1101 Louisiana v. Tassin (La. Ct. App.)
BIO of Lelia Tassin 3/31. Dist. for 5/1.

1. May state-law wrongful death and personal injury tort actions be predicated upon a claim of inadequate design of an interstate highway guardrail struck by a 40,000 pound intercity bus when the guardrail installation is approved by the Secretary of Transportation through the Federal Highway Administration, and conforms with the Congressional mandate of Section 1073 of the Intermodal Surface Transportation Efficiency Act (ISTEA), directing the Secretary of Transportation to implement standards and guidelines for the installation of acceptable roadside barriers and other safety appurtenances "which shall accommodate vans, minivans, pickup trucks, and 4-wheel drive vehicles"?
2. Does ISTEA Section 1073 establish a federal crashworthiness design standard for guardrails on the interstate highway system; and do federal design standards or guidelines for interstate highway guardrails require accommodation of a 40,000 pound intercity bus notwithstanding ISTEA Section 1073?

Civil Procedure: Enforceability of Financial Agreements

08-1106 Gross v. German Found. Indus. Initiative (3d Cir.)
BIO 4/6.

Under the Berlin Agreements, Holocaust victims dismissed claims against German corporations in return for respondents' promise to pay 5 billion deutschmarks (DM), plus "at least" DM 100 million in "interest," to a German Foundation for distribution to the victims. Petitioners allege that over DM 250 million in interest is payable as a result of respondents' 18-month delay in payment. The ruling below, holding respondents' financial promise judicially unenforceable, raises the following questions:

1. Whether the decision below if contrary to *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), and other cases treating the bargain in the Berlin Agreements as a judicially enforceable ceiling.
2. Whether private financial promises, using the mandatory "shall," in hybrid documents signed by both private parties and governments are judicially enforceable as contracts or self-executing private economic regulations with "domestic effect" within the meaning of *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

Administrative Law: *Chevron* Deference

08-1124 Marchand v. Marchand (N.M.)
BIO 4/6.

1. What is the proper distribution of the September 11th Victims Compensation Fund Award? Whether the Final Report of the Special Master of the September 11th Victims Compensation Fund, based upon federal regulations and articulating the policy that no surviving spouse is to receive less than one-half of the award for economic loss, should be given *Chevron* deference.
2. Where Congress enacts special legislation, such as the September 11th Victims Compensation Fund, in response to a national tragedy, and gives special legal authority to a Special Master, can a state court ignore the administrative law decisions of the Special Master?

Fourth Amendment: Excessive Force

08-1128 Broad v. Weigel (10th Cir.)
BIO 4/10.

This case arose out of an altercation between two Wyoming Highway Patrol Troopers, several passing motorists and Bruce Weigel after Weigel rear-ended a Trooper's patrol vehicle on the interstate, then ran into oncoming traffic after being stopped. Weigel was tackled into the shoulder of the in an effort to save his life. With the help of passers-by, the Troopers eventually managed to get a struggling Weigel on the ground and handcuffed. Weigel then stopped breathing and died. Despite finding no prior cases on point, a plit panel of the Tenth Circuit found that the Troopers were not entitled to qualified immunity. The questions presented are:

1. Whether, under *Hope v. Pelzer*, it is proper for a court, in a qualified immunity analysis, to elevate and equate police training to the status of clearly established law.
2. Whether the Court of Appeals applied the proper standard in determining that the Troopers' conduct was objectively unreasonable in light of this Court's recent decision in *Scott v. Harris*.

Fourth Amendment: Seizure

08-1138 Aureus Holdings, Ltd. v. City of Detroit (6th Cir.)
BIO 4/10.

1. Whether the Sixth Circuit Court of Appeals erred in affirming the district court's decision to dismiss Plaintiff Schultz's § 1983 action against Dockery on the grounds that the seizure of Schultz's shotgun was not so unreasonable as to violate Schultz's Fourth Amendment Constitutional rights.
2. Whether the Sixth Circuit Court of Appeals erred in affirming the district court's decision to dismiss Plaintiff Aureus's § 1983 action against the City of Detroit for violations of the Fifth and Fourteenth Amendments on the grounds that Plaintiffs presented no evidence of a policy or custom that deprived them of procedural due process.

Fifth Amendment: Takings Clause

08-1139 Action Apt. Ass'n v. City of Santa Monica (Cal. Ct. App.)
BIO 4/6, reply 4/14.

The City of Santa Monica enacted Ordinance 2191, which mandates that certain developers of new residential units sell or rent a percentage of those units at below-market prices or rents to lower-income persons as a condition to obtaining a building permit. Does a Fifth Amendment taking claims, based upon the "essential nexus" and "rough proportionality" tests articulated in *Nollan v. California Coastal Commission*, 483 U.S. 826 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), lie against legislatively imposed exactions (like Ordinance 2191), as numerous state and federal courts have held? Or, are legislatively imposed exactions, including Ordinance 2191, immune to a takings claim under *Nollan* and *Dolan*, as the California Court of Appeal below and other courts have held?

Preemption: Motor Carrier Act

08-1154 Johnson v. Clarendon Nat'l Ins. Co. (Ga. Ct. App.)
BIO 3/31, reply 4/13. Dist. for 5/1.

1. Federal law requires interstate motor carriers to enter leases with owner-operator truckers and assume vicarious responsibility for them as statutory employees. Regulations define "motor carrier" to include an agent, "employee" to include an independent contractor, and "lease" to include a "contract *or* arrangement." In this case, a carrier appointed an agent who informally hired an unqualified owner-operator without use of the word "lease." Can a carrier thus immunize itself from responsibility to the public through an informal hiring arrangement that evades compliance with the lease requirement?
2. This Court has long held that federal safety regulations must be liberally construed to effectuate their remedial purpose. May a state court construe the Motor Carrier Act more strictly and narrowly than the text of the Federal Motor Carrier Safety Regulations promulgated by the agency to which Congress delegated Authority to administer the Act?
3. Do the Motor Carrier Act and the Federal Motor Carrier Safety Regulations preempt state laws that set lower standards for safety and financial responsibility?

Criminal Law: Sentencing

08-1185 Dunphy v. United States (4th Cir.)
Memo. in opposition 4/16.

Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

CALLS FOR RESPONSE

NEW CFR

First Amendment: Employee Speech

08-1082 City of Maywood v. Densmore (9th Cir.)
CFR 4/21, due 5/21.

1. Probationary police officer Joseph Densmore reported a fellow officer's crime to a superior via email. He allegedly suffered retaliation. Under the department's Policy Manual and California law, police officers have a duty to report crimes. Did Densmore speak within the scope of his duties in reporting the crime—barring his First Amendment retaliation claim?
2. Defendants moved for summary judgment on the ground Densmore spoke within the scope of his duties and this did not engage in First-Amendment-protected speech. Densmore submitted a declaration opining that his job duties did not require him to make the report; to the contrary, he opined, a "code of silence" within the police department required him *not* to report his fellow officer's misconduct. Despite Densmore's evidence, the district court granted summary judgment. Did the district court correctly decide the scope of duties as a question of law, or did Densmore's evidence establish a genuine issue of fact?
3. And more generally: After *Garcetti*, id the protected speech determination *still* to be decided by the court as a "question of law," or do disputed facts raise a "question of fact" to be decided by a jury?

First Amendment: Petition Clause

08-1122 Clark v. Jenkins (Tex. Ct. App.)
CFR 4/17, due 5/18. *Amicus* Tex. Civil Rights Project 4/1.

1. Whether a statement concerning possible corruption by a public official—made solely in a petition for redress of grievances addressed to government authorities empowered to investigate those claims—can support an action for libel, or whether that statement is absolutely privileged under the Petition Clause of the First Amendment.
2. Whether, even if a public figure may bring an action for libel based on a statement made solely in a petition for redress of grievances, the First Amendment nonetheless protects from liability those who merely relay defamatory statements made by others.
3. Whether this Court should overrule *McDonald v. Smith*, 472 U.S. 479 (1985).

Due Process: Recusal

08-1205 Botes v. United States (11th Cir.)
CFR 4/15, due 5/15.

1. Whether the Eleventh Circuit Court of Appeals erred by accepting the government's position that appearance of impropriety is *not* the proper standard for recusal of trial court and judicial candidates.
2. Whether the Eleventh Circuit Court of Appeals appellate review for "unreasonableness" has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *Booker* and its progeny. (This petition may be held for 08-22 *Caperton v. A.T. Massey Coal Co.*, which was granted 11/14 and argued 3/3.)

PENDING 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 5/22 (ext.).

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?

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 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 5/11 (ext.).

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

Immigration Law: Due Process

08-785 Agasino v. Holder (9th Cir.)
CFR 2/11, due 5/26 (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 5/20 (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 4/30 (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.

Attorney's Fees: "Prevailing Party"

08-853 Zessar v. Keith (7th Cir.)
CFR 2/26, due 4/29 (ext.).

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

American Indian Law: Village Corporations

08-863 Stratman v. Salazar (9th Cir.)
BIO of Leisnoi, Inc. 1/15. CFR from federal resp. 3/26, due 4/27.

Petitioner brought this action to review of the determination that Leisnoi, Inc., was qualified to receive land and benefits under the Alaska Native Claims Settlement Act (ANCSA) as an eligible "Native village." On remand, the Interior Board of Land Appeals (IBLA) determined that Leisnoi was not qualified. The Ninth Circuit held that the Petitioner's action has been mooted by Section 1427 of the Alaska National Interest Land Conservation Act (ANILCA), which listed Leisnoi as one of the affected "village corporations." The Ninth Circuit held that the listing of Leisnoi as a "village corporation" constituted a congressional determination of its eligibility, and exempted Leisnoi from having to satisfy ANCSA's requirements. The court based its interpretation on the "plain language" of this provision, and refused to consider its legislative history, which showed that Congress has listed Leisnoi as a "village corporation" in the mistaken belief that the determination of its eligibility had already become final, and that Leisnoi has

already been determined to have satisfied ANCSA's eligibility requirements. The question presented is: Whether Ninth Circuit impermissibly invalidated a prior Congressional enactment by failing to apply the canons statutory construction relating to the "plain language" of ANILCA Section 1427 as exempting Leisnoi from ANCSA's village eligibility provisions, and mooting the Petitioner's action, without regard to Section 1427's legislative history, and contrary to Congress's actual intent.

Due Process: Prejudgment Remedies

08-890 Diaz v. Paterson (2d Cir.)
CFR 3/11, due 5/11 (ext.).

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 limitations on litigable issues when individuals seek to have a *lis pendens* cancelled violate the right of access to judicial redress, including the right to raise constitutional challenges to the law itself?

Habeas Corpus: Statute of Limitations

08-917 McSwain v. Davis (6th Cir.)
CFR 3/18, due 4/17.

Whether, in order to be entitled to an evidentiary hearing to determine if a habeas petitioner's mental illness prevented her from meeting the one-year limitations period instituted by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d), it is sufficient that a habeas petitioner demonstrates the existence of such a mental condition, as the Third and Ninth Circuits have held, or whether a petitioner must also meet additional pleading and evidentiary requirements, as the Sixth Circuit held below.

Attorney's Fees: "Prevailing Party"

08-951 Tavory v. NTP, Inc. (Fed. Cir.)
CFR 3/24, due 4/23.

Whether a dismissal for lack of subject matter jurisdiction can ever be a "judgment on the merits" or other "material alteration of the legal relationship between the parties" under this Court's definition of "prevailing party" articulated in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), thereby authorizing an attorney's fee award to a defendant under federal statutes allowing a "prevailing party" to recover attorney's fees.

Section 1983: Qualified Immunity

08-961 McKinney v. Parsons (6th Cir.)
CFR 3/24, due 4/23.

1. Whether the Sixth Circuit's published decision erroneously sent to the jury a question of law reserved for the Court, i.e. under qualified immunity, whether or not Officers were reasonably mistaken when engaged in conduct arguably violative of a constitutional right.
2. Whether the Sixth Circuit's published Opinion properly eliminates the burden traditionally placed upon plaintiffs to establish that governmental Officers were not objectively reasonable.
3. Whether an appellate court's *de novo* review can reverse a Rule 56 summary judgment on the strength of unsupported speculation and erroneous assumption.

ADA: Standing

08-993 Best Western Encina Lodge & Suites v. D'Lil (9th Cir.)
CFR 3/19, due 5/18 (ext.).

Whether the Ninth Circuit erred in holding that a plaintiff has standing to assert an Americans with Disabilities Act claim solely for injunctive relief against a hotel even though the district court found that the plaintiff had not proven any intent to return to the hotel at the time she filed her complaint and that she had filed numerous complaints with similar allegations and had never returned to those hotels.

Criminal Law: Plea Agreements

08-1018 Ohio v. Veney (Ohio)
CFR 3/19, due 5/20 (ext.).

1. This criminal defendant approved a written plea in which he acknowledged his understanding of various constitutional rights and in which he waived those rights, and he further acknowledged in open court that he approved the written plea and had reviewed his constitutional rights with his counsel. Did the constitutional standard under *Boykin v. Alabama*, 395 U.S. 238 (1969), require that the trial court go further and provide specific oral advisements and obtain specific oral waivers regarding such constitutional rights?
2. The *Boykin* Court held that the record of proceedings must affirmatively disclose the waiver of the right against compelling self-incrimination, the right to jury trial, and the right to confront witnesses. Should the list of three *Boykin* rights be expanded to include the right to require proof beyond a reasonable doubt?
3. If an oral advisement is constitutionally required, does the failure to give such an advisement require automatic reversal when other parts of the trial-court record, including the defendant's written plea, show that the defendant was aware of the right to proof beyond a reasonable doubt and was waiving that right?

ERISA: Remedies

08-1068 Gagliano v. Reliance Standard Life Ins. Co. (4th Cir.)
CFR 3/23, due 5/22 (ext.). *Amicus* Patient Advocate Found. 3/23.

If employee welfare benefits are terminated in violation of the procedures required by 29 U.S.C. § 1133 and regulations promulgated thereunder, does 29 U.S.C. § 1132(a)(3) permit a court to reinstate those benefits (or enjoin their termination) until they are terminated in compliance with ERISA? The Fourth Circuit expressly split with its sister circuits on this question.

ADEA: Burden-Shifting

08-1097 Adam v. Salazar (9th Cir.)
CFR 4/1, due 5/1.

1. Whether the burden of proof in an ADEA disparate-impact claim is on the plaintiffs, rather than the defendants as held in *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, 128 S. Ct. 2395 (June 19, 2008).
2. Whether each plaintiff in a RIF must present *additional* direct evidence of age discrimination, after finding direct evidence of age discrimination for two of the plaintiffs and "the existence of a culture of age-based discriminatory animus in the Geological Division."
3. Whether bifurcation of discrimination claims from "non discrimination" claims such as violations of the RIF regulations denies *de novo* review required by 5 U.S.C. § 7703(b) of the Civil Service Reform Act.

Criminal Law: Double Jeopardy

08-1103 Michigan v. Williams (Mich. Ct. App.)
CFR 4/6, due 5/6.

Do decisions holding that the direction of a verdict of acquittal by a trial judge, taking the case from the jury, based on an erroneous understanding of that which constitutes the elements of the offense, constitutes an acquittal barring retrial, conflict with *United States v. Martin Linen Supply*, and if not, should that case be reconsidered? (This petition may be held for 08-67 *Yeager v. United States*, granted on 11/14 and argued 3/23.)

ADA: Former Employees

08-1113 McKnight v. Gen. Motors Corp. (6th Cir.)
CFR 4/1, due 5/29 (ext.).

1. Do the anti-discrimination protections of the Americans with Disabilities Act (ADA) and its implementing regulations apply to disabled former employees?
2. Under the ADA and its implementing regulations, may an employer, which does not reduce the benfits of non-disabled worker who have post-retirement earnings, reduce the retirement benefits of disabled workers solely because they receive federal disability benefits?

First Amendment: Religious Student Groups

08-1130 Truth v. Kent Sch. Dist. (9th Cir.)
Supp. br. of Truth 4/3. CFR 4/6, due 5/6.

Truth, a Christian student group, applied for charter club status at Kentridge High School in Kent School District to secure access to facilities, funding, and other benefits. Truth's application was denied, however, because its membership criteria require students to possess a true desire to study the Bible and grpw in a relationship with Jesus Christ. While the school district generally allows chartered student clubs to maintain group identity and expression by limiting membership to those who adhere to the group's ideology, the district's nondiscrimination policy denied religious groups this same privilege. The questions presented are:

1. Did the Ninth Circuit err in holding, in conflict with the decisions of this Court and the Second Circuit, that schools could circumvent the basic protections of the Equal Access Act by excluding religious groups under a nondiscrimination policy?
2. Did the Ninth Circuit err in holding, in conflict with the decisions of this Court and the Seventh and Eighth Circuits, that an infringemnet on expressive association triggers a deferential reasonableness standard, rather than strict scrutiny?

Military Courts: Jurisdiction

08-1133 Wuterich v. United States (C.A.A.F.)
CFR 4/2, due 5/4.

Whether a statute authorizing an interlocutory prosecution appeal of a ruling "which excludes evidence" grants the Article I military appellate courts jurisdiction to reverse an order quashing a subpoena.

Medicaid: Reimbursement

08-1146 Brown v. N.C. Dep't of Health & Human Servs. (N.C.)
CFR 4/9, due 5/11. *Amicus* N.C. Advocates for Justice 4/15.

Whether the North Carolina Supreme Court's application of N.C. Gen. Stat. § 180A-57(a) fails to comply with federal anti-lien laws and with this Court's ruling in *Ahlborn v. Arkansas Department of Human Services*, 545 U.S. 1165 (2005), by establishing an irrebuttable presumption allowing Medicaid to obtain reimbursement of 100% of its actual past medical expenses up to a cap of one-third of the proceeds of a Medicaid beneficiary's personal injury settlement or recovery, without permitting any judicial determination of the amount actually allocable to medical expenses.

Preemption: State-Law Immunity

08-1173 Amalgamated Transit Union Local No. 1338 v. Dallas Area Rapid Transit (Tex.)
CFR 4/8, due 5/8.

Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC held that a union does not have a federal cause of action to enforce the provisions of a "Section 13(c)" arrangement and a collective bargaining agreement negotiated pursuant to such arrangement against a local transit authority under the Urban Mass Transit Act of 1964 (UMTA). *Jackson Transit Authority* held that any such suit must be filed under state law. Here, the Texas Supreme Court held that Texas governmental immunity law is not preempted by Section 13(c) of the UMTA and therefore, the local transit authority is immune from a suit alleging a breach of the parties' 13(c) arrangement. The questions presented are:
1. Whether the decision of the Texas Supreme Court conflicts with *Jackson Transit Authority*.
2. Whether federal preemption applies to Texas state immunity law that otherwise would bar a union's state-court suit against a governmental entity for alleged violations of a Section 13(c) arrangement.
3. Whether UMTA give a union the right to pursue a contract action in state court, regardless of state law that provides governmental entity immunity from suit, for alleged vioaltions of a Section 13(c) arrangement and agreements reached pursuant to the Section 13(c) arrangement.
4. Whether the Court in *Jackson Transit Authority* intended the "right" to "pursue a contract action in state court" merely meant that the union could file suit, subject to summary dismissal because of governmental immunity, or whether the Supremacy Clause dictates that 13(c) arrangements and agreement reached pursuant to those arrangements can both be *filed* and *considered on the merits* in state court?

Equal Protection: Religious Service

08-1184 Bowman v. United States (6th Cir.)
CFR 4/10, due 5/11.

In 1993, Congress enacted legislation to encourage members of the armed services to retire early from the military. As an incentive, the legislation allowed early retirees ro attain credit for twenty years of military service, and a full military pension by engaging in employment for "public and community service" organizations. However, the Secretary of Defense adopted a regulation that precluded credit for work for "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." This case challenges the validity of that regulation and presents the following questions:

1. Is the exclusion of religious organizations invalid as contrary to the intent of Congress in enacting the community service program?
2. Does the exclusion constitute a religion-based classification that violates the guarantee to equal protection embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

PENDING CVSG

Statute of Limitations: Inquiry Notice

07-1489 Trainer Wortham & Co., Inc. v. Betz (9th Cir.)
BIO 6/30, reply 7/10. Dist. for 9/29. CVSG 10/6.

1. Did the Court of Appeals err in concluding that the statute of limitations begins to run not from the moment the plaintiff is on inquiry notice that there may have been a misrepresentation (as some circuits have held), and not from the subsequent point at which a reasonable investigation would have revealed that she had a possible fraud claim (as other circuits have held), but only from the point at which she receives evidence that the investment advisor intended to defraud her?

2. Did the Court of Appeals err in holding that an investor who is on inquiry notice that she has a basis for a fraud claim, and is, therefore, obliged to make a reasonable inquiry, may reasonably end her investigation just because the suspected defrauders have made assurances that contradict known facts.

Petroleum Marketing Practices Act: Constructive Termination

08-240/08-372 Mac's Shell Serv. v. Shell Oil Prods. Co./Shell Oil Prods. Co. v. Mac's Shell Serv. (1st Cir.)
08-240: BIO 10/31. Dist. for 11/25. CVSG 12/1.
08-372: BIO 10/24, reply 11/7. *Amicus* Am. Petroleum Inst. 10/24. Dist. for 11/25. CVSG 12/1.

08-240:
Whether the Petroleum Marketing Practices Act encompasses a claim for "constructive" nonrenewal of the franchise relationship where: (1) 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?

Preemption: Telecommunications Law

08-626 Level 3 Commc'ns, LLC v. St. Louis (8th Cir.)
BIO 12/19, reply 12/31. *Amicus* AT&T, Inc. 12/12. Dist. for 3/20. CVSG 3/23.

Did the Eighth Circuit err in holding, in acknowledged conflict with several other circuits, that local governments' fees and restrictions on telecommunications carriers' access to public rights-of-way are not preempted by federal law so long as they do not effectively preclude the plaintiff from providing telecommunications services?

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 Unites 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?

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.

Preemption: Telecommunications Law

08-759 Sprint Telephony PCS, LP v. San Diego County (9th Cir.)
Amici Level 3 Commc'ns, LLP 12/31, PCIA, NextG Networks of Cal., Inc. 1/12. BIO 2/11, reply 2/24. Dist. for 3/20. CVSG 3/23.

Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. § 253(a), provides that "[n]o State or local states or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate telecommunications service." The question presented is whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by 47 U.S.C. § 253(a) if it substantially impedes an entity from providing service.

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?

Criminal Law: Private Prosecutions

08-6261 Robertson v. United States (D.C. Cir.)
CFR 12/11. BIO 2/11. Dist. for 3/20. CVSG 3/23.

Whether prosecution for criminal contempt of a Congressionally created court must be done in the name of the United States, or whether the prosecution may be pursued by a private individual.

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 "polices, 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. Re-listed for 3/27.

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

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?

Criminal Law: Aggravated Identity Theft

08-622 United States v. Villanueva-Sotelo (D.C. Cir.)
CFR 12/31. BIO 3/2. Dist. for 4/3. Held for 08-108 *Flores-Figueroa v. United States* (granted 10/20, arg. 2/25).

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.

Immigration Law: Criminal Definitions

08-643 Canales-Matamoros v. Holder (11th Cir.)
BIO 3/16, reply 3/31. Dist. for 4/17. Likely held for 08-495 *Nijhawan v. Holder* (granted 1/16, arg. 4/27).

1. Whether the uniform federal criminal definition for conviction of sexual abuse of a minor governs the deportation provision in Section 101(a)(43)(A) of the Immigration and Nationality Act of 1952 as amended, 8 U.S.C. § 1101(a)(43)(A), requiring removal of an alien convicted of sexual abuse of a minor.
2. Whether the rule lenity or narrow construction should be applied to resolve an ambiguity in a deportation provision that is also part of a federal criminal statute.

Habeas Corpus: "Clearly Established"

08-652 Beard v. Abu-Jamal (3d Cir.)
BIO 2/13, reply 3/2. Suppl. brief of pet. 3/18. Dist. for 3/20.

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

Communications Regulation: Broadcast Indecency

08-653 Fed. Commc'ns Comm'n v. CBS Corp. (3d Cir.)
BIO 1/8, reply 1/16. Dist. for 2/20.

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

Immigration Law: Stay of Removal

08-693 Tesfagaber v. Holder (4th Cir.)
BIO 1/28. Dist. for 2/27. Held for 08-681 *Nken v. Holder* (granted 11/25, arg. 1/21).

Whether a circuit court's decision to stay an alien's removal pending consideration of the alien's petition for review is governed by section 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)—which provides that no court shall "enjoin" the removal of an alien unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law—as the court below and one other court of appeals have held, or whether theat 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?

International Law: Child Abduction

08-775 Duran v. Beaumont (2d Cir.)
CFR 2/11. BIO 3/13, reply 3/23. Suppl. brief of pet. 3/23. Dist. for 4/17. Held for 08-645 *Abbott v. Abbott*, (CVSG 1/21).

1. Should the Supreme Court resolve the cirucit 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?

Arbitration: Interlocutory Appeal

08-816 Renasant Bank v. Kimberlin (6th Cir.)
CFR 2/5. BIO 3/9. Dist. for 4/17. Held for 08-146 *Arthur Andersen LLP v. Carlisle* (granted 11/7, arg. 3/3).

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.

LAST CONFERENCE

View the **April 20th Orders List** from the April 17th Conference.

CERTIORARI GRANTED

Criminal Law: Speedy Trial Act

08-728 Bloate v. United States (8th Cir.)
BIO 2/4, reply 2/18. Record req. 2/23. Dist. for 4/17. Cert. granted 4/20.

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).

First Amendment: Animal Cruelty Depictions

08-769 United States v. Stevens (3d Cir.)
Amicus Humane Soc'y 1/14. BIO 3/20, reply 3/31. Dist. for 4/17. Cert. granted 4/20.

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. The question presented is whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause.

Section 1983: Prosecutor Liability

08-1065 Pottawattamie County v. Harrington (8th Cir.)
BIO 3/17, reply 3/31. Dist. for 4/17. Cert. granted 4/20.

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

CERTIORARI DENIED

Immigration Law: Waiver of Deportation

08-605 Gonzáles-Mesías v. Holder (1st Cir.)
BIO 3/9, reply 3/23. Dist. for 4/17. Cert. denied 4/20.

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 of 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 is 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?

First Amendment: Prior Restraint

08-636 Gen. Auto Serv. Station v. City of Chicago (7th Cir.)
CFR 12/9. BIO 3/11, reply 3/20. Dist. for 4/17. Cert. denied 4/20.

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.

Bankruptcy Law: Setoff

08-719 Am. Steamship Owners Mut. Prot. Indemnity Ass'n, Inc. v. Asbestosis Claimants (2d Cir.)
BIO 3/13, reply 3/20. Dist. for 4/17. Cert. denied 4/20.

1. Did the Second Circuit, in reversing the decision of the district court which had affirmed the bankruptcy court, err in denying petitioner marine indemnity insurer (Club) the proper full exercise of its judicially granted right of setoff under federal bankruptcy law, in conflict with relevant decisions of this Court?
2. In reaching its decision, did the Second Circuit, by
(a) failing to state or apply any legal rule applicable to interpreting reorganization plan provisions,
(b) without analyzing or accurately stating bankruptcy plan § 4.05.07(a)(iv), wrongly asserting that it "authorized that any setoff owed by Prudential to an insurer be shared ratably among the Claimants and subtracted from each Claimant's individual recovery in much the same way as the deductibles

. . . ," in such a way as to deny petitioner Club exercise of its adjudicated setoff right fully against the Trust when in fact subsection (iv) authorized nothing of the kind, but instead *mandated* that there be a ratable sharing among all affected claimants of *a claim against the offset amount*, i.e., the total amount previously offset by the Club; and
(c) in "quoting" that plan provision exercising certain words and adding others in brackets, thus rewriting, distorting, and concealing its actual language and true meaning, in such a way as to lend spurious credence to its wrong assertion of what plan § 4.05.07(a)(iv) "authorized,"

so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

First Amendment: True Threat Doctrine

08-757 Parr v. United States (7th Cir.)
BIO 3/13. Dist. for 4/17. Cert. denied 4/20.

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"?

Criminal Law: Sentencing

08-779 Wittig v. United States (10th Cir.)
CFR 1/14. BIO 3/16, reply 3/26. Dist. for 4/17. Cert. denied 4/20.

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.

Criminal Law: Jury Deliberations

08-833 Oliver v. Quarterman (5th Cir.)
BIO 3/20, reply 4/1. Dist. for 4/17. Cert. denied 4/20.

1. Does juror consultation of the Bible during sentencing deliberations deprive a defendant of his federal constitutional rights?
2. When evaluating possible prejudice to a defendant resulting from juror consultation of the Bible during sentencing deliberations, what standard of proof should apply, or should there be an irrebuttable presumption of prejudice?
3. Did the Fifth Circuit misapply or contravene federal law by requiring Petitioner to present "clear and convincing" evidence to rebut what the Fifth Circuit believed was the state court's finding "that the Bible did not prejudice the jury's decision," given the state trial court refused to permit or consider juror testimony about the effect of the Bible consultation on the jurors or their deliberations?

Statute of Limitations: Tolling

08-849 Kight v. Turner (Md.)
Amicus North Carolina 2/6. BIO 3/20, reply 3/31. Dist. 4/17. Cert. denied 4/20.

1. When a federal district court dismisses state law claims under 28 U.S.C. § 1367(c), does 28 U.S.C. § 1367(d) operate to toll the limitations period to the extent necessary to guarantee the plaintiff a period of at least 30 days following the dismissal to refile in state court (as most state courts and all federal courts of appeals that have considered the question have concluded), rather than to suspend the running of the relevant state statute of limitations and thereby grant the plaintiff a refiling period consisting of the entire balance of the limitations period plus 30 days (as the Court of Appeals of Maryland, among a minority of other state courts, has decided)?
2. Once a federal district court has dismissed state law claims under 28 U.S.C. § 1367(c), have they ceased to be "pending" for purposes of 28 U.S.C. § 1367(d)?

ADA: Burden-Shifting

08-873 Grubb v. Sw. Airlines (5th Cir.)
BIO 3/13. Dist. for 4/17. Cert. denied 4/20.

This court recently repudiated burden-shifting in an ADEA case (*Mescham Knolls Atomic Power Laboratory*, 128 S. Ct. 2395), citing the lack of congressional intent that traditional burdens of proof should be shifted. Yet , the issue remains unsettled as to whether or not the court-created *McDonnell-Douglass Corp. v. Green*, (411 U.S. 792) burden-shifting protocol should continue to be utilized when courts decide FMLA and ADA cases. Numerous circuit courts have rejected the use of burden shifting in FMLA entitlement/interference cases and ADA reasonable accommodation cases. Yet other circuit courts, including the Fifth Circuit below, continue to utilize the *McDonnell-Douglass* burden-shifting protocol and its progeny for FMLA entitlement/interference cases and ADA reasonable accommodation cases. This Petition addresses the question of whether or not this Court should decide the propriety of the continued application of burden shifting under *McDonnell-Douglass* and its progeny for FMLA and ADA cases in general, and FMLA entitlement/interference cases and ADA reasonable accommodation cases in particular.

Preemption: FDCA/State Consumer Remedy

08-889 Tri-Union Seafoods, LLC v. Fellner (3d Cir.)
CFR 2/2. *Amicus* Nat'l Fisheries Inst. 2/17, Chamber of Commerce of U.S. 3/3. BIO 3/20, reply 4/1. Dist. for 4/17. Cert. denied 4/20.

Adina Rosenbaum, Brian Wolfman, and Allison Zieve of Public Citizen are counsel for the respondent.
Brief in Opposition

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.

Statute of Limitations: Choice of Law

08-1019 Hilao v. Revelstoke Investment Corp., Inc. (9th Cir.)
BIO 3/10, reply 3/17. Dist. for 4/17. Cert. denied 4/20.

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?

Securities Exchange Act: Pleading Requirements

08-1021 Gilead Sci., Inc. v. St. Clare (9th Cir.)
BIO 3/16, reply 3/31. *Amici* Biotech. Indus. Org., Wash Legal Found., Nat'l Ass'n of Mfrs., Former SEC Comm'rs, Civ. Justice Ass'n of Cal., Tech. Network 3/16. Dist. for 4/17. Cert. denied 4/20.

Whether a plaintiff in a "fraud on the market" case under Section 10(b) of the Securities Exchange Act must plead facts with sufficient particularity to support a reasonable, non-speculative belief that the plaintiff ultimately can prove loss causation.

Due Process: Evidence

08-1033 5634 E. Hillsborough Ave., Inc. v. Hillsborough County (11th Cir.)
BIO 3/16. Dist. for 4/17. Cert. denied 4/20.

1. Has the opinion of the Eleventh Circuit below, and the other judicial opinions throughout the nation that have misinterpreted or misapplied the decision in *City of Los Angeles v. Alameda Books, Inc.*, 525 U.S. 425 (2002), operated as a denial of due process by depriving a party the right in a dispute, constitutional or otherwise, to put on *evidence*, addressing the truth or falsity of a fact in dispute?
2. Does the confusion in the application of the burden shifting evidentiary process set forth in *Alameda Books* justify certiorari review?
3. Can the courts apply a differential summary judgment standard and evaluate countervailing evidence and testimony at the summary judgment stage in upholding regulations affecting a First Amendment protected form of business, and deny due process in this one isolated context?

Section 1983: Qualified Immunity

08-1037 Roberts v. Torres (9th Cir.)
BIO 3/10. Dist. for 4/17. Cert. denied 4/20.

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?

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 seas 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. Arg. 4/28.

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).