



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
June 4, 2009 Conference**

Prepared by Leah Nicholls, 2008–2009 SCAP Fellow

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

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

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

WATCH LIST CONTENTS

Issue Index.	<u>3</u>
Resources.	<u>5</u>
Links for More Information.	<u>5</u>
Key Terms & Abbreviations.	<u>6</u>
May 28th Conference.	<u>7</u>
Pending for Upcoming Conferences.	<u>15</u>
Calls For Response.	<u>31</u>
Pending CFR.	<u>31</u>
Calls for the Views of the Solicitor General.	<u>36</u>
New CVSG.	<u>36</u>
Pending CVSG.	<u>36</u>
Held/Awaiting Action.	<u>38</u>
Last Conference.	<u>41</u>
Summary Reversal.	<u>41</u>
Certiorari Denied.	<u>41</u>
Granted Cases Involving Public Citizen 2008 Term.	<u>44</u>

ISSUE INDEX

ADA	<i>Former Employees</i> <u>32</u>	<i>Private Prosecutions</i> <u>37</u>
	<i>Standing</i> <u>21</u>	<i>Sentencing</i> <u>9, 24, 33, 43</u>
ADEA	<i>Burden-Shifting</i> <u>31</u>	<i>Venue</i> <u>21</u>
American Indian Law		Due Process
<i>RFRA</i> <u>8</u>		<i>Civil Commitment</i> <u>28</u>
<i>Village Corporations</i> <u>19</u>		<i>Evidentiary Presumptions</i> <u>35</u>
Antitrust		<i>Forfeiture</i> <u>34, 47</u>
<i>Competitor Fraud</i> <u>38</u>		<i>Prejudgment Remedies</i> <u>20</u>
<i>Sports Leagues</i> <u>37</u>		<i>Recusal</i> <u>23, 34, 46</u>
Arbitration		Eleventh Amendment
<i>Class Arbitration</i> <u>25</u>		<i>State Entities</i> <u>43</u>
<i>Foreign Arbitral Awards</i> <u>26</u>		Employment Law
<i>Government Contracts</i> <u>25</u>		<i>Strikebreakers</i> <u>34</u>
<i>Public Policy Defense</i> <u>42</u>		Environmental Law
<i>Unincorporated Territories</i> <u>24</u>		<i>Clean Air Act</i> <u>30</u>
Attorney's Fees		<i>Clean Water Act</i> <u>22, 45</u>
<i>"Prevailing Party"</i> <u>31, 42</u>		<i>Standing</i> <u>44</u>
Bankruptcy		Equal Protection
<i>Attorneys</i> <u>10</u>		<i>"Don't Ask, Don't Tell"</i> <u>7</u>
<i>First Amendment</i> <u>12</u>		<i>Juveniles</i> <u>29</u>
Civil Procedure		<i>Religious Service</i> <u>33</u>
<i>Class Actions</i> <u>25, 27, 47</u>		ERISA
<i>Diversity Jurisdiction</i> <u>10</u>		<i>Administrator Deference</i> <u>18</u>
<i>In Forma Pauperis</i> <u>37</u>		<i>Remedies</i> <u>42</u>
<i>RICO Pleadings</i> <u>29</u>		False Claims Act
<i>Subject-Matter Jurisdiction</i> <u>36</u>		<i>State Audits</i> <u>15</u>
Civil Rights Act		FCRA
<i>Immunity</i> <u>22</u>		<i>Reporting Agencies</i> <u>13</u>
Criminal Law		FDCPA
<i>"Proceeds"</i> <u>9</u>		<i>Defenses</i> <u>33</u>
<i>Clear Error</i> <u>9</u>		Federal Jurisdiction
<i>Counterfeiting</i> <u>22</u>		<i>Foreign Sovereign</i>
<i>Death Penalty</i> <u>43</u>		<i>Immunities Act</i> <u>36</u>
<i>Detainers</i> <u>14</u>		FELA
<i>Double Jeopardy</i> <u>32, 39</u>		<i>Fear of Cancer</i> <u>41</u>
<i>Honest Services Fraud</i> <u>26</u>		Fifth Amendment
<i>Jury Instructions</i> <u>26</u>		<i>Takings Clause</i> <u>8, 11</u>

First Amendment

Commercial Regulation. [27](#)
Employee Speech. [31](#), [41](#)
Establishment Clause. [14](#), [29](#)
Petition Clause. [32](#)
Religious Student Groups. [23](#)

FLSA

Collective Actions. [35](#)

FOIA

Exemption 6. [19](#)

Fourth Amendment

Exclusionary Rule. [24](#)
Pat-Down Search. [46](#)
Student Searches. [11](#)
Wiretapping. [18](#)

FTCA

Discretionary Functions. [8](#)

Habeas Corpus

"Clearly Established". [40](#)
Guantanamo Detainees. [28](#)
Plea Agreements. [17](#)
Statute of Limitations. [20](#)
Sufficient Evidence. [38](#)

Immigration Law

"Crime of Violence". [9](#)
Criminal Definitions. [39](#)
Due Process. [18](#)

International Law

Child Abduction. [17](#), [40](#)

Medicaid

Reimbursement. [24](#)

Military Courts

Jurisdiction. [33](#)

PMPA

Constructive Termination. [15](#)

Preemption

Airline Deregulation Act. [28](#)
CERCLA. [22](#)
Cigarette Labeling. [45](#)
FCRA. [17](#)
FDCA. [44](#)
Home Loan Regulation. [9](#)
Medicaid. [16](#), [28](#)
National Bank Act. [47](#)
State-Law Immunity. [12](#)
Telecommunications Law. [16](#)
Vaccine Act. [11](#)

Prisoners' Rights

Disclosure Statements. [15](#)

Public Citizen

Cert. Denied. [42](#)
Cert. Granted. [44-47](#)
Cert. Pending. [21](#), [22](#), [25](#), [30](#)

Section 1983

Bivens Actions. [21](#)

Separation of Powers

Non-Delegation Doctrine. [7](#)

Sixth Amendment

Confrontation Clause. [39](#)
Ineffective Assistance. [14](#)
Miranda Rights. [12](#)
Public Trial. [35](#)
Right to Jury Trial. [32](#)

Special Education

Tuition Reimbursement. [46](#)

Statute of Limitations

Inquiry Notice. [38](#)

Title VII

Race Discrimination. [29](#), [37](#), [40](#)

Voting Rights

Voter ID Laws. [13](#)

RESOURCES

LINKS FOR MORE INFORMATION

- ✓ **Supreme Court's Website:**
<http://www.supremecourtus.gov>. For info or status updates on a particular petition, click on the Docket Number included on this list for that petition. View the Orders List which comes out after each conference for news on all petitions here:
<http://www.supremecourtus.gov/orders/08ordersofthecourt.html>
- ✓ **Alan Morrison Supreme Court Assistance Project of Public Citizen:**
<http://www.citizen.org/litigation/SupremeCourt>. SCAP Information.
- ✓ **SCOTUS Blog:**
<http://www.scotusblog.com>. Frequent Supreme Court Updates.
- ✓ **Office of Solicitor General:**
<http://www.usdoj.gov/osg>. Briefs Filed by the United States.

KEY TERMS & ABBREVIATIONS

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

MAY 28TH CONFERENCE

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. Re-listed for 5/1. Re-listed for 5/14. Re-listed for 5/21. Re-listed for 5/28. Re-listed for 6/4.

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

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

Equal Protection: "Don't Ask, Don't Tell"

08-824 Pietrangelo v. Gates (1st Cir.)

BIO 5/6. Dist. for 6/4.

1. Whether 10 U.S.C. § 654 and its regulatory scheme (collectively "Don't Ask, Don't Tell") violate due process, equal protection, and free speech.
2. Whether, even in the military, the prejudice of group A against group B may be a legitimate basis for the government to deny equal benefits to group B. Specifically, whether the prejudice of heterosexual service members against homosexuals is a legitimate basis for the Government to exclude homosexuals from the military.
3. Whether the district court and the court of appeals improperly refused to hear plaintiffs' chill/overbreadth claim and their as-applied equal protection claim.

American Indian Law: RFRA

08-846 Navajo Nation v. U.S. Forest Serv. (9th Cir.)

BIO 5/8, reply 5/19. Dist. for 6/4.

The U.S. Forest Service has authorized a ski resort to begin spraying millions of gallons of recycled sewage water (in the form of artificial snow) onto the most sacred mountain of southwest Native American tribes. The tribes contend that this authorization violated the Religious Freedom Restoration Act (RFRA), under which the federal government may not “substantially burden” a person exercise of religion unless its action is the least restrictive means of furthering a compelling governmental interest. A divided en banc panel of the Ninth Circuit rejected this claim at its threshold, holding that a “substantial burden” exists under RFRA “only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” Spraying sewage water onto the mountain would do neither of these particular things, notwithstanding the profound impact it would have on the tribes’ spirituality and religious practices. The question presented is:

Whether a governmental action cannot constitute a “substantial burden” under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

FTCA: Discretionary Functions

08-894 Snyder v. United States (5th Cir.)

BIO 5/7. Dist. for 6/4.

1. Whether military regulations prohibiting disposal of waste so as not to contaminate water supplies are specific and mandatory such that the discretionary function exception does not apply to the Federal Tort Claims Act.
2. Must there be a finding on the record that the second tier analysis of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), was considered before the discretionary function exception can apply?
3. Is the disposal of toxic industrial waste commonly used in commercial applications the type of conduct that the discretionary function was designed to shield?

Fifth Amendment: Takings Clause

08-945 Empress Casino Joliet Corp. v. Giannoulis (Ill.)

BIO 4/9, reply 4/21. Dist. for 5/14. Re-listed for 5/21. Re-listed for 5/28. Re-listed for 6/4.

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.

Criminal Law: Clear Error

08-968 Houston v. United States (6th Cir.)

BIO 5/4. Dist. for 6/4.

1. What is the meaning of clear error in Rule 35(a) of the Federal Rules of Criminal Procedure?
2. What is the meaning of unwarranted disparity in sentencing under 18 U.S.C. § 3553(a)(6)?

Criminal Law: “Proceeds”

08-981 Yusef v. United States (3d Cir.)

BIO 5/6, reply 5/18. Dist. for 6/4.

To be proceeds of unlawful activity under the federal money laundering statute must funds constitute profits derived from the gross proceeds of criminal conduct after payment of expenses, or does proceeds in the sense of profits also encompass an amount of money equal to the liability avoided through nonpayment of taxes?

Immigration Law: “Crime of Violence”

08-983 Serna-Guerra v. Holder (5th Cir.)

BIO 5/6. Dist. for 6/4.

Does unauthorized use of a vehicle constitute a “crime of violence,” as the Fifth Circuit has repeatedly held, or does that offense fall outside the 18 U.S.C. § 16 definition, as the Tenth Circuit has held?

Preemption: Home Loan Regulation

08-1098 Madsen v. JP Morgan Chase Bank, N.A. (Utah)

BIO 5/4, reply 5/12. Dist. for 6/4.

1. Whether federal regulations (12 C.F.R. §§ 541.5, 544.1, 545.6–11(c)) barring the payment of interest on escrow funds “except as provided by contract” preempt Utah laws (as set forth in *Madsen I*) holding that the banks must pay profits earned on “pledged” funds.
2. Whether this Court should warn courts and counsel to address the issue of federal preemption early in the case, saving as much as 34 years in futile litigation.

Criminal Law: Sentencing

08-1104 Tankersley v. United States (9th Cir.)

BIO 5/4, reply 5/18. Dist. for 6/4.

1. Whether a Sentencing Guidelines departure should be subject to appellate review that is conducted prior to, and distinctly from, review of the ultimate sentence for reasonableness, a question on which the courts of appeals are divided.
2. Whether the holding in *Williams v. United States*, 503 U.S. 193 (1992), that a sentencing court’s use of an erroneous ground for departure constitutes an incorrect application of the Guidelines remains valid after *United States v. Booker*, 543 U.S. 220 (2005).

Civil Procedure: Diversity Jurisdiction

08-1107 Hertz Corp. v. Friend (9th Cir.)

BIO 5/6, reply 5/14. *Amicus* Chamber of Commerce, Cal. Retailers Ass'n 4/6. Dist. for 6/4.

Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters.

Bankruptcy: Attorneys

08-1119/08-1225 Milavetz, Gallop & Milavetz, P.A. v. United States/United States v. Milavetz, Gallop & Milavetz, P.A. (8th Cir.)

08-1119: BIO 5/8. Dist. for 6/4.

08-1225: BIO 5/4, reply 5/19. Dist. for 6/4.

08-1119:

Section 101(12A) of Title 11 of the United States Code defines the term "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110," with five enumerated exceptions. Section 528 of Title 11 requires any "debt relief agency" to include certain disclaimers in any public advertising that promotes specified bankruptcy-related services. The questions presented are as follows:

1. Whether an attorney who provides bankruptcy assistance to an assisted person in return for valuable consideration, and who does not fall within one of the five exceptions, is a "debt relief agency" for purposes of 11 U.S.C. 526–528.
2. Whether 11 U.S.C. 528 violates the First Amendment to the Constitution.

08-1225:

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The questions presented are as follows:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.
2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

Preemption: Vaccine Act

08-1120 Am. Home Prods. Corp. v. Ferrari (Ga.)

BIO 5/8, reply 5/18. Dist. for 6/4.

The National Childhood Vaccine Injury Act of 1986 shielded vaccine manufacturers from categories of tort litigation, directed federal agencies to develop safer childhood vaccines, and established a Vaccine Court to administer a no-fault remedy for vaccine-related injuries. The Act's express preemption provision states that "[n]o vaccine manufacturer shall be held liable in a civil action" if the injury "resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The question presented is:

Does the Vaccine Act expressly preempt a state-law claim against a vaccine manufacturer based on an allegation that the vaccine-related injury could have been avoided by a vaccine design allegedly safer than the one approved by the U.S. Food and Drug Administration for use nationwide?

Fourth Amendment: Student Searches

08-1125 Pike County Joint Vocational Sch. Dist. v. Knisley (6th Cir.)

BIO 5/8, reply 5/29. Dist. for 6/4.

1. Whether it is unconstitutional for a school administrator to stop a class and search a classroom of nursing students to recover stolen cash, a gift card, and a credit card with the reasonable belief that the theft occurred during that continuing class period, by one or more persons still in the classroom.
2. Whether the Sixth Circuit departed from established principles of qualified immunity in holding that school administrators may be liable in a damages lawsuit under 42 U.S.C. § 1983 for the scope of the search conducted of a classroom of nursing students for stolen cash, a gift card, and a credit card.
3. Whether the Sixth Circuit's decision conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits regarding the reasonableness of the inception and scope of the search, and the application of established principles of qualified immunity. (This petition may be held for 08-479 *Safford Unified Sch. v. Redding*, granted 1/16 and argued 4/21.)

Fifth Amendment: Takings Clause

08-1151 Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot. (Fla.)

BIO 4/30, reply 5/12. Dist. for 5/28. Re-listed for 6/4.

1. The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?
2. Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?
3. Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Preemption: State-Law Immunity

08-1173 Amalgamated Transit Union Local No. 1338 v. Dallas Area Rapid Transit (Tex.)
CFR 4/8. BIO 5/7. Dist. for 6/4.

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 violations 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?

Bankruptcy: First Amendment

08-1174 Hersh v. United States (5th Cir.)
BIO 5/4. Dist. for 6/4.

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as “debt relief agencies” and who are hired by consumer debtors for bankruptcy services may not advise those debtors “to incur more debt in contemplation of” filing a bankruptcy petition. The question presented is whether Section 526(a)(4), construed with due regard for principles of constitutional avoidance, violates the First Amendment.

Sixth Amendment: *Miranda* Rights

08-1175/08-1229 Florida v. Powell/Florida v. Rigterink (Fla.)
08-1175: BIO 4/22, reply 5/15. Dist. for 5/21. Re-listed for 6/4.
08-1229: BIO 5/5. Dist. for 6/4.

08-1175:

1. Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation, conflicts with *Miranda v. Arizona* and decisions of federal and state appellate courts.
2. If so, does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (a) the right to talk to a lawyer “before questioning” and (b) the “right to use” the right to consult a lawyer “at any time” during questioning?

08-1229:

1. Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation conflicts with *Miranda v. Arizona* and decisions of federal and state appellate courts.
2. Whether use of an arguably defective *Miranda* warning requires suppression of a suspect's statement when law enforcement officers reasonably relied upon a standard warning informing a suspect of his right to an attorney prior to questioning and there is no evidence that the defendant was confused or misled by the warning and the resulting statement was otherwise voluntary.
3. Whether the Florida Supreme Court's opinion finding the defendant was in custody conflicts with *Miranda* and its progeny defining custodial interrogations where the defendant voluntarily came to the station to provide fingerprints, volunteered his desire to make a statement, and where he was never restrained or told he could not leave during a lengthy but non-coercive interview.

FCRA: Consumer Reporting Agencies

08-1221 Perry v. Mirfasihi (7th Cir.)

BIO 5/4. *Amici* Fleet Mortgage Corp., Ctr. for Pub. Interest Law 5/4. Dist. for 6/4.

Whether the Seventh Circuit correctly interpreted the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, by holding that (1) a mortgage lender selling more than one million consumer reports was not a consumer reporting agency, and (2) the exemption for information based solely on the reporting entity's own experience with its customers also exempts customer information based on sources other than the reporter's own experience, even though these holdings would narrow the Act's scope in violation of clear congressional intent as found by this Court and contradict what every other circuit to consider the question has held.

Voting Rights: Voter ID Laws

08-1231 NAACP v. Billups (11th Cir.)

BIO 5/6, reply 5/15. Dist. for 6/4.

The Court of Appeals upheld the validity of the 2006 Georgia Photo ID Act on the ground that "*Anderson* [*v. Celebrezze*] does not require any evidentiary showing or burden of proof to be satisfied by the state government . . . Nor do the more recent decisions in *Burdick* [*v. Takushi*] and *Crawford* [*v. Marion County Board of Elections*] place an evidentiary burden on the state when defending a voting regulation."

1. Does this ruling obliterate the well-established distinction between the heightened standard of review that applies to statutes that infringe fundamental rights protected by the First and Fourteenth Amendments, and the highly deferential rational basis standard of review that applies to other economic or social legislation?
2. Does this ruling conflict directly with the decisions of this Court (i) in *Crawford*, which requires that any burden on the right to vote "[h]owever slight . . . be justified by relevant and legitimate state interests," (ii) in *Norman v. Reed*, 502 U.S. 279, 288–89 (1992), in which this Court "called for the demonstration [by the state] of a corresponding interest sufficiently weighty to justify the limitation," and (iii) in *Anderson*, which held that a reviewing court is required to "identify and evaluate the precise interests put forward by the State as justification for the burden imposed" by a photo ID requirement on the right to vote and "determine the legitimacy and strength of each of those interests [and] . . . the extent to which those interest make it necessary to burden plaintiffs' rights."

Sixth Amendment: Ineffective Assistance

08-1237 South Carolina v. Council (S.C.)

BIO 5/6. Dist. for 6/4.

1. Whether the Supreme Court of South Carolina abandoned the *Strickland* prejudice test in favor of a mere “influence” test in direct contravention of this Court’s precedent, *Strickland v. Washington*.
2. Whether the Supreme Court of South Carolina abandoned the *Strickland* by improperly shifting the constitutional burden to the State to show harmless error which in patent error under this Court’s precedent, *Brecht v. Abrahamson*.
3. Whether the Supreme Court of South Carolina abandoned the *Strickland* test as a whole and improperly applied a “nothing to lose” standard to determine error and prejudice in direct contravention of this Court’s precedent, *Strickland v. Washington* and *Knowles v. Mirzayance*.

First Amendment: Establishment Clause

08-1240 Arizona ex rel. Thomas v. Arellano (Ariz. Ct. App.)

BIO 5/8. Dist. for 6/4.

Respondent Riccitelli is an ordained priest of the Roman Catholic Church and was the pastor of Holy Cross Catholic Church. Riccitelli was indicted on ten counts of theft from and four counts of fraudulent schemes and artifices on the Catholic Church. Three years later, Riccitelli filed a motion to remand the case to the grand jury for a new probable cause determination, asserting that the State failed to instruct the grand jury on canon law and the policy and procedures of the Diocese. The motion was granted. The questions presented are:

1. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Did the Respondent Judge’s order violate the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions?
2. The Equal Protection Clause of the Fourteenth Amendment prohibits denying citizens equal protection under the law. Did the Respondent Judge’s orders violate the Equal Protection Clause by provided Riccitelli with special rights and criminal defenses based upon his religious affiliation?

Criminal Law: Detainers

08-1243 Michigan v. Swafford (Mich.)

BIO 5/5. Dist. for 6/4.

This Court has held that “[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.” Is a document from a state law-enforcement agency notifying the United States Marshal that a federal *pretrial detainee* is wanted to face pending charges a detainer, and if not, does it become a detainer if forwarded by the United States Marshal to the appropriate federal correctional institution after the pretrial detainee is convicted of the pending federal charges?

PENDING FOR UPCOMING CONFERENCES

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, filed 5/15 (urging a grant). Dist. for 6/11.

08-372: BIO 10/24, reply 11/7. *Amicus* Am. Petroleum Inst. 10/24. Dist. for 11/25. CVSG 12/1, filed 5/15 (urging a grant). Dist. for 6/11.

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, filed 5/20 (urging a grant).

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).

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. BIO 5/22.

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

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

Preemption: 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, filed 5/29 (urging denial).

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

08-626/08-759 Level 3 Commc'ns, LLC v. St. Louis (8th Cir.)/Sprint Telephony PCS, LP v. San Diego County (9th Cir.)

08-626: BIO 12/19, reply 12/31. *Amicus* AT&T, Inc. 12/12. Dist. for 3/20. CVSG 3/23, file 5/28 (urging denial).

08-759: *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, filed 5/28 (urging denial).

08-626:

Did the Eighth Circuit err in holding, in 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?

08-759:

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.

International Law: Child Abduction

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

BIO 12/29, reply 12/31. Dist. for 1/16. CVSG 1/21, filed 5/28 (urging a grant).

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. A “wrongful removal” is one that occurs “in breach of rights of custody.” 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.

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, filed 5/29 (urging denial).

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.

Habeas Corpus: Plea Agreements

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

CFR 1/9. BIO 5/11, reply 5/22. Dist. for 6/11.

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. BIO 5/26.

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. *Amicus* NACDL 2/17. BIO 5/20.

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?

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, filed 5/28 (urging denial).

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?

American Indian Law: Village Corporations

08-863 Stratman v. Salazar (9th Cir.)

BIO of Leisnoi, Inc. 1/15. CFR from federal resp. 3/26. BIO of federal resp. 5/27.

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 mooted the Petitioner’s action, without regard to Section 1427’s legislative history, and contrary to Congress’s actual intent.

FOIA: Exemption 6

08-884 Berger v. IRS (3d Cir.)

BIO 5/15. Dist. for 6/11.

This petition stems from the Internal Revenue Service’s refusal to release, pursuant to the Freedom of Information Act (FOIA) and Privacy Act, the work-related time records of one of its employees who was in charge of a civil tax investigation of Petitioners. Petitioners sought such records to the extent they memorialized the time spent and activities performed by the employee with respect to the investigation. The Third Circuit held that the employee had a privacy interest, and the records could be withheld under Exemption 6 of FOIA, which protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The Third Circuit did not review the District Court’s opinion de novo. The Third Circuit held that the records did not have to be released under the Privacy Act because the records did not pertain to Petitioners, but rather to the employee. The questions presented are:

1. Given the split of authority among the circuits, what standard or review should be used to evaluate an appeal from a grant of summary judgment in a FOIA case?
2. For purposes of applying Exemption 6, does a federal employee have a privacy interest which would be threatened by the release of the employee's work-related time records, notwithstanding the fact that the records related solely to the employee's official duties as an employee of the Government?
3. Are the work-related time records of a federal employee, which memorialize the time spent and activities performed by the employee with respect to an agency investigation, sufficiently related to the individual who was the target of the investigation so as to permit the individual to inspect the records under the Privacy Act?

Due Process: Prejudgment Remedies

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

CFR 3/11. BIO 5/11. Dist. for 6/11.

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 probable 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. BIO 5/18, reply 5/29.

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.

Criminal Law: Venue

08-987 Campa v. United States (11th Cir.)

BIO 5/22, reply 5/27. *Amici* Nat'l Lawyers Guild 3/2, Nat'l Jury Project, Ibero-Am. Fed'n of Ombudsman 3/5, Civil Rights Clinic Howard Univ. Sch. of Law, Ctr. for Int'l Policy, Int'l Ass'n of Democratic Lawyers, Fla. Ass'n of Criminal Defense Lawyers-Miami, Nat'l Ass'n of Criminal Defense Lawyers, Senate of Mex. 3/6. Dist. for 6/11.

Petitioners were convicted in district court in Miami on charges centering on their role as unregistered Cuban agents in monitoring anti-Castro organizations. The trial was the only judicial proceeding in United States history to be condemned by the U.N. Human Rights Commission, which found a "climate of bias and prejudice against the accused" so extreme that it failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a fair trial." A panel of the Eleventh Circuit agreed and ordered a retrial in a new venue, but the en banc court reversed, holding that the community's pervasive hostility to the Castro government was categorically irrelevant to the venue inquiry. The dissent called on this Court to grant certiorari. The court of appeals further held that petitioners could not state a *prima facie* claim under *Batson v. Kentucky* because the prosecution had not used all of its peremptory strikes to eliminate every potential black juror. The questions presented are:

1. Did the Eleventh Circuit apply an erroneous legal standard in holding that petitioners did not establish a right to a change of venue?
2. Does a party's failure to use all of its peremptory strikes to strike all minority members of the jury *per se* preclude a *prima facie* challenge under *Batson v. Kentucky*?
3. Incident to its review of Questions 1 and 2, should this Court review the judgment as it pertains specifically to petitioner Hernandez?

ADA: Standing

08-993 Best Western Encina Lodge & Suites v. D'Lil (9th Cir.)

CFR 3/19. BIO 5/12, reply 5/22. Dist. for 6/11.

Michael Kirkpatrick and Adina Rosenbaum are co-counsel for the respondent.

Brief in Opposition

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.

Section 1983: *Bivens* Actions

08-1043 Wilson v. Libby (D.C. Cir.)

BIOS 5/18, 5/20, reply 5/29.

Whether there are "special factors counseling hesitation" precluding constitutional claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 3088 (1971), when no federal statute applies or provides any possible remedy for plaintiffs, and when there is no more than speculation that litigation might lead to the disclosure of classified information.

Environmental Law: Clean Water Act

08-1052 Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs (9th Cir.)

BIO 5/22. *Amici* Alaska, Nat'l Ass'n of Home Builders 3/23.

Is a jurisdictional determination under the Clean Water Act, finding that Petitioner's property is subject to that Act's strictures, a "final agency action" subject to judicial review under the Administrative Procedure Act, where the jurisdictional determination: (1) affords the landowner a viable estoppel defense in a future enforcement action; (2) decides whether a CWA permit is necessary; and (3) subjects the landowner to elevated penalties?

Preemption: CERCLA

08-1053 Sunoco, Inc. v. McDonald (9th Cir.)

BIO 5/22.

Allison Zieve of Public Citizen is co-counsel for the respondents.

Brief in Opposition

Whether a state statute providing that an action for negligence may not be brought "more than 10 years after the act or omission complained of" establishes a "limitations period" that is subject to a provision in the Comprehensive Response, Compensation, and Liability Act, 42 U.S.C. § 9658, establishing a uniform discovery rule for the commencement of limitations periods applicable to state-law causes of action for personal injury or property damage resulting from the release of a hazardous substance, pollutant, or contaminant from a facility.

Civil Rights Act: Immunity

08-1086 Trout v. Winter (D.C. Cir.)

BIO 5/14, reply 5/22. Dist. for 6/11.

1. Whether this Court's decision in *Austria v. Altmann*, 541 U.S. 677 (2004), interpreting *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), controls waivers of sovereign immunity by the federal government so that the waiver in Section 114(2) of the Civil Rights Act of 1991 applies to the federal government's assertion of a sovereign immunity defense after the passage of the Act.

2. Whether the lower court disregarded *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and adopted a definition of "claim" contrary to that used by ten other circuits when, instead of defining "claim" as a "cause of action," the lower court treated a request for pre-1991 prejudgment interest within a single cause of action as a separate "claim" that was factually and legally distinct from the underlying backpay on which the interest was based.

Criminal Law: Counterfeiting

08-1109 Porter v. United States (5th Cir.)

BIO 5/20.

Whether 18 U.S.C §§ 471 & 472, which prohibit making or passing "counterfeit[]" obligations of the United States, require the Government to prove, and the jury to find, that a bill was not only fake, but also similar enough to genuine currency to deceive an honest unsuspecting person of ordinary observation and care.

Due Process: Recusal

08-1129 Pinnick v. Corboy & Demetrio, PC (Ill.)

CFR 4/28. BIO 5/28.

1. Are appellants in the Illinois appellate courts denied due process where one or more appellate judges hearing their appeal receive substantial contributions for their election campaigns directly from—and have close personal ties with—the opposing party, the appellee?
2. Do members of the Illinois judiciary who hear an appeal involving a party who makes substantial contributions to their election campaign—and with whom they have close personal ties—lose, or appear to lose, their ability to decide the appeal fairly and impartially so that recusal is required as a matter of due process? (This petition will be held for 8-22 *Caperton v. A.T. Massey Coal Co., Inc.*, granted 11/14 and argued 3/3.)

First Amendment: Religious Student Groups

08-1130/08-1268 Truth v. Kent Sch. Dist./Kent Sch. Dist. v. Truth (9th Cir.)

08-1130: Supp. br. of Truth 4/3. CFR 4/6. *Amici* Stand True 4/23, Found. for Individual Rights in Educ. 4/29, Christian Legal Soc’y, Fellowship of Christian Athletes 5/6. BIO 5/29.
08-1268: BIO 5/11.

08-1130:

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 infringement on expressive association triggers a deferential reasonableness standard, rather than strict scrutiny?

08-1268:

If this Court reviews the Ninth Circuit’s decision, should it also review the lower court’s holding that a plaintiff can seek injunctive relief under 42 U.S.C. § 1983 in the absence of a government policy that causes the alleged harm, a holding in conflict with decisions of this Court and the First, Second, Fourth, and Eleventh Circuits?

Arbitration: Unincorporated Territories

08-1137 ENTEX Corp. v. Centro de Recaudación de Ingresos Municipales (P.R.)

BIO 5/11. Dist. for 6/11.

1. Is Section 2 of the Federal Arbitration Act applicable to unincorporated territory (such as the Commonwealth of Puerto Rico), in the same way it applies to the fifty states of the Union?
2. Can the court system of an unincorporated territory (such as Puerto Rico) ignore or obviate an arbitration clause within a contract to adjudicate a controversy thereunder in the Commonwealth's court system?
3. Does the doctrine of "law of the case" allow the court system of an unincorporated territory (such as Puerto Rico) to disregard conflicting opinions of this Court on questions of federal law, such as the doctrine set forth in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* and *Buckeye Check Cashing, Inc. v. Cardegna*, in the context of a commercial dispute under a contract containing an arbitration clause.

Medicaid: Reimbursement

08-1146 Brown v. N.C. Dep't of Health & Human Servs. (N.C.)

CFR 4/9. Amicus N.C. Advocates for Justice 4/15. BIO 5/11. Dist. for 6/11.

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.

Criminal Law: Sentencing

08-1149 Cunningham v. United States (7th Cir.)

Memo. of U.S. 5/18.

Does this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), which held in the initial sentencing context that the United States Sentencing Guidelines are advisory only, apply with equal force to sentence reductions under 18 U.S.C. § 3582(c)(2) such that a district court has discretion to reduce the defendant's term of imprisonment below the Guideline range?

Fourth Amendment: Exclusionary Rule

08-1152 Srivastava v. United States (4th Cir.)

BIO 5/18.

Whether all of the evidence seized pursuant to search warrants should be suppressed under the exclusionary rule, where the supervising officer believed that the warrants imposed no meaningful limits on the items that could be seized and where the executing officers seized a substantial volume of items not covered by the warrants.

Civil Procedure: Class Actions

08-1156 AT&T Mobility LLC v. Shorts (4th Cir.)

CFR 4/22. BIO 5/22.

Brian Wolfman of Public Citizen is assisting the respondent.

Congress enacted the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4, to ensure that interstate class actions can be litigated in federal court, where Congress believed they belong. Toward that end, the Act expands diversity jurisdiction and liberalized removal practice. As relevant here, CAFA's removal provision states that a qualifying class action in a federal court "may be removed to a district court of the United States . . . by any defendant." 28 U.S.C. § 1435(b) (emphasis added). In this case, a divided panel of the Fourth Circuit held that, when a qualifying (and otherwise removable) class action is pleaded as a counterclaim rather than an independent suit, the Act prohibits the removal of the class action by a counterclaim defendant—even one that is not an original plaintiff and instead is joined as an "additional" counterclaim defendant. Does CAFA authorize removal by a counterclaim defendant?

Arbitration: Class Arbitration

08-1198 Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp. (2d Cir.)

BIO 5/11, reply 5/26. *Amici* Ass'n of Ship Brokers & Agents (USA), Inc. 4/23, Soc'y of Maritime Arbitrators, Inc. 4/24, Chamber of Commerce 4/27. Dist. for 6/11.

Brian Wolfman and Scott Nelson of Public Citizen are assisting the respondent.

In *Green Tree Financial Corp. v. Bazzle*, this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act (FAA) permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here—which continues to divide the lower courts—is the same one presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the FAA.

Arbitration: Government Contracts

08-1123 ChevronTexaco Corp. v. Republic of Ecuador (2d Cir.)

BIO 5/26.

Under federal common law, a contractual arbitration clause generally may be enforced against a nonsignatory pursuant to ordinary principles of contract and agency, including either assumption or estoppel. This case raises a split of authority on an important legal question within this framework: Where a government entity steps into the shoes of a private party in a commercial joint venture and takes substantial and direct benefits under the venture's joint operating agreement, is it bound by the arbitration provision in the joint operating agreement?

Criminal Law: Jury Instructions

08-1172 Nacchio v. United States (10th Cir.)

BIO 5/29. *Amici* Nat'l Ass'n of Criminal Defense Lawyers, Chamber of Commerce, Wash. Legal Found. 4/22.

Joseph P. Nacchio, the former CEO of Qwest Communications, was convicted of insider trading for selling Qwest stock while knowing internal Qwest predictions and interim operating results allegedly placing Qwest at risk of missing its year-end 2001 public revenue projections eight to twelve months in the future. The Tenth Circuit penal and *en banc* opinions affirming that conviction conflict with holdings of other circuits and raise several questions meriting review. The questions presented are:

1. Whether the defendant is entitled to acquittal or a new trial because the Tenth Circuit, in conflict with the standards applied in other circuits, erred by upholding the jury instructions bearing on the materiality of the type of information at issue, and by holding that there was sufficient evidence that the defendant failed to disclose material information and knew it.
2. Whether the judgment must be reversed and remanded for a new trial because the Tenth Circuit approved the use of impermissible procedures for the exclusion of expert testimony under Rule 702 that conflict with decisions of other circuits.
3. Whether the Tenth Circuit's decision should be summarily reversed because it misapplied decisions of this Court, mischaracterized the district court's reasoning, failed to resolve all the issues presented, and held that Nacchio failed to address an issue that was a principal focus of his brief.

Arbitration: Foreign Arbitral Awards

08-1179 Rogers v. Royal Caribbean Cruise Lines (9th Cir.)

BIO 5/21.

1. Whether the Court of Appeals for the Ninth Circuit erred in holding that the U.N. Convention of the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United States and codified at 9 U.S.C. §§ 201 *et seq.*, supersedes the mandatory jurisdiction conveyed to federal courts by Congress under the Seafarer's Wage Act, 46 U.S.C. § 10313(i), which had been recognized by existing precedent set by this Court and that of the Court of Appeals for the Second, Third, Fourth, and Fifth Circuits.
2. Whether Congress intended to supersede Title 9's definition of "commercial" found in Chapter 1, Section 1, which specifically excludes contracts of employment of seamen as being commercial, when enacting Chapter 2 of Title 9, which permits arbitration of international "commercial" disputes.
3. If two federal laws conflict, such as Title 9, amended in 1971, with Title 46, amended in 1983, should courts continue to follow the "last-in-time" rules as to hold the more recent statute supersedes the former?

Criminal Law: Honest Services Fraud

08-1196 Weyhrauch v. United States (9th Cir.)

BIO 5/27.

Whether 18 U.S.C. § 1346, by criminalizing denials of "the intangible right of honest services," mandates the creation by the federal courts of a federal common law defining the disclosure obligations of state government officials.

First Amendment: Commercial Regulation

08-1202 IMS Health, Inc. v. Ayotte (1st Cir.)

BIO 5/27. *Amici* Pac. Legal Found., Council of Am. Survey Research Orgs., Inc., New England Legal Found. 4/24, Wash. Legal Found., Ctr. for Democracy and Tech., Coalition for Healthcare Comm'n, Pharma. Research & Mfrs. of Am., Ass'n of Nat'l Advertisers, Inc., Academic Research Scientists, Am. Business Media, Vermont 4/27.

For decades, publishers have acquired doctors prescribing histories, and used the information to public reports. Drug companies use that information to deliver information about new products to doctors. New Hampshire has made it a crime to transfer prescribing histories within the state to increase brand-name drug sales. The First Circuit held that the law does not implicate the First Amendment because it targets conduct and involves only speech with “scant societal value.” Alternatively, it held that the First Amendment permits the government to level the playing field” in communications with doctors, notwithstanding that the law in fact “may not accomplish very much.” The questions presented are:

1. To what extent does the First Amendment protect the acquisition, analysis, and publication of accurate factual information that is used by third parties for a commercial purpose?
2. Does the First Amendment permit such a prohibition when the government seeks to “level the playing field” by inhibiting truthful speech while simultaneously permitting the use of the identical information for communication of the state’s preferred viewpoint?
3. Does the First Amendment permit such a prohibition when it is both grossly underinclusive (because it is so riddled with exceptions that it “may not accomplish very much”) and overinclusive (because it inhibits even communication that the state acknowledges benefits public health)?

Civil Procedure: Class Actions

08-1206 Andrews v. Chevy Chase Bank (7th Cir.)

BIO 5/28.

This Court’s decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), holds that Federal rule of Civil Procedure 23 allows federal statutory claims to be brought as class actions unless directly and expressly banned by Congress. The plain language of the Truth in Lending Act (TILA), 15 U.S.C. § 1635, permits an action for rescission whenever a lender has committed a material violation, and the clear text of TILA imposes no class action ban. Nevertheless, the court of appeals failed to apply the plain language of TILA and created a ban on class actions for rescission that Congress never expressed. The question presented is: Whether the Court of Appeals erred in ruling that class actions for a declaratory right of rescission are never permitted under TILA, in conflict with this Court’s determination in *Yamasaki* that federal statutory claims may be brought as class actions under Federal Rule of Civil Procedure 23 unless expressly banned by Congress.

Preemption: Medicaid Reimbursement Rates

08-1223 Maxwell-Jolly v. Indep. Living Ctr. of S. Cal. (9th Cir.)
BIO 5/22.

Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to “safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population.” Virtually all of the Circuits to have considered the issue, including the Ninth Circuit, have concluded that this provision may not be enforced by private parties under 42 U.S.C. § 1983, and respondents do not contend otherwise. The question presented is whether Medicaid recipients and providers may nonetheless maintain a private cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates.

Due Process: Civil Commitment

08-1224 United States v. Comstock (4th Cir.)
BIO 5/20.

Whether Congress had the constitutional authority to enact 18 U.S.C. § 4248, which authorizes court-ordered civil commitment by the federal government of (1) “sexually dangerous” persons who already in the custody of the Bureau of Prisons, but who are coming to the end of their prison sentences, and (2) “sexually dangerous” persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

Habeas Corpus: Guantánamo Detainees

08-1234 Kiyemba v. Obama (D.C. Cir.)

BIO 5/29. *Amici* Federal Pub. Defender for the Dist. of Or. 4/29, ACLU 5/6, Ass’n of the Bar of the City of N.Y., Uyghur Am. Ass’n 5/7.

Whether a federal court exercising its *habeas* jurisdiction, as confirmed by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), has no power to order the release of prisoners held by the Executive for seven years, where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.

Preemption: Airline Deregulation Act

08-1259 Weiss v. El Al Israel Airlines, Ltd. (2d Cir.)

BIO 5/14. Suppl. Br. of Pet. 5/21. Dist. for 6/11.

1. Is a common-law tort claim, for physical abusive treatment by an airline of passengers at the airline terminal, preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), which prohibits a state or any of its subdivisions from enacting or enforcing any provision “related to a price, route, or service” of an air carrier?
2. Does that statutory prohibition of state action regarding airline “service” prohibit the common-law tort claim?

Equal Protection: Juveniles

08-1269 Louisiana v. Armstard (La. Ct. App.)

BIO 5/15. Dist. for 6/11.

Did the Courts of the State of Louisiana deprive a newborn child of her constitutional rights under the Fourteenth Amendment to equal protection of the law and due process of law by quashing a prosecution for cruelty to a juvenile alleged to have been committed by administering illicit drugs to said child via the umbilical cord after birth?

First Amendment: Establishment Clause

08-1288 Bergin v. McCall (9th Cir.)

BIO 5/20.

1. Whether coerced participation in a 12-Step based evaluation process violates the Establishment Clause, the Free Exercise Clause, and the First Amendment.
2. Whether a State Administrative Hearing has preclusive effect over Constitutional claims in Federal Court.

Title VII: Race Discrimination

08-1292 Acosta v. City of Phoenix (9th Cir.)

BIO 5/15. Dist. for 6/11.

1. Whether, in Mr. Acosta's case, EEOC complaint proceedings proved a ruse, depriving them and the court proceedings based upon them, of all legitimacy.
2. Whether a "disparate treatment" test is even possible in a segregation case.
3. Whether Title VII retaliation is often a form of discrimination itself.

Civil Procedure: RICO Pleadings

08-1296 St. Germain v. Howard (5th Cir.)

BIO 5/21.

1. To avoid Rule 12(b)(6) dismissal of a civil RICO complaint, is the standard of pleading a "criminal act" standard, heightened above the plausibility standard?
2. Must civil RICO plaintiffs file a complaint pleading the same heightened level of fact, before discovery, as would be available to the government after a criminal investigation?
3. In an alleged civil RICO mail and wire fraud scheme pleading the specific circumstances of the fraud, where the fraudulent scheme is additionally alleged to violate state law governing attorney conduct, where three plaintiffs allege direct economic damage from a continuing pattern of a scheme perpetrated by a RICO person and a RICO enterprise, is the civil RICO complaint properly dismissed under Rule 12(b)(6) because it fails to allege "predicate criminal acts"?
4. Where a civil RICO complaint is dismissed under Rule 12(b)(6) four months after filing, the complaint has never been amended, no responsive pleading has been made, and plaintiffs express an intent to amend, is amendment under Rule 15(a) properly denied with no analysis or finding of undue delay dilatory motive, undue prejudice, repeated failure, or futility, but rather because plaintiffs filed a RICO case statement as required by a RICO standing order and filed a memorandum in opposition to a motion to dismiss?

Environmental Law: Clean Air Act

08-1304 Franklin County Power of Ill. v. Sierra Club (7th Cir.)
BIO 5/29.

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

Brief in Opposition

Whether the Sierra Club submitted sufficient evidence to show that one of its members, Barbara McKasson, would be injured by petitioners' construction, without a valid Clean Air Act permit, of a large, coal-fired power plant three miles from a park that McKasson regularly visits; and, if so, whether McKasson's injury is traceable to petitioners' conduct and could be redressed by an injunction prohibiting construction of the plant until petitioners obtain a valid permit.

CALLS FOR RESPONSE

PENDING CFR

Attorney's Fees: "Prevailing Party"

[08-951](#) *Tavory v. NTP, Inc.* (Fed. Cir.)

CFR 5/5, due 6/4.

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.

First Amendment: Employee Speech

[08-1082](#) *City of Maywood v. Densmore* (9th Cir.)

CFR 4/21, due 6/22 (ext.).

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*, is 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?

ADEA: Burden-Shifting

[08-1097](#) *Adam v. Salazar* (9th Cir.)

CFR 4/1, due 6/1 (ext.).

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 6/5 (ext.).

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 benefits of non-disabled worker who have post-retirement earnings, reduce the retirement benefits of disabled workers solely because they receive federal disability benefits?

Sixth Amendment: Right to Jury Trial

08-1117 Bowen v. Oregon (Or. Ct. App.)

CFR 4/28, due 6/29 (ext.). *Amici* Federal Pub. Defender for the Dist. of Or. 5/27, Or. Criminal DefenseLawyers Ass'n 5/28.

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

First Amendment: Petition Clause

08-1122 Clark v. Jenkins (Tex. Ct. App.)

CFR 4/17, due 6/1. *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).

Criminal Law: Sentencing

08-1131 Phon v. Kentucky (Ky.)

CFR 5/4, due 6/3.

1. Whether petitioner, a juvenile under the age of eighteen at the time of his offense, is entitled to a new sentencing hearing in light of *Roper v. Simmons*, given that his original sentencing was premised on the theory that the death penalty was permissible and as such, the jury was instructed on the mitigating sentence of life without parole, which was an otherwise inapplicable sentence.
2. In light of *Roper v. Simmons*, the evolving standards of decency in this country, and overwhelming international opinion, does the sentence of life imprisonment without the possibility of parole constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments? (This petition will likely be held for 08-7412 *Graham v. Florida* and 08-7621 *Sullivan v. Florida*, both granted 5/4.)

Military Courts: Jurisdiction

08-1133 Wuterich v. United States (C.A.A.F.)

CFR 4/2, due 7/6 (ext.).

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.

Equal Protection: Religious Service

08-1184 Bowman v. United States (6th Cir.)

CFR 4/10, due 6/10 (ext.).

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 to 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.” The questions presented are:

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?

FDCPA: Defenses

08-1200 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (6th Cir.)

CFR 5/7, due 6/8.

Whether a debt collector’s legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692.

Due Process: Recusal

08-1205 Botes v. United States (11th Cir.)

CFR 4/15, due 6/15 (ext.).

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.)

Employment Law: Strikebreakers

08-1211 Church Homes, Inc. v. NLRB (2d Cir.)

CFR 5/20, due 6/19.

Since this Court's 1938 opinion *NLRB v. Mackay Radio & Telegraph Co.*, employers have been free, consistent with the National Labor Relations Act, to permanently replace employees who are engaged in economic strike. This right has only one narrow restriction: employers may not exercise this right for an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964). Until this case, the Board has never found an employer to have had such a motive. In this case, although employers are not required to notify a union of their hiring plans, the Second Circuit held that the mere fact that the employer did not affirmatively give the union advance notice that it was hiring permanent replacements established that the employer had an independent unlawful motive. The questions presented are:

1. Did the Board unlawfully shift the burden of proof from the General Counsel by holding that it would find Petitioner acted for an independent unlawful purpose unless Petitioner proved that it has a legitimate reason for not disclosing its hiring plans to the Union?
2. Did the Board err when it disregarded as hearsay the testimony of Dr. Miriam Parker as to why Petitioner did not inform the union of its staffing plans and required Petitioner to produce actual evidence of the Union's potential for disruption?
3. Did the Board err, in light of the record, when it found that Petitioner hired permanent replacements for an independent unlawful purpose?

Due Process: Forfeiture

08-1266 Guerra v. United States (11th)

CFR 5/6, due 7/6 (ext.).

1. Whether a criminal defendant should be severely and unconstitutionally penalized with a forfeiture order that had been vacated by the district court and not reinstated until after the defendant had filed her brief on appeal with the 11th Circuit.
2. Whether the ruling from the 11th Circuit sustaining the illegal forfeiture because "it had not been appealed" was arbitrary and capricious and in conflict with its own rulings on the effect a vacatur has on a criminal sentence once the original order of forfeiture has been vacated.
3. Whether the criminal forfeiture order entered is constitutionally defective since criminal forfeiture had been held to be a fine subject to the Eighth Amendment's excessive fines clause and whether the question of whether a fine is constitutionally excessive is subject to de novo review.

FLSA: Collective Actions

08-1287 Family Dollar Stores, Inc. v. Morgan (11th Cir.)

CFR 5/5, due 7/6 (ext.).

Can a collective action under the Fair Labor Standards Act be maintained when the employer's liability turns on a statutory exception that must be litigated individually based on "all the facts in a particular case" (29 C.F.R. § 541.700(a))?

Sixth Amendment: Public Trial

08-1310 Gibbons v. Savage (2d Cir.)

CFR 5/19, due 6/18.

Does an unjustified, intentional closure of a courtroom to exclude all spectators, including Petitioner's mother, from the first full afternoon of jury selection in a criminal trial require overturning Petitioner's conviction?

Due Process: Evidentiary Presumptions

08-1363 Narron v. North Carolina (N.C.)

CFR 5/26, due 6/25.

Does the statutory language "the results of a chemical analysis shall be deemed sufficient evidence of a person's alcohol consumption" constitute a mandatory presumption violative of a person's due process rights secured by the Fifth and Fourteenth Amendments?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

Civil Procedure: Subject-Matter Jurisdiction

08-1191 Morrison v. Nat'l Austl. Bank, Ltd. (2d Cir.)

BIO 5/1, reply 5/11. *Amicus* Nat'l Ass'n of Shareholder & Consumer Attorneys 4/24. Dist. for 5/28. CVSG 6/1.

1. Whether the antifraud provisions of the U.S. securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange, and its financial statements were filed with the Securities and Exchange Commission (SEC) and (b) the claim arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida-based subsidiary and were merely reported from overseas in the parent company's financial statements.
2. Whether this Court, which has never addressed the issue of whether subject-matter jurisdiction may extend to claims involving transnational securities fraud, should set forth a policy to resolve the three-way conflict among the circuits.
3. Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject-matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's amicus brief submitted at the request of the Second Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject-matter jurisdiction exists here due to the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.

PENDING CVSG

Federal Jurisdiction: Foreign Sovereign Immunities Act

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

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

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

Antitrust: Sports Leagues

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

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

1. Are the National Football League (NFL) and its member teams a single entity that is exempt from rule of reason claims under section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?

2. Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years, subject to a rule of reason claim under section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?

Title VII: Race Discrimination

08-974 Lewis v. City of Chicago (7th Cir.)

BIO 4/10, reply 4/20. Dist. for 5/14. CVSG 5/18.

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?

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.

Civil Procedure: In Forma Pauperis

08-7683 Patton v. Harris (7th Cir.)

CFR 1/26. BIO 3/27. Dist. for 4/24. CVSG 4/27.

28 U.S.C. §1915(b)(1) provides that "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." The circuits are divided on the question of whether, when a prisoner files a notice of appeal and application to proceed in forma pauperis, and his (or her) application is denied, should the prisoner be treated as having "file[d] an appeal in forma pauperis" so that the fee requirement attaches?

HELD/AWAITING ACTION

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?

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, filed 4/22 (urging the Court to deny cert.). Dist. for 5/21. Likely held for 08-905 *Merck & Co., Inc. v. Reynolds* (granted 5/26).

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.

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).

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 *Ash 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?

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?

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, filed 5/28 (urging a grant)).

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

LAST CONFERENCE

View the [June 1st Orders List](#) from the May 28th Conference.

SUMMARY REVERSAL

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. Re-listed for 5/21. Re-listed for 5/28. Summary reversal 6/1.

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.”

CERTIORARI DENIED

First Amendment: Employee Speech

[08-720 Callahan v. Fermon \(7th Cir.\)](#)

CFR 1/21. BIO 5/1, reply 5/11. Dist. for 5/28. Cert. denied 6/1.

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

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

Arbitration: Public Policy Defense

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

CFR 2/9. BIO 4/30, reply 5/10. Dist. for 5/28. Cert. denied 6/1.

Scott Nelson, Leah Nicholls, and Deepak Gupta of Public Citizen are assisting the respondent.

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. BIO 4/29, reply 5/11. Dist. for 5/28. Cert. denied 6/1.

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 & Care 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.

ERISA: Remedies

08-1068 *Gagliano v. Reliance Standard Life Ins. Co.* (4th Cir.)

CFR 3/23. *Amicus* Patient Advocate Found. 3/23. BIO 4/30, reply 5/12. Dist. for 5/28. Cert. denied 6/1.

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.

Criminal Law: Sentencing

08-1081 Cavera v. United States (2d Cir.)

BIO 4/27. Dist. for 5/28. Cert. denied 6/1.

1. Whether or not the decisions in *Gall v. United States*, 128 S. Ct. 586 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (2007), adequately guide an appellate court regarding the standard of review to employ upon consideration of an enhanced non-Guideline sentence imposed by a District Court in a mine-run case.
2. Whether or not the “closer review” standard in the dictum of *Kimbrough* justifies the split in the circuits that has developed when review of enhanced non-Guideline sentences imposed in mine-run cases occurs.
3. Whether a sentencing court has the discretion to enhance a sentence, based upon a finding that the crime committed affected the community within which it occurred, to a greater extent than other communities.

Criminal Law: Death Penalty

08-1084 Taylor v. Missouri (Mo.)

BIO 4/27, reply 5/11. Dist. for 5/28. Cert. denied 6/1.

1. Whether a Missouri statute—which is similar to the statutes of five other states—denying the right to have a jury determine aggravating factors following a capital murder guilty plea violates the Sixth and Fourteenth Amendments to the United States Constitution.
2. Whether the Missouri Supreme Court, which held that *Ring v. Arizona* applies retroactively on state law grounds to death row inmates, *see Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), violated petitioner’s due process rights under the Fourteenth Amendment and also denied him the meaningful appellate review required under the Fourteenth Amendment by failing to apply *Whitfield*’s protections to the petitioner.

Eleventh Amendment: State Entities

08-1085 Se. Pa. Transp. Auth. v. Cooper (3d Cir.)

BIO 4/29, reply 5/11. Dist. for 5/28. Cert. denied 6/1.

Whether an entity created by the State enjoys sovereign immunity under the Eleventh Amendment where the entity (i) is authorized by State statute to “exercise the public powers” of the State “as an agency and instrumentality thereof,” (ii) is recognized by its enabling act and the State Supreme Court as enjoying sovereign immunity under State law, and (iii) is receiving substantial annual subsidies from the State to fund the entity’s public mission.

GRANTED CASES INVOLVING PUBLIC CITIZEN 2008 TERM

Preemption: FDCA

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

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. Decided 6-3 in favor of Petitioners 4/1.

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

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

Environmental Law: Clean Water Act

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

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

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

Brief in Opposition

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

Fourth Amendment: Pat-Down Search of Passenger

07-1122 Arizona v. Johnson (Ariz.)

CFR 5/13. BIO 5/22, reply 6/3. Dist. for 6/19. Cert. granted 6/23. Arg. 12/9. Decided 9-0 in favor of the state 1/26.

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

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

Due Process: Recusal

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

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

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

Amicus Brief (Cert. Stage)

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

Amicus Brief (Merits Stage)

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

Special Education: Tuition Reimbursement

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

CFR 10/2. *Amicus* Nat’l Sch. Bds. Ass’n 10/6. BIO 12/3, reply 12/16. Dist. for 1/9. Re-listed for 1/16. Cert. granted 1/16. 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 and Allison Zieve of Public Citizen are 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).

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. Cert. granted 5/4.

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

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