Alan Morrison Supreme Court Assistance Project

CERT. PETITIONS OF PUBLIC INTEREST:

SUMMER CALLS FOR RESPONSE & 2008 TERM ORAL ARGUMENT PREVIEW

Prepared by Leah Nicholls, 2008–2009 SCAP Fellow

about this list

The **Alan Morrison Supreme Court Assistance Project** (SCAP) of Public Citizen Litigation Group regularly distributes a 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.

Although the Supreme Court does not hold any conferences over the summer months, the Court's docket remains active. In particular, the Court continues to request responses to petitions in cases warranting further examination. Typically, we highlight each of the new calls for response on our watch list. However, due to the long time between conferences and the large volume of cases slated for discussion at the first conference on September 29th, we are using this opportunity to highlight the calls for response issued since the June conference.

In addition to the summer calls for response, this list includes a preview of watch list cases that have been granted and slated for oral argument during the October 2008 Term. Our usual watch list will be distributed just before the September 29th conference and every conference thereafter.

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, 2008-09 Supreme Court Assistance Project Fellow, at (202) 588-1000 or **supremecourt@citizen.org**.

WATCH LIST CONTENTS

ISSUE INDEX

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 *"Cert" Petition*	The brief filed at the Supreme Court by a party who lost in a lower federal or state court, asking the Supreme Court to grant certiorari and review the decision of the lower court. If cert is granted, the Court will hear the case. If cert is denied, the decision below stands.
Petitioner	The party petitioning the Supreme Court for a *grant* of certiorari—who lost in the lower court and is asking the Supreme Court to overturn the lower court decision.
Respondent	Any party other than the petitioner, but generally the party opposing a grant of certiorari. These parties usually want the Court to *deny* cert.
BIO *Brief in Opposition*	The brief in opposition to certiorari is the brief filed by a respondent in response to the petitioner's petition for certiorari ("cert petition"). This is the brief in which the respondent may explain why the Court should not hear the case.
CFR *Call For a Response*	Where the respondent has initially waived filing a response, after reading the petition for certiorari but before deciding whether to hear the case, the Court sometimes issues a CFR, or asks the respondent to file a brief in opposition.
Conf. *Conference*	This is the term for the meeting the Justices regularly hold regarding pending cert petitions and cases. Conference dates are listed on the current **Supreme Court calendar**.
CVSG *Call for the Views of the Solicitor General*	Before deciding whether to hear a case, the Court sometimes chooses to CVSG the petition. This means the Court is inviting the **Solicitor General** to file a brief providing the views of the United States regarding the question presented by the petition. The brief eventually filed is called an "invitation brief." Briefs filed this term are available here: **http://www.usdoj.gov/osg/briefs/2007/2007brieftypes.html**.
Dist. *Distributed*	This provides the date of the Conference for which this petition and related filings were distributed to the Justices, and the date when the Court may take action on the petition.
GVR *Granted, Vacated, and Remanded*	The Supreme Court granted, vacated, and remanded the petition, usually in light of an intervening case. Essentially, this means the Supreme Court has cancelled out the lower court's decision and sent the case back to that court for reconsideration.
Held	The Court frequently holds petitions for later consideration if they raise the same or similar questions as those presented by other petitions or granted cases. The Court will consider these petitions again later, usually after announcing a decision in another case.
QP *Question/s Presented*	The question or questions presented in a petition for the Supreme Court to decide. The Court usually does not address issues not included in the QP.
Vide	Occasionally, more than one party will ask the Supreme Court to hear the same case. Marking a petition "Vide" recognizes that it comes from the same lower court opinion as another pending petition.

CALLS FOR RESPONSE SINCE THE JUNE CONFERENCE

Disability Rights: State Immunity

07-1259 Haas v. Quest Recovery Servs., Inc. (6th Cir.)
CFR 7/7. BIO 8/6, reply 8/18. Dist. for 9/29.

1. Should the Sixth Circuit have followed the holdings of the First, Ninth, and Eleventh Circuits which had recognized that Congress had abrogated Eleventh Amendment Immunity by adopting Title II of the American with Disabilities Act (ADA) and allowing States to be held liable for failing to comply with handicap accessibility requirements?
2. Is absolute judicial immunity applicable to sentencing orders that result in an individual suffering disparate treatment in violation of the Constitution and/or statutory law while in confinement?
3. When the U.S. Supreme Court remands a civil action to a court appeals with instructions that the panel is "to consider the views of the United States," may the panel refuse to do so on the erroneous grounds that the plaintiff's pleadings fail to meet the minimal requirements imposed by Fed. R. Civ. P. 8(a)?
4. When a sixty (60) paragraph amended complaint is required to be prepared and submitted prior to the announcement of a U.S. Supreme Court decision which substantially modifies and clarifies the applicable constitutional law, may an appellate court terminate the proceedings on the basis that the claims for Title II ADA discrimination were not alleged with a high degree of particularity?

Arbitration: Judicial Review

07-1370 Long John Silver's Restaurants v. Cole (4th Cir.)
CFR 6/26. BIO 8/27. Dist. for 9/29.

The Second, Fourth, and Eleventh Circuits have held that a federal court must confirm an arbitral award that misinterprets a federal statute unless the arbitrator intentionally misrepresented the statute. In contrast, the District of Columbia and Fifth Circuits have held that such an award must be vacated if, regardless of the arbitrator's willfulness, the error in interpreting the statute materially affects a party's substantive rights. The question presented is:

What degree of "judicial scrutiny . . . is sufficient to ensure that arbitrators comply with the requirements of the statute"? *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 232 (1987).

Environmental Law: Supremacy Clause

07-1427 UFO Chuting of Haw., Inc. v. Smith (9th Cir.)
Amici Ocean Tourism Coalition 6/16. CFR 8/1, due 9/23 (ext.).

1. Does Hawaii's five-month seasonal ban on parasailing in navigable (federal) waters off Maui's coast violate the Supremacy Clause because it furthers neither the purpose nor the objectives of the federal Marine Mammal Protection Act, 16 U.S.C. § 1379(a), the predominant federal regime enacted by Congress in 1972 for the safety and well-being of humpback whales?
2. Does the enactment of legislation mooting a judgment which granted all of the relief sought, including a permanent injunction, deprive the prevailing party, here petitioners, of the right to attorney's fees under 42 U.S.C. § 1988?

Habeas Corpus: *Miranda* Rights

07-1436 Terhune v. Anderson (9th Cir.)
CFR 6/26. BIO 8/15. Dist. for 9/29.

1. Whether it was "unreasonable" for the police and the state courts to conclude that, under the circumstances, saying "I plead the fifth" did not constitute an invocation of Anderson's right to remain silent.
2. Whether the state courts' decision to admit the confession was reasonable under *Oregon v. Elstad* and *Edwards v. Arizona*, even if the police had violated *Miranda* by continuing the interrogation after Anderson earlier invoked his right to silence, because the confession was obtained only after the police later stopped the interrogation when Anderson asked for counsel and resumed it only after Anderson initiated it and stated that he wanted to talk without counsel.

Federal Jurisdiction: Remand to State Court

07-1437 Carlsbad Tech., Inc. v. HIF Bio, Inc. (Fed. Cir.)
CFR 8/8, due 9/8.

In *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988), this Court held that district courts could remand removed claims upon deciding not to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). However, in *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2416 (2007), the Court stated that "it is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)" and noted that "[w]e have never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of post-1988 versions of § 1447(c) and § 1447(d)."

Construing *Powerex* as leaving the question open, the Federal Circuit held that a remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject-matter jurisdiction, thus disagreeing with the nine other federal courts of appeal that have construed *Cohill* as distinguishing between remands for lack of subject matter jurisdiction and remands based on declining to exercise subject matter jurisdiction that already exists. Thus, this petition presents the question posed but left unanswered in *Powerex* that is now the subject of a direct conflict among the circuits:

Whether a district court's order remanding a case to state court following its discretionary decision to decline to exercise the supplemental jurisdiction accorded to federal courts under 28 U.S.C. § 1367(c) is properly held to be a remand for a "lack of subject matter jurisdiction" under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d).

Habeas Corpus: Statute of Limitations

07-1474 Pietrzak v. Quarterman (5th Cir.)
CFR 7/18, due 9/17 (ext.).

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

affirmed on his out-of-time direct appeal). Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine on which date the statute of limitations began running and the validity and applicability of *Salinas v. Dretke* in this situation?
2. With Petitioner representing himself *pro se*, the Court of Criminal Appeals of Texas granted post-conviction *habeas* relief and restored him to procedural position that allowed him to seek review of his conviction via direct appeal. In doing so, the court informed Petitioner that "all time limits should be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." Petitioner then timely pursued his direct appeal and state *habeas corpus* remedies and filed the instant section 2254 petition within one year of the conviction becoming final for state law purposes, excluding the time when his subsequent state *habeas* petitions were pending. Did the United States Court of Appeals for the Fifth Circuit err by denying Petitioner's request for a certificate of appealability to determine if this case presents the type of circumstances required for application of the doctrine of equitable tolling to the statute of limitations under 28 U.S.C. § 2254(d)(1)?

Habeas Corpus: Sufficient Evidence

07-1483 Patrick v. Smith (9th Cir.)
CFR 8/5, due 9/4. Dist. for 9/29.

In a state trial of respondent for causing the death of an infant, prosecution and defense experts disagreed on whether there was sufficient evidence that the baby died from shaking. The jury convicted respondent. In federal habeas corpus proceedings, the Ninth Circuit Court of Appeals held that there was insufficient evidence to support the state criminal conviction, and that state appellate court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), in upholding it.

This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit reinstated its earlier opinion, concluding that its analysis was "unaffected by *Musladin*." The question presented is:

Did the Ninth Circuit on remand exceed its authority under the deferential standard for habeas corpus 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?

Attorney's Fees: Preliminary Injunctions

07-1527 City of Garland, Tex. v. Dearmore (5th Cir.)
CFR 7/10. BIO 8/7, reply 8/21. Dist. for 9/29.

This case presents the question expressly reserved by this Court in *Sole v. Wyner*, ___ U.S. ___ (2007)—whether a party who obtains a preliminary injunction in the absence of a final decision on the merits of a claim for permanent injunctive relief is entitled to prevailing party status so as to permit the award of attorney's fees under federal fee shifting statutes. In this case, the Fifth Circuit held that the fleeting modicum of victory represented by a subsequently mooted preliminary injunction is sufficient. The Fourth and Eighth Circuits disagree, relying on this Courts disavowal of the "catalyst theory" in *Buckhannon Board & Care Home v. West Virginia Department of Health*, 532 U.S. 598 (2001), as authority for their positions. Still other circuit court answer the question "yes" or "sometimes" based upon differing tests devised by those circuits, none of which is entirely consistent with the tests created by the other circuits.

Fifth Amendment: Public Employees

07-1547 Aguilera v. Baca (9th Cir.)
Amici Byron L. Warnken 7/14. CFR 7/28, due 9/26 (ext.).

This Court has established that a public employer may compel employees to testify in internal investigations and may discipline those who refuse to cooperate only if it "offer[s] to [the employees] whatever immunity is required" to protect their Fifth Amendment rights against self-incrimination. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973).

Lower courts are divided three ways on what a public employer must do to offer employees that required immunity: (1) Three federal circuits and five state supreme courts hold that to compel potentially incriminating testimony a public employer must give employees a "*Garrity* notice," i.e., must notify employees of their immunity rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and explain the consequences of their decision whether to testify; (2) one federal circuit holds that a public employer can compel potentially incriminating testimony if the employees are deemed to have notice of their *Garrity* rights under an objective standard; and (3) three federal circuits (including the Ninth Circuit below) and three state high courts hold that a *Garrity* notice is entirely unnecessary and that a public employer can compel potentially incriminating testimony so long as it does not also compel employees to waive their *Garrity* immunity. The question presented is:

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

Sixth Amendment: Confrontation Clause

07-1562 Chun v. New Jersey (N.J.)
CFR 7/16. BIOs 8/14, 8/15. Dist. for 9/29.

Is an individual's Sixth Amendment right to confront witnesses against him violated where the State is permitted to rely on documents created for the sole purpose of supporting computer-generated evidence used to convict the individual, without requiring the proponent of the document to testify?

Preemption: Medical Marijuana

07-1569 City of Garden Grove v. Kha (Cal. Ct. App.)
CFR 8/27, due 9/26.

1. Does the Due Process Clause of the 14th Amendment require the return of "medical marijuana" when the person from whom the drug was seized is not prosecuted under state drug laws, despite the fact that the Controlled Substances Act provides that there is no protected property right in marijuana?
2. If California's medical marijuana laws are interpreted to require that police return marijuana seized from a "qualified patient" as defined by state law, does that requirement conflict with federal drug laws which generally make the distribution and possession of any amount of marijuana illegal?

Sixth Amendment: Confrontation Clause

07-1602 De La Cruz v. United States (1st Cir.)
CFR 7/18, due 9/17 (ext.).

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-non-testifying medical examiners and forensic analysts violates a defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).

Fourth Amendment: Exclusionary Rule

08-2 Martin v. Kansas (Kan.)
CFR 7/28. BIO 8/18. Dist. for 9/29.

The lower courts are sharply divided on the frequently recurring question whether—if the initial seizure of the individual was unlawful—evidence discovered pursuant to the search is admissible at trial. Some courts hold that the evidence should be suppressed because the detention was unlawful; others have concluded that the discovery of the outstanding warrant vitiates the taint of the illegal detention. The question presented is:

Whether an officer's discovery of an outstanding warrant during a concededly illegal detention initiated for the purpose of conducting a warrant check is an "intervening circumstance[]" (*Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)) that removes the taint of the illegal detention and permits the introduction of evidence obtained in a search incident to an arrest on the outstanding warrant.

Section 1983: Access to DNA Evidence

08-6 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne (9th Cir.)
CFR 7/25, due 9/24 (ext.).

1. May Osborne use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?
2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert—a freestanding claim of innocence—is not legally cognizable?

Due Process: "Vexatious Litigant"

08-38 Molski v. Evergreen Dynasty Corp. (9th Cir.)
CFR 8/20, due 9/22.

Whether a federal district court may deem a litigant or an attorney to be vexatious litigants and preclude the filing of future lawsuits without express permission from the district court when there was no determination that the prior lawsuits were meritless and no evidentiary hearing to ascertain whether the prior suits were frivolous or contained false allegations.

Statutory Interpretation: *Chevron* Deference

08-63 Nat'l Mining Ass'n v. Kempthorne (D.C. Cir.)
CFR 8/27, due 9/26.

1. Whether the D.C. Circuit correctly held that a statutory phrase is necessarily ambiguous and triggers *Chevron* deference because a single word within the phrase is itself ambiguous.
2. Whether the D.C. Circuit correctly declined to narrow the Office of Surface Mining Reclamation and Enforcement's statutory construction even though its interpretation will trigger takings claims.

Fourth Amendment: Particularity Requirement

08-77 Baranski v. United States (8th Cir.)
CFR 8/11, due 9/10.

Whether the particularity requirement of the Fourth Amendment ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized") is satisfied by a search warrant which stated only "See Attached Affidavit" with respect to the things to be seized, but to which the affidavit wasd not attahced, is the affidavit was not present at the scene of the search.

Criminal Law: Mail Fraud Proceeds

08-148 Martinelli v. United States (11th Cir.)
CFR 8/13, due 9/15.

Whether this Court's decision in *United States v. Santos*, 128 S. Ct. 2020 (2008), necessitates that this case be remanded to the Eleventh Circuit to reconsider is decisions affirming the conviction, 454 F.3d 1300 (2006), and affirming the sentence, 265 F. App'x 784 (2008), in light of the fact that both decisions concluded that *all* proceeds of a mail fraud offense constitute money laundering proceed, regardless of whether the money represents profit.

CASES GRANTED FOR ARGUMENT IN THE 2008 TERM

Preemption: FDCA / State Consumer Remedy

06-1249 Wyeth v. Levine (Vt.)
BIO 4/20, reply 4/30. 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)). Cert. granted 1/18. Arg. 11/3.

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

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

Title VII: Retaliation

06-1595 Crawford v. Nashville (6th Cir.)
BIO filed 7/16, reply 7/30. Cert. granted 1/18. Arg. 10/8.

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

Criminal Law: "Violent Felony"

06-11206 Chambers v. United States (7th Cir.)
BIO 7/16, reply 7/25. Cert. granted 4/21. Arg. 11/10.

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Environmental Law: Standing / Nationwide Injunction

07-463 Summers v. Earth Island Inst. (9th Cir.)
BIO 12/5, reply 12/21. Cert. granted 1/18. Arg. 10/8.

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

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?

Immigration Law: Asylum

07-499 Negusie v. Mukasey (5th Cir.)
BIO 2/15, reply 2/27. Cert. granted 3/17. Arg. 11/5.

The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § l158(b)(2)(A). The question presented is:

Whether this "persecutor exception" prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

Fourth Amendment: Exclusionary Rule

07-513 Herring v. United States (11th Cir.)
BIO 1/18, reply 1/30. Cert. granted 2/19. Arg. 10/7.

Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.

Native American Rights: Land Trusts

07-526 Carcieri v. Kempthorne (1st Cir.)
BIO 1/25, reply 2/5. Cert. granted 2/25. Arg. 11/3.

1. Whether the 1934 Indian Reorganization Act empowers the Secretary of the Interior to take land into trust for Indian tribes that were not recognized under federal jurisdiction in 1934.
2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.

Fourth Amendment: Passenger Search

07-542 Arizona v. Gant (Ariz.)
CFR 12/11. BIO 1/24, reply 2/5. Cert. granted 2/25. Arg. 10/7.

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Title VII: Pregnancy Discrimination

07-543 AT&T Corp. v Hulteen (9th Cir.)
BIO 12/21, reply 1/2. CVSG 1/22, filed 5/21 (urging grant). Cert. granted 6/23.

Whether Title VII permits an employer, when setting retirement benefits, to discriminate between women who took pregnancy disability leaves before the Pregnancy Discrimination Act came into effect and other employees who took any other kind of temporary disability leave during that same period.

Criminal Law: Jury Instructions

07-544 Chrones v. Pulido (9th Cir.)
BIO 12/26, reply 1/10. Cert. granted 2/25. Arg. 10/15.

Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

Preemption: Cigarette Labeling

07-562 Altria Group, Inc. v. Good (1st Cir.)
BIO filed 12/28, reply 1/2. Cert. granted 1/18. Arg. 10/6.

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

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?

Arbitration: Union-Negotiated Waiver

07-581 14 Penn Plaza LLC v. Pyett (2d Cir.)
BIO 1/16, reply 1/29. Cert. granted 2/19.

Is an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, enforceable?

Communications Regulation: "Fleeting Expletives"

07-582 FCC v. Fox Television Stations, Inc. (2d Cir.)
BIOs 2/1, reply 2/15. Cert. granted 3/17. Arg. 11/4.

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

Environmental Law: Clean Water Act

07-588/07-589/07-597 Entergy Corp. v. EPA/PSEG Fossil LLC v. Riverkeeper/Utility Water Act Group v. Riverkeeper (2d Cir.)
Riverkeeper BIO filed 2/29, Federal respondents, Rhode Island BIOs filed 3/3. Cert. granted 4/14.

Scott Nelson of Public Citizen is assisting respondent Riverkeeper.

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.

Sixth Amendment: Confrontation Clause

07-591 Melendez-Diaz v. Massachusetts (Mass.)
CFR 12/6. BIO 2/5, reply 2/19. Cert. granted 3/17. Arg. 11/10.

Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)?

Criminal Law: Domestic Violence

07-608 United States v. Hayes (4th Cir.)
BIO 2/19, reply 3/12. Cert. granted 3/24. Arg. 11/10.

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim.

First Amendment: Public Employees

07-610 Locke v. Karass (1st Cir.)
BIO of Maine State Employees Association, SEIU Local 1989, 1/9, reply 1/29. Cert. granted 2/19. Arg. 10/6.

May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent's affiliates' litigation outside of a nonunion employee's bargaining unit?

War on Terror: Seizure of Foreign Assets

07-615 Ministry of Def. of Iran v. Elahi (9th Cir.)
BIO 1/8, reply 1/17. CVSG 2/19, filed 5/23 (urging GVR). Cert. granted 6/23.

Is an attachment against foreign sovereign property permissible when that property is "at issue in claims against the United States before an international tribunal," and that property is not a "blocked asset" pursuant to the terms of the 2000 Victims of Trafficking and Violence Protection Act and the 2002 Terrorism Risk Insurance Act?

First Amendment: Public Forum

07-665 Pleasant Grove City, Utah v. Summum (10th Cir.)
BIO 2/21, reply 3/7. Cert. granted 3/31. Arg. 11/12.

1. Did the Tenth Circuit err by holding, in conflict with the Second, Third, Seventh, Eighth, and D.C. Circuits, that a monument donated to a municipality and thereafter owned, controlled, and displayed by the municipality is not government speech but rather remains the private speech of the monument's donor?
2. Did the Tenth Circuit err by ruling, in conflict with the Second, Sixth, and Seventh Circuits, that a municipal park is a public forum under the First Amendment for the erection and permanent display of monuments proposed by private parties?
3. Did the Tenth Circuit err by ruling that the city must immediately erect and display Summum's "Seven Aphorisms" monument in the city's park?

Voting Rights: Vote Dilution

07-689 Bartlett v. Strickland (N.C.)
CFR 1/15, filed 2/14. Reply 2/25. Cert. granted 3/17. Arg. 10/14.

Whether a racial minority group that constitutes less than 50 percent of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Fourth Amendment: Consent

07-751 Pearson v. Callahan (10th Cir.)
BIO 2/6, reply 2/14. Cert. granted 3/24. Arg. 10/14

1. Whether police officers may enter a home without a warrant on the theory that the owner consented to the entry by consenting to the entry of a confidential informant.
2. Whether the Fourth Amendment's prohibition of warrantless entry into a home is clearly established, such that officers who violate that right are not entitled to qualified immunity.
3. Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?

Criminal Law: Jury Instructions

07-772 Waddington v. Sarausad (9th Cir.)
BIO 2/5, reply 2/20. Cert. granted 3/17. Arg. 10/15.

1. In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?
2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conduct there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

Preemption: Federal Arbitration Act

07-773 Vaden v. Discover Bank (4th Cir.)
BIO 2/11, reply 2/22. Cert. granted 3/17. Arg. 10/6.

1. Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "arises under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach—involves federal law.
2. If so, whether a "completely preempted" state-law *counter*claim in an underlying state-court dispute can supply subject matter jurisdiction.

Prosecutorial Immunity: Jailhouse Informants

07-854 Van de Kamp v. Goldstein (9th Cir.)
CFR 1/31. BIO filed 3/3, reply 4/2. Cert. granted 4/14. Arg. 11/5.

1. Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure

of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency?
2. Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

First Amendment: Public Employees

07-869 Ysursa v. Pocatello Educ. Ass'n (9th Cir.)
BIO 2/25, reply 3/4. Cert. granted 3/31. Arg. 11/3.

Does the First Amendment to the United States Constitution prohibit a state legislature from removing the authority of state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers?

Criminal Law: Sentencing

07-901 Oregon v. Ice (Or.)
BIO 2/5, reply 2/15. Cert. granted 3/17. Arg. 10/15.

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

Environmental Law: Clean Water Act

07-984 / 07-990 Coeur Alaska, Inc. v. Se. Alaska Conservation Council/Alaska v. Se. Alaska Conservation Council (9th Cir.)
BIOs filed 5/14, reply 5/27. Brief of respondent Goldbelt, Inc. in support, 2/11. Cert. granted 6/27.

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?

Pleading Requirements

07-1015 Ashcroft v. Iqbal (2d Cir.)
CFR 3/17. BIO 5/9, reply 5/29. Cert. granted 6/16.

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.
2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

Trade Law: Anti–Dumping

07-1059 / 07-1078 United States v. Eurodif, S.A./USEC, Inc. v. Eurodif, S.A. (Fed. Cir.)
BIOs 3/21, replies 4/1, 4/2. Cert. granted 4/21. Arg. 11/4.

Whether the court of appeals erred in rejecting Commerce's conclusion that foreign merchandise is "sold in the United States" within the meaning of 19 U.S.C. 1673 when a purchaser in the United States obtains foreign merchandise by providing monetary payments and raw materials to a foreign entity that performs a major manufacturing process in which substantial value is added to the raw materials, thereby creating a new and different article of merchandise that is delivered to the U.S. purchaser.

Habeas Corpus: Procedural Default

07-1114 Cone v. Bell (6th Cir.)
BIO 5/14, reply 5/22. Cert. granted 6/23.

1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?
2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

Fourth Amendment: Passenger Search

07-1122 Arizona v. Johnson (Ariz.)
CFR 5/13. BIO 5/22, reply 6/3. Cert. granted 6/23.

Bonnie Robin-Vergeer of Public Citizen assisted the respondent.

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?

Title IX: Implied Right of Action

07-1125 Fitzgerald v. Barnstable Sch. Comm. (1st Cir.)
BIO 5/5, reply 5/20. Cert. granted 6/9.

Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.

Veterans' Benefits: Prejudicial Error

07-1209 Peake v. Sanders (Fed. Cir.)
BIOs, 5/12, 5/16, reply 5/28. Cert. granted 6/16.

The Veterans Claims Assistance Act of 2000 (VCAA) requires the Department of Veterans Affairs (VA) to provide a notice to benefits claimants. Under 38 U.S.C. 7261(b)(2) (Supp. V 2005), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." The question presented is whether the court of appeals erred in holding that a failure of the VA to give the notice required by the VCAA must be presumed to be prejudicial.

State–Law Procedural Bar

07-1216 Philip Morris USA, Inc. v. Williams (Or.)
BIO 4/23, reply 5/5. Cert. granted 6/9.

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

Habeas Corpus: Ineffective Assistance of Counsel

07-1223 Bell v. Kelly (4th Cir.)
BIO 3/28, reply 4/1. Cert. granted 5/12. Arg. 11/12.

Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The question presented is:

Did the Fourth Circuit err when, in conflict with the decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

Environmental Law: National Environmental Policy Act

07-1239 Winter v. Natural Res. Def. Council, Inc. (9th Cir.)
BIO 5/23, reply 6/2. Cert. granted 6/23. Arg. 10/8

1. Whether the Council on Environmental Quality (CEQ) permissibly construed its own regulation in finding "emergency circumstances."

2. Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA's procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.

Habeas Corpus: Ineffective Assistance of Counsel

07-1315 Knowles v. Mirzayance (9th Cir.)
BIO 5/15, reply 5/29. Cert. granted 6/27.

1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal Law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point?
2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings ere "clearly erroneous"?

Habeas Corpus: Statute of Limitations

07-6984 Jimenez v. Quarterman (5th Cir.)
CFR 12/6. BIO 2/6. Cert. granted 3/17. Arg. 11/4.

Whether a Certificate of Appealability should have issued pursuant to *Slack v. McDaniel*, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of whether pursuant to 28 U.S.C. § 2244 (d) (1)(A), when through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the one-year limitations period?

Death Penalty: Right to Clemency Counsel

07-8521 Harbison v. Bell (6th Cir.)
BIO 2/1, reply 2/11. CVSG 3/3, filed 5/23. Cert. granted 6/23.

1. Does 18 U.S.C. §3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. §848(q) (4)(B) and (q) (8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose?
2. Is a certificate of appealability required to appeal an order denying a request for federally funded counsel under 18 U.S.C. §3599(a)(2) and (e).

Section 1983: State–Court Jurisdiction

07-10374 Haywood v. Drown (N.Y. Ct. App.)
BIO 5/14, reply 5/22. Cert. granted 6/16.

Whether a state's withdrawal of jurisdiction over certain damages claims against state corrections employees—from state courts of general jurisdiction—may be constitutionally applied to exclude federal

claims under Section 1983, especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy?