



**ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT**

**CERT. PETITIONS OF PUBLIC INTEREST  
DECEMBER 12, 2008 CONFERENCE**

Prepared by Leah Nicholls, 2008–2009 SCAP Fellow

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

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

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## RESOURCES

### LINKS FOR MORE INFORMATION

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

**KEY TERMS & ABBREVIATIONS**

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

## DECEMBER 12TH CONFERENCE

### Title VII: Racial Discrimination

#### [07-1428/08-328 Ricci v. DeStefano \(2d Cir.\)](#)

07-1428: CFR 8/27. BIO of New Haven 11/13. Letter from DeStefano 11/17, reply 11/21. Dist. for 12/12.  
08-328: *Amicus* Ctr. for Individual Rights 10/14. BIO of New Haven 11/13, reply 11/21. Dist. for 12/12.

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?
2. Does an employer violate 42 U.S.C. § 2000e-2(I), which makes it unlawful for employers “to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race,” when it rejects the results of such tests because of the race of the successful candidates?

### Federal Jurisdiction: Copyright Infringement

#### [08-103 Reed Elsevier, Inc. v. Munchnick \(2d Cir.\)](#)

BIO of Pogrebin 8/8. CFR 9/18. BIO of Munchnick 10/16, reply 10/28. Dist. for 11/14. Re-listed for 11/25.  
Re-listed for 12/5. Re-listed for 12/12.

1. Whether the usual power of lower courts to approve a comprehensive settlement releasing claims that would be outside the courts’ subject matter jurisdiction to adjudicate, confirmed in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), was eliminated in copyright infringement actions by 17 U.S.C. § 411(a).
2. Whether the Second Circuit erred by ignoring the assurance in *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001), that the problem of compromised electronic news archives could be remedied by “[t]he Parties (Authors and Publishers) [entering] into an agreement allowing continued electronic reproduction of the Authors’ works . . . and remunerating the authors for their distribution.

### FOIA: Exemption 5

#### [08-125 Nat’l Inst. of Military Justice v. U.S. Dep’t of Defense \(D.C. Cir.\)](#)

BIO 11/12, reply 11/26. Dist. for 12/12.

Whether documents submitted by private citizens in response to a request by a government official for comment on proposed rules qualify as “inter-agency or intra-agency memorandums or letters” exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

### Criminal Law: Mail Fraud Proceeds

#### [08-148 Martinelli v. United States \(11th Cir.\)](#)

CFR 8/13. BIO 11/14. Dist. for 12/12.

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 its decisions affirming the conviction and the sentence 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.

## Price-Anderson Act: Government Contractor Defense

### **08-210 E.I. DuPont de Nemours & Co. v. Stanton (9th Cir.)**

BIO 11/10, reply 11/24. Dist. for 12/12.

*Bonnie Robin-Vergeer and Brian Wolfman of Public Citizen are co-counsel for the respondents.*

#### **Brief in Opposition**

1. Whether the Ninth Circuit erred by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the Price-Anderson Act (PAA), which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions.
2. Whether Ninth Circuit erred by holding that petitioners may be held strictly liable under the Price-Anderson Act for federally authorized nuclear emissions.
3. Whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling.

## War on Terror: RFRA

### **08-235 Rasul v. Myers (D.C. Cir.)**

BIO 11/14, reply 11/24. *Amicus* Nat'l Inst. for Military Justice and Military Law 9/24. Dist. for 12/12.

1. Whether the Court of Appeals erred in holding that petitioners' claim for religious abuse and humiliation at Guantánamo was not actionable under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, because they are not "persons"?
2. Whether the Court of Appeals erred in holding that petitioners lack the right under the Constitution not to be tortured or, alternatively, that respondents are entitled to qualified immunity because petitioners' right not to be tortured was not "clearly established" at the time of their detention?
3. Whether the Court of Appeals erred in holding that the ordering of torture by the Secretary of Defense and senior military officers was within the scope of their employment?

## Preemption: Takings Claims

### **08-242 Bair v. United States (Fed. Cir.)**

BIO 11/14, reply 11/24. Dist. for 12/12.

1. Under a Fifth Amendment categorical takings analysis, does a previously enacted federal statute constitute a "background principle" of law under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), thereby eliminating a compensable property interest that would otherwise exist as a matter of state law?
2. Can a federal statute preempt, and thereby render valueless, a state-created property right without triggering the requirement of paying just compensation under the Fifth Amendment?

## **EAJA: “Prevailing Party”**

### **08-345 Alabama v. Pope (11th Cir.)**

BIO 11/14, reply 11/25. *Amici* Int’l Municipal Lawyers’ Ass’n, Virginia & 26 Other States 10/17. Dist. for 12/12.

Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney’s fees—and whose interests are therefore aligned with those of the would-be fee payer—is “prevailing party” entitled to fees within the meaning of federal fee-shifting statutes?

## **FLSA: Fire Service Paramedics**

### **08-388 City of Philadelphia v. Lawrence (3d Cir.)**

BIO 11/10, reply 11/24. Dist. for 12/12.

*Brian Wolfman of Public Citizen is assisting the respondents.*

Section 207(k) of the Fair Labor Standards Act (FLSA) sets forth when overtime pay is due for public employees engaged in “fire protection activities.” Section 203(y) defines such employees to include not only firefighters, but also paramedics who are trained in fire suppression, have the legal authority and responsibility to engage in fire suppression, are employed by a municipal fire department, and are engaged in responding to emergency situations where life, property, or the environment is at risk.

Did the Third Circuit err in concluding, contrary to other circuits, that “responsibility” to engage in fire suppression under section 203(y) requires that fire-trained paramedics, who in that role may be called upon to engage in fire suppression activities on a fireground, also be cross-utilized and dispatched regularly as firefighters solely to control and extinguish fires?

## **First Amendment: Public Figures**

### **08-483 Hatfill v. N.Y. Times Co. (4th Cir.)**

BIO 11/14, reply 11/26. Dist. for 12/12.

1. Whether the court of appeals erred by declining to identify the “particular controversy giving rise to the defamation” of petitioner Steven Hatfill, as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and instead finding that Hatfill is a “limited purpose public figure” because he has some expertise relating to the broader issues discussed in the defamatory articles.
2. Whether the court of appeals erred by holding that Hatfill must show that the defamatory articles were *completely* fabricated to demonstrate “actual malice,” even though the evidence revealed that some of the articles’ allegations were fabricated and other statements made in the articles were embellished to support the allegation that Hatfill was the anthrax murderer.

## Section 1983: Municipal Liability

### **08-486 Mann v. Helmig (6th Cir.)**

BIO 11/14. Dist. for 12/12.

1. Can a municipality delegate its decision-making authority to a third party, and then escape liability in a 42 U.S.C. § 1983 action for redress of constitutional injuries, by claiming that the injury was not the result of the municipality's policy?
2. Can a municipality avoid liability for a constitutional injury when it condones and endorses the illegal conduct of the agent that committed the constitutional violation?

## Title VII: Retaliation Claims

### **08-488 Bowie v. Personnel Bd. of Jefferson County, Ala. (11th Cir.)**

BIO 11/14. Dist. for 12/12.

1. Can a court-appointed receiver be sued as an employer under Title VII of the Civil Rights Act of 1964 for retaliatory employment decisions made during his receivership?
2. When a period of receivership ends during the pendency of a Title VII action, should the action continue with the original employer substituted for the receiver?

## Disability Rights: Accessibility

### **08-502 D.G. v. N. Plainfield Bd. of Educ. (N.J. Ct. App.)**

BIO 11/14. Dist. for 12/12.

1. Does an action brought pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1487, have to be heard in an administrative setting or can it be heard in a state court in situations like here, where the IDEA action that was started in the Office of Administrative Law, was consolidated with the New Jersey Law Against Discrimination Act, N.J.S.A. 10:5-1, *et seq.*, and Americans with Disabilities Act (ADA) action in the Superior Court by order of the court and with the consent of the parties?
2. Does the ADA require a court to make reasonable accommodations for a litigant in a wheelchair to testify from the witness box like everyone else, so that can stay within their own county, or does it allow the court to send the trial to a different county which is accessible, thereby denying the litigant the right to be heard in the county in which individuals who are not in a wheelchair have their litigation heard?
3. Is it a violation of the Fourteenth Amendment to the U.S. Constitution, commonly known as the Equal Protection Clause, and the ADA for a judge to make comments about the movements and behaviors of a disabled party during trial, which are part of the individual's disability, and for the judge to allow the adversary to do likewise thereby impacting the perception of the jury particularly in a case that resolves around said disability?
4. Does the ADA require a judge to order a new trial when there is *prima facie* evidence of discrimination and violations of the ADA?

## Criminal Law: Retroactivity

### [08-517](#) *Curry v. Butler* (9th Cir.)

BIO 11/12, reply 11/24. Dist. for 12/12.

In *Cunningham v. California*, 549 U.S. 270 (2007), this Court held the California upper-term sentencing procedure unconstitutional. In this case, the Ninth Circuit invalidated a pre-*Cunningham* California upper-term sentence. The question presented is:

In light of *Teague v. Lane*, 489 U.S. 288 (1989), and 28 U.S.C. § 2254(d), may a federal court grant habeas relief on a California petitioner's claim that his upper-term sentence, imposed and final prior to *Cunningham*, violated his right to jury trial?

## PENDING FOR UPCOMING CONFERENCES

### ERISA: “Accrued Benefits”

#### **07-663 AK Steel Corp. Retirement Accumulation Pension Plan v. West (6th Cir.)**

BIO filed 12/20, reply 1/2. Dist. for 1/18. Re-listed for 6/5. CVSG 6/9, filed 12/2 (urging the Court to deny cert.).

1. Whether the Sixth Circuit, in accord with the Seventh Circuit but in conflict with two other circuits and numerous state courts, was correct in holding that a pension plan participant may seek relief for a statutory violation of ERISA under ERISA § 502(a)(1)(B), even though that provision authorizes relief only for violations of “the terms of the plan.”
2. Whether the Sixth Circuit, in accord with the Fourth Circuit but in conflict with four other circuits, was correct in holding that a court may apply the rule of *contra proferentem* to override a plan administrator’s reasonable interpretation of a pension plan.

### Bankruptcy Law: Dischargeability

#### **07-952 Denton v. Hyman (2d Cir.)**

BIO 3/21. Dist. for 4/18. CVSG 4/21, filed 12/2 (urging the Court to deny cert.).

1. Whether a state court judgment holding a corporate fiduciary liable for the inherently willful misappropriation and exploitation of corporate assets for personal gain, without any additional finding of “intent,” is dischargeable in bankruptcy (as appears to be the law in the First, Fifth and Seventh Circuits), or is within the purview of the “fiduciary defalcation” exception to discharge of Bankruptcy Code § 523(a)(4) (as appears to be the law in the Fourth, Sixth, Eighth and Ninth Circuits).
2. Whether the express findings of a state court that a corporate officer and director has breached his fiduciary duty by “co-opting [a corporate] enterprise for... his own personal enrichment,” by... “exploiting the [corporations’] assets” and by “misappropriat[ing their] ... tangible assets and goodwill” for personal gain, are sufficient, under principles of collateral estoppel, held applicable to Bankruptcy Court proceedings in *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S. Ct. 654 (1991), to establish a “defalcation while acting in a fiduciary capacity” under Section 523(a)(4) of the Bankruptcy Code?

### Sovereign Immunity: Patent Infringement

#### **07-956 Biomedical Patent Mgmt. Corp. v. Cal. Dep’t of Health Servs. (Fed. Cir.)**

BIO 3/21, reply 4/2. *Amicus* U.S. Chamber of Commerce, 2/22. Dist. for 4/18. CVSG 4/21, filed 12/2 (urging the Court to deny cert.).

1. Whether a state’s waiver of Eleventh Amendment immunity in one action extends to a subsequent action involving the same parties and the same underlying transaction or occurrence.
2. Whether a state waives its Eleventh Amendment immunity in patent actions by regularly and voluntarily invoking federal jurisdiction to enforce its own patent rights.

## **Federal Jurisdiction: Foreign Sovereign Immunities Act**

### **07-1090 Republic of Iraq v. Beaty (D.C. Cir.)**

BIO 4/23, reply 5/5. Dist. for 5/22. CVSG 5/27, filed 12/5 (urging the Court to grant cert.).

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime and predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7).

## **Preemption: State-Court Filing Requirements**

### **07-1152 Weldon v. Norfolk S. Ry. Co. (Ohio)**

BIO 5/12, reply 5/27. Dist. for 6/12. CVSG 6/16, filed 12/5 (urging the Court to deny cert.).

Whether a state law may impose on plaintiffs bringing asbestos claims preliminary evidentiary medical requirements in cases brought in state court as a condition precedent to the exercise of rights under the Federal Employers' Liability Act and the Locomotive Boiler Inspection Act.

## **Preemption: FDCA/State Consumer Remedy**

### **07-1327 Albertson's, Inc. v. Kanter (Cal.)**

*Amici* Food Mktg. Inst., Rexall Sundown, Inc. 5/22. BIO 6/20, reply 7/2. Dist. for 9/29. CVSG 10/6, filed 12/5 (urging the Court to deny cert.).

Are private parties' state law claims to enforce Food, Drug, and Cosmetic Act requirements preempted by Congress's mandate that the Act be enforced only by the federal or state governments?

## **Environmental Law: Clean Water Act**

### **07-1524 Carlota Copper Co. v. Friends of Pinto Creek (9th Cir.)**

BIO of EPA 9/5 (opposing cert.), reply 9/15. CFR 9/22. BIO 11/21, reply 12/1. Dist. for 1/9.

*Deepak Gupta and Brian Wolfman of Public Citizen are co-counsel for the respondent.*

### **Brief in Opposition**

Whether the court of appeals erred in setting aside the United States Environmental Protection Agency's issuance of a National Pollution Discharge Elimination System permit on the ground that it was inconsistent with 40 C.F.R. 122.4(i), an EPA regulation implementing the Clean Water Act.

## Criminal Law: Sentencing

### **08-118 Masferrer v. United States (11th Cir.)**

CFR 9/8. BIO 12/8.

Petitioner, chairman of a national bank, was convicted of engaging in a fraudulent swap transaction designed to conceal investment losses suffered by the bank. Petitioner was sentenced to thirty years in jail, based on two hotly contested sentencing facts that the district court found by a preponderance of the evidence: that Petitioner was legally responsible for false testimony given by two other individuals (increasing sentence range by seventeen years) and that Petitioner had caused losses exceeding \$20 million (increasing sentencing range by fourteen years). The questions presented are:

1. Whether the Eleventh Circuit, in conflict with the Eighth and Ninth Circuits, but consistent with the Third, Sixth, and Seventh Circuits, erroneously declined to apply a standard higher than preponderance of evidence in determining facts that have a disproportionately large impact on sentencing.
2. Whether the Eleventh Circuit, in conflict with the Second, Fifth, and Ninth Circuits but consistent with the Eighth Circuit, erroneously declined to apply the loss causation principles articulated in *Dura Pharmaceuticals, Inc. v. Broudo* in determining “loss” under the Sentencing Guidelines.

## Tax Exemptions: Section 501(c)(4)

### **08-164 Vision Serv. Plan v. United States (9th Cir.)**

BIO 11/17, reply 12/2. *Amici* Prevent Blindness Am., Nat’l Taxpayers Union 9/10. Dist. for 1/9.

Consistent with the IRS’s longstanding position and Congress’s intent, whether a nonprofit health care organization that provides benefits to a broad and substantial class of subscribers qualifies for tax exemption as a “social welfare” organization pursuant to section 501(c)(4) of the Internal Revenue Code of 1986.

## EMTALA

### **08-169 Sociedad Española de Auxilio Mutuo y Beneficencia v. Morales (1st Cir.)**

CFR 9/22. BIO 11/21. Dist. for 1/9.

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

### **Brief in Opposition**

One of the requirements for the application of the Emergency Medical Treatment and Active Labor Act (EMTALA) is that the individual must “come to” the emergency department. The question presented is: Whether physical presence is required by the “comes to” language contained in the statute.

## Civil Procedure: RCFC 60(b)(4)

### **08-231 South Fork Band v. United States (Fed. Cir.)**

BIO 11/21. Dist. for 1/9.

1. Does Rule 60(b)(4) of the Rules of the United States Court of Federal Claims (RCFC), providing for relief from a void judgment, require that it be raised within a “reasonable time,” contrary to other Courts of Appeals’ decisions construing identical Federal Rule of Civil Procedure 60(b)(4) and holding that there is no timeliness requirement?

2. Can the Treaty of Ruby Valley be construed under RCFC 12(b)(6) as a matter of law to not confer treaty-recognized title, without regard to the established tenets for interpretation of Indian treaties?
3. Was the statutory “finality” bar of the Indian Claims Commission Act, § 22, 25 U.S.C. § 70u (1976), in effect after the termination of the Indian Claims Commission (ICC) on September 30, 1978, such that it could then attach to an ICC judgment even though the conditions of the Statute had not been met at the time of the ICC’s termination?

### **Equal Educational Opportunity Act: Injunction**

**08-289/08-294 Horne v. Flores/Speaker of the Ariz. House of Representatives v. Flores (9th Cir.)**  
BIO 12/1. *Amici* Wash. Leg. Found., Am. Legislative Exch. Council 10/6.

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act (EEOA) because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act (NCLB). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with the decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction’s “basic premises” have not been “swept away.” The questions presented are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.
2. Whether compliance with NCLB’s extensive requirements for English-language instruction is sufficient to satisfy the EEOA’s mandate that States take “appropriate action” to overcome language barriers impeding students’ access to equal educational opportunities.

### **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.

***Bonnie Robin-Vergeer of Public Citizen is co-counsel for the respondent.***  
**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.

## Prisoners' Rights: Disclosure Statements

### **08-327 Arizona v. Tuzon (9th Cir.)**

CFR 10/21, due 11/20. Dist. for 1/9.

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 most suits to exchange disclosure statements, but it specifically exempts suits filed by pro se prison inmates. Do the district judges have the power to, in essence, enact their own rule—inconsistent with this Court's rule—requiring the defendants in pro-se inmate suits to unilaterally provide super 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 for it. Similarly, under federalism principles, a federal court cannot co-opt a state government agency to do its bidding. 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; courts must have jurisdiction over 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 and associated persons?

## Due Process: Class-Action Choice of Law

### **08-349 Gen. Motors Corp. v. Bryant (Ark.)**

BIO 11/20, reply 12/2. Dist. for 1/9.

Whether a state court's refusal to consider choice of law before certifying a nationwide class action that is predicated upon varying state laws fails to give full faith and credit to the laws of sister states and deprives litigations of due process by injecting arbitrariness into the proceedings.

## Sixth Amendment: Confrontation Clause

### **08-381 Sweet v. New Jersey (N.J.)**

CFR 10/27. BIO 11/24. Dist. for 1/9.

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? (This case will likely be held for 07-591 *Melendez-Diaz v. Massachusetts*, granted and set for oral argument on 11/10.)

### First Amendment: Heckler's Veto

**08-424/08-431 L.A. County Sheriff's Dep't v. Ctr. for Bioethical Reform/Roberts v. Ctr. for Bioethical Reform (9th Cir.)**

08-424: CFR 11/3. BIO 11/18. Dist. for 1/9.

08-431: CFR 11/7. BIO 11/18. Dist. for 1/9.

08-424:

1. Can school and law enforcement officials restrict speech that causes a substantial disturbance at a school even if the manner in which the speech is presented is not in and of itself disruptive?
2. Is there an exception for schools with regard to the ban on the heckler's veto?
3. Did the sheriff's deputies violate the First Amendment by instructing anti-abortion protestors with large, graphic photographs of aborted fetuses to leave the perimeter of a middle school when their presence created a substantial disruption?
4. Where an appellate court, such as the Ninth Circuit, admits that the application of a law to a particular circumstance is unclear, does qualified immunity shield police officers from liability for the length of the detention while the officers investigate the application of the unclear law?

08-431:

1. Whether graphic, blown-up photographs of aborted fetuses constitute a *manner* of expression which can reasonably be regulated by a time, place, and manner of restriction on speech adjacent to a public middle school.
2. Whether a captive audience of public school children can constitutionally exercise a heckler's veto over disturbing speech which interferes with the order of that public school.

### Habeas Corpus: Ineffective Assistance of Counsel

**08-430 Schriro v. Correll (9th Cir.)**

BIO 12/3.

1. Pursuant to a remand to address a claim of ineffective assistance of counsel, the district court held a nine-day evidentiary hearing. In a detailed 109-page report, the district court found that Correll was not prejudiced due to any deficient performance on counsel's part. The Ninth Circuit reversed. Did the Ninth Circuit fail to appropriately afford deference to the district court's factual findings?
2. Did the Ninth Circuit essentially eliminate the prejudice prong of the *Strickland* analysis by presuming prejudice, and by failing to consider the facts and circumstances of the offense, the death-qualifying aggravating factors found at trial, Arizona law, and the rebuttal evidence the state would have presented had the alleged omitted mitigation been offered?

### Voting Rights Act: Vote Dilution

**08-432 Thompson v. Glades County, Fla. Bd. of County Comm'rs (11th Cir.)**

CFR 11/3. BIO 12/2.

1. Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the Fourteenth Amendment of the Constitution of the United States.
2. Are crossover votes properly considered in assessing a potential vote dilution remedy under Section 2 or the Fourteenth Amendment?

3. Whether the lower court erred in holding that petitioners' proposed district—with an African-American voting age population of 50.23%, or at least 47.58%, if adjusted to achieve absolute population equality across districts, a Hispanic voting age population of 15.23%, and a white voting age voting population of approximately 33%—failed to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986). (This case will likely be held for 07-689 *Bartlett v. Strickland*, granted and set for oral argument on 10/14.)

### Pleading Requirements

#### [08-435](#) *Hall v. Back* (6th Cir.)

BIO 12/3.

Whether the raising of an affirmative defense of qualified immunity in an unlawful termination for political affiliation cases based on the First and Fourteenth Amendments of the U.S. Constitution and 42 U.S.C. § 1983 require the plaintiff to provide specific, non-conclusory allegations to survive a motion to dismiss in such an intent-based constitutional tort; and, whether the Court should now reject the emasculating of qualified immunity that has resulted from the decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998)?

### Preemption: FDCA/State Consumer Remedy

#### [08-437](#) *Colacicco v. Apotex, Inc.* (3d Cir.)

BIOs 12/3.

Whether prior approval of a pharmaceutical label by the Food and Drug Administration (FDA) preempts state-law failure-to-warn claims where FDA made no authoritative determination requiring or prohibiting a warning prior to the injury, but subsequently allowed warnings that parallel the state-law duty. (This case will likely be held for 06-1249 *Wyeth v. Levine*, granted on 1/18 and argued on 11/3.)

### Civil Procedure: *Forum Non Conveniens*

#### [08-439](#) *Windt v. Qwest Commc'ns Int'l, Inc.* (3d Cir.)

BIO 12/2. *Amici* INSOL Eur. 10/31, Kingdom of the Netherlands 11/3.

For purpose's of a federal court's application of *forum non conveniens*, where the alternative to pursuing the case in the United States is pursuing the case in another country, is the relevant *domestic* forum the United States (as the First, Eighth, and Eleventh Circuits have held) or merely the specific judicial district in which the district court sits (as the Third Circuit held below)?

### Criminal Law: Sentencing

#### [08-444](#) *Cruzado-Laureano v. United States* (1st Cir.)

BIO 12/5.

When a court of appeals reverses a criminal sentence, it remands the case to the district court for further sentencing proceedings because the district court is best situated to hear and decide in the first instance issues that bear on the appropriate sentence. The court of appeals has the option of explicitly restricting the scope of the district court's inquiry on resentencing, but in this case it did not. The question presented is whether a district court on remand for resentencing retains the discretion to hear issues and take evidence beyond the scope of the error addressed by the appellate court, where the appellate court has not expressly limited the district court's authority on remand.

## Preemption: National Bank Act

### **08-453** *Cuomo v. Clearing House Ass'n, L.L.C.* (2d Cir.)

BIO 12/8. *Amici* Nat'l Ass'n of Realtors, North Carolina, Conference of State Bank Supervisors, Cent. N.Y. Citizens in Action 11/6.

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).

## Mineral Leasing Act: Right of Action

### **08-499** *Cuba Soil & Water Conservation Dist. v. Lewis* (10th Cir.)

BIO 11/17. Dist. for 1/9.

The 1976 amendments to the Mineral Leasing Act provide that when spending its portion of federal royalties, states must give “priority” to state government subdivisions impacted by federal mining development for planning, public services, and infrastructure. 30 U.S.C. § 191. In New Mexico, nearly all of the royalties are targeted for Albuquerque, and no funds are provided to petitioner state subdivisions within whose largely rural boundaries widespread federal oil and gas development occurs. Does Congress’s directive that New Mexico give “priority” to impacted state subdivisions establish a right of action for the subdivisions to establish a “priority” distribution plan for those communities which are adversely impacted from federal mining development?

## Section 1983: Privacy Rights

### **08-500** *Lambert v. Hartmann* (6th Cir.)

BIO 11/17, reply 12/2. Dist. for 1/9.

Petitioner filed a lawsuit under section 1983 for violation of her right to privacy when a public official intentionally published her personal information, including her Social Security number and signature, on a publicly available governmental website. The publication of this personal information enabled thieves to steal Petitioner’s identity, causing her economic harm and damaging her credit. Did the Court of Appeals err in concluding that Petitioner failed to state a claim for violation of her constitutional right to privacy merely because the economic harm resulting from the theft of her identity did not implicate a fundamental liberty interest?

### **First Amendment: Viewpoint Discrimination**

**08-518 Turner v. City Council of the City of Fredericksburg, Va. (4th Cir.)**

Supp. brief of petitioner 11/3. BIO 11/20, reply 12/5. Dist. for 1/9.

1. Does a city council engage in viewpoint discrimination under the Free Speech and Free Exercise Clauses when it promulgates and enforces a “non-denominational” prayer policy specifically to prevent a city council member from closing a council meeting opening prayer in the name of Jesus Christ, but permits prayer by other council members referring to other deities?
2. Does prayer offered by an individual city council member at the opening of a council meeting constitute “government speech”?
3. Is a policy permitting only “non-denominational” prayers at city council meetings unconstitutionally vague and overbroad?
4. Does a city council policy that proscribes (and prescribes) the content of prayers offered at council meetings violate the Establishment Clause?

### **Section 1983: Qualified Immunity**

**08-521 Abrams v. Jones (6th Cir.)**

BIO 11/19, reply 12/1. Dist. for 1/9.

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

1. Whether the “for all purposes” mandate of Federal Rule of Civil Procedure 10(c) requires that federal courts accept as true the facts stated in exhibits to a complaint for purposes of evaluating a motion to dismiss.
2. Whether the rule of *Scott v. Harris*, 550 U.S. 372 (2007) (requiring summary judgment reliance on incontrovertible facts established by a public record videotape), also applies to Rule 12(b)(6) motions to dismiss asserting public employees’ qualified immunity defense.
3. Whether the substantive due process “malice and intent to harm” standard, rather than the “deliberate indifference” standard, governs judicial review of police officers’ on-the-scene immediate reaction to a suspect’s need for medical care.

### **Civil Procedure: FRCP 60(b)**

**08-532 Cranmer v. Tucson Police Dep’t (9th Cir.)**

BIO 11/21. Dist. for 1/9.

Should a civil litigant, innocent of wrongdoing or bad faith, have relief under Federal Rule of Civil Procedure 60(b)(6) from the misconduct or neglect of his attorney when the attorney has, through gross negligence and disability, abandoned his representation of the client, failing to conduct discovery, meet deadlines, or respond to a motion for summary judgment, and that misconduct or neglect has resulted in an adverse ruling on a motion for summary judgment against the client?

## War on Terror: Sovereign Immunity

### [08-539](#) **Republic of Iraq v. Simon (D.C. Cir.)**

BIO 11/24. Dist. for 1/9.

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the court of the United States in cases involving alleged misdeeds of the Saddam Hussein regime predicated on the now-repealed state sponsor of terrorism subject matter exception to sovereign immunity of former 28 U.S.C. § 1605(a)(7).

## Habeas Corpus: Sufficient Evidence

### [08-559](#) **McDaniel v. Brown (9th Cir.)**

BIO 11/28. Dist. for 1/9.

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996?
2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979), under U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

## First Amendment: Child Online Protection Act

### [08-565](#) **Mukasey v. ACLU (3d Cir.)**

BIO 11/25. Dist. for 1/9.

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

## Fourth Amendment: Probable Cause

### [08-568](#) **Rothhaupt v. Dickow (6th Cir.)**

BIO 11/25. Dist. for 1/9.

Whether the Sixth Circuit's opinion is in conflict with this Court's holding and decisions in other circuits which would allow the introduction of state law (e.g. whether an officer had the right to arrest under state law) to prove interference with a constitutional right.

## Preemption: Utility Ratemaking

### [08-573](#) **Mich. Env'tl. Council v. Mich. Pub. Serv. Comm'n (Mich. Ct. App.)**

BIO 12/1.

Whether federal law preempts the Michigan Public Service Commission from exercising its historic police powers to protect the public interest and to regulate electric utility retail rates by adopting ratemaking remedies with respect to a utility's continued payment of spent nuclear fuel fees under the Standard Contract that is in long-term default?

## Equal Protection: Contractor Bidding

### **08-580/08-601 City of Cincinnati v. Cleveland Constr., Inc./Cleveland Constr., Inc. v. City of Cincinnati (Ohio)**

BIO of City of Cincinnati 12/1. BIO of Cleveland Constr., Inc. 12/3. *Amicus* Pac. Leg. Found. 12/3.

08-580:

1. Whether a contractor bidding for a municipal construction contract on equal footing with other bidders can state a facial equal protection claim against the municipality's discretionary procurement system where contracts are awarded to the lowest and best bidder based on evaluating a non-exhaustive list of factors that may include the bidder's compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.
2. Whether strict or other heightened judicial scrutiny applies to a contractor's facial equal protection claim against a municipality's discretionary procurement system providing that all bidders compete *ex ante* on equal footing but allowing the municipality to consider, as part of a non-exhaustive list of factors, the bidders' compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.

08-601:

1. Whether a state scheme of competitive bidding that contains substantive limitations and particularized standards which restrict the discretion of the decisionmaker may give rise to a property interest protected by due process.
2. Whether the City of Cincinnati could deny Cleveland Construction, Inc., the award of a competitively bid contract for the sole purpose of implementing unconstitutional racial requirements and to achieve unconstitutional racial goals.

## Criminal Law: Double Jeopardy

### **08-585 Ohio v. Wade (Ohio Ct. App.)**

BIO 12/3.

1. Does the collateral estoppel recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970), bar or limit the trier of fact in a second trial from considering evidence that is relevant to the remaining charges?
2. Does an acquittal on issues of whether a gun was "deadly" or "operable" create a collateral estoppel bar to the consideration of evidence indicated that the defendant wielded the gun, when the gun need not be "deadly" or "operable to the retried counts?"

## CALLS FOR RESPONSE

### NEW CFR

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#### First Amendment: Prior Restraint

##### **08-636** Gen. Auto Serv. Station v. City of Chicago (7th Cir.)

CFR 12/9, due 1/8.

By ordinance, the City of Chicago grandfathers some, but not all, lawfully established but now nonconforming outdoor signs. The benefit of the grandfather status is predicated upon prior compliance with Chicago's former sign permitting requirement that, when it was in force, violated the First Amendment as an invalid prior restraint on speech. The questions presented are:

1. Whether a municipality violates the First Amendment when, by reason of an individual's past exercise of his First Amendment right to ignore an unconstitutional sign permitting requirement, it prohibits the continued display of a lawfully established but now non-conforming outdoor sign.
2. Whether a municipality's prohibition of future speech for some but not all speakers, in the form of non-conforming signs and billboards, otherwise violates the First Amendment, when such prohibition is imposed on the sign owner or operator for having in the past engaged in a certain kind of lawful speech, an issue upon which there is a direct conflict between federal circuit courts of appeal.
3. Whether an outdoor sign ordinance and a separate grandfathering provision modifying that sign ordinance are to be treated as a combined single regulation of speech for purposes of determining content-neutrality and constitutionality under the First Amendment, an issue upon which there is a direct conflict between federal circuit courts of appeals.

### PENDING CFR

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#### Due Process: Termination of Employment

##### **08-159** Lee v. New Orleans Police Dep't (La. Ct. App.)

CFR 9/30, due 1/12 (ext.).

1. Whether the failure to provide a pre-termination hearing pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), is no longer a violation of the Due Process Clause if the denial of the pre-termination/deprivation hearing is during a unique circumstance or extraordinary event such as a hurricane or flood.
2. Under what unique circumstance, extraordinary event, or emergency situation can the government suspend the Due Process Clause of the United States Constitution?
3. Can the government take a citizen's property during an emergency or extraordinary event other than war?

#### Eighth Amendment: Administrative Fines

##### **08-221** Meadowlake Corp. v. Ohio (Ohio Ct. App.)

CFR 10/7, due 12/8 (ext.).

1. Whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution applies to a civil, administrative fine assessed in a non-forfeiture case.

2. Whether the emphasis on the “punitive” nature of a fine as set forth in *Austin* or the distinction between remedial fines and punitive fines as delineated in *Bajakajian* applies when analyzing the constitutionality of a civil, administrative fine under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.
3. If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the “grossly disproportionate” standard apply to a non-forfeiture case?
4. If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the U.S. Civil Penalty Policy apply, and what role, if any, does the ability to pay of the one on whom the fine is imposed play?
5. Whether the due process rights of Petitioners were violated when Petitioners were denied the opportunity to present evidence, cross-examine witnesses, and otherwise participate in an evidentiary hearing.
6. Whether the due process rights of Petitioners were violated where a court denies a continuance knowing that the corporation (that has a right to counsel in a quasi-criminal case) will be forced to proceed unrepresented.

### **Employee Benefits: Status of Contributions**

#### **08-263 Jackson v. United States (4th Cir.)**

CFR 9/16, due 12/17 (ext.).

Whether an unpaid employer contribution to a company’s employee benefit plan, such as a pension or retirement plan, becomes an asset of the plan before it is paid into the plan such that an officer of such company can be convicted of embezzling from the plan when the company fails to timely fund the plan.

### **Due Process: Forfeiture**

#### **08-351 Devine v. Smith (7th Cir.)**

CFR 11/12, due 1/12 (ext.).

1. 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)?
2. In light of this Court’s holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), may a court of appeals order a district court to enter permanent injunctive relief enjoining the application of a State statute based simply upon Plaintiffs’ allegations in a complaint, where the parties are not at issue as no answer was filed in the district court and no evidence was ever heard in that court?

### **Sixth Amendment: Confrontation Clause**

#### **08-357 Hogsett v. United States (7th Cir.)**

CFR 10/7, due 1/7 (ext.).

Whether the district court violated Petitioner’s Sixth Amendment right to confront key witness against him when voir dire revealed the foundation for such questioning and where the district court, based on its in camera assessment that the witness’s actual answers would not be favorable to Petitioner, prevented completely Petitioner’s trial counsel from cross-examining a key witness in front of the jury regarding a particular source of the witness’s potential pro-prosecution bias.

## Fourth Amendment: Seizure of Individual

### **08-362 Illinois v. Lopez (Ill.)**

CFR 11/10, due 12/10.

1. Whether a court may consider a defendant's age and experience with law enforcement when determining whether the defendant was seized for purposes of the Fourth Amendment or "in custody" for purposes of the Fifth Amendment.
2. Whether a person who voluntarily accompanies police to the station for questioning and is left in a closed interview room while the police attempt to verify the information provided is seized under the Fourth Amendment.
3. Whether a *de novo* or "clear error" standard of review applies to a trial court's determination regarding whether the police have deliberately engaged in a "question first, warn later" scheme to circumvent *Miranda*.

## Fourth Amendment: Pat-Down Search

### **08-473 New Jersey v. Matthews (N.J.)**

CFR 12/1, due 12/31.

*Florida v. J.L.*, 529 U.S. 266 (2000), held that an anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. Here, during a lawful detention of an automobile, the police conducted a protective search and secured a handgun they suspected of being in the vehicle due to the totality of threatening circumstances, which included an anonymous report that someone in the vehicle was flashing a gun. Does *J.L.* require suppression of the handgun? (This case may be held for 07-1122 *Arizona v. Johnson*, granted and set for oral argument on 12/9.)

## Fourth Amendment: Blood Samples

### **08-506 Shriner v. Minnesota (Minn.)**

CFR 11/18, due 12/18.

Does probable cause to believe alcohol is in a person's blood creates a "single-factor exigent circumstance" that justifies a warrantless, nonconsensual seizure of that blood without violating the Fourth Amendment?

## Civil Procedure: FRCP 60(b)

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

CFR 11/26, due 12/29.

Federal Rule of Civil Procedure (FRCP) 60(b)(1) allows a party to seek relief from a final judgment for "mistake, inadvertence, surprise, or excusable neglect" and requires that parties move for relief within one year of the judgment, while FRCP 60(b)(6) allows a party to seek such relief for "any other reason justifying relief from the operation of judgment" and requires parties to move for relief "within a reasonable time." In this case, the district court granted petitioner's 60(b)(6) motion because the court of appeals had explicitly abrogated the legal rule on which the petitioner's conviction had been sustained and this Court had abrogated the legal rule that had prevented the petitioner from seeking relief earlier. The court of appeals reversed, holding that because petitioner alleged legal error as part of the basis for his 60(b)(6) motion, he was required to move pursuant to FRCP 60(b)(1), under which his motion was untimely. May a federal court ever grant a motion for relief under FRCP 60(b)(6) in a case involving legal error?

## First Amendment: Employee Speech

### **08-608 Flipping v. Reilly (3d Cir.)**

CFR 12/2, due 1/23 (ext.).

1. Whether the Third Circuit erred in holding that a public employee's in-court testimony, made pursuant to his official duties, is cloaked with First Amendment protection notwithstanding this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
2. Whether the Third Circuit ignored established principles of qualified immunity in holding that government employees are subject to suit under section 1983 when they discipline employees for speech that is made pursuant to their official duties, and in so doing, improperly affirmed the District Court's denial of qualified immunity.
3. Assuming the respondent's testimony was protected, whether the Third Circuit so far departed from the accepted and usual course of judicial proceedings involving claims of qualified immunity when it failed to abide by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which stands for the proposition that upon an employee's demonstration that his conduct is constitutionally protected and was a motivating factor in the employer's adverse employment decision, a reviewing court must go on to determine whether the employer would have reached the same decision even in the absence of the protected conduct?

## CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

### NEW CVSG

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#### False Claims Act: State Audits

**08-304** *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson* (4th Cir.)

BIO 11/7, reply 11/18. *Amici* Nat'l League of Cities, Pharm. Research & Mfrs. of Am., Chamber of Commerce of the U.S., Wash. Legal Found., Pennsylvania 10/8. Dist. for 12/5. CVSG 12/8.

Whether an audit and investigation performed by a State or its political subdivision constitutes an “administrative . . . report . . . audit, or investigation” within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

### PENDING CVSG

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#### Statute of Limitations: Inquiry Notice

**07-1489** *Trainer Wortham & Co., Inc. v. Betz* (9th Cir.)

BIO 6/30, reply 7/10. Dist. for 9/29. CVSG 10/6.

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

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

#### Petroleum Marketing Practices Act: Constructive Termination

**08-240/08-372** *Mac's Shell Serv. v. Shell Oil Prods. Co./Shell Oil Prods. Co. v. Mac's Shell Serv.* (1st Cir.)

08-240: BIO 10/31. Dist. for 11/25. CVSG 12/1.

08-372: BIO 10/24, reply 11/7. *Amicus* Am. Petroleum Inst. 10/24. Dist. for 11/25. CVSG 12/1.

08-240:

Whether the Petroleum Marketing Practices Act encompasses a claim for “constructive” nonrenewal of the franchise relationship where: (1) the petitioner-franchisees filed suit prior to receiving new lease agreements that violated the Act; (2) the lease agreements were presented on a take-it-or-leave-it basis; (3) the respondent-franchisor stated it would terminate the franchises unless petitioners signed the lease agreements; and (4) the franchisees signed the lease agreements, under protest, and pursued their legal claims against the franchisor.

08-372:

Whether a service station operator that continues to operate its franchise—using the same trademark, selling the same fuel, and occupying the same premises—can bring an action claiming that it was “constructively terminated” in violation of the Act.

## HELD/AWAITING ACTION

### Criminal Law: “Violent Felony”

**07-61 Mathias v. United States (4th Cir.)**

CFR 8/6. BIO 10/26, reply 11/2. Dist. for 1/4. Re-listed for 4/18.

Whether a conviction under Va. Code Ann. § 18.2-479(B) for escape “other than by force or violence” is a “violent felony” for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e), when the defendant’s escape involved the failure to return from a work release program?

### Criminal Law: “Violent Felony”

**07-668 Taylor v. United States (11th Cir.)**

BIO 1/22, reply 2/5. Dist. for 2/22. Re-listed for 4/18.

Whether an escape conviction based on petitioner’s failure to return to a halfway house is categorically a “violent felony” for purposes of 18 U.S.C. § 924(e).

### Preemption: FDCA / State Consumer Remedy

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

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

Whether 21 U.S.C. § 352(n) and the regulations promulgated thereunder by the Food and Drug Administration preempt all state-law claims for unfair and deceptive marketing of a prescription drug even though Congress stated in the legislation that created § 502(n), P.L. 87-781 § 202, 76 Stat. 793 (Oct. 10, 1962), that “[n]othing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law which would be valid in the absence of such amendments unless there is a direct and positive conflict between such amendments and such provision of State law.”

### Pleading Requirements

**07-827 Hastly v. Iqbal (2d Cir.)**

CFR 3/17. BIO 4/16, reply 4/19. Dist. for 5/15. Re-listed for 6/12. Held for 07-1015 *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Whether a supervisory official sued as an individual defendant in a *Bivens* action is entitled to qualified immunity when the plaintiff pleads only generalized and conclusory allegations in his complaint and asserts no specific facts as to that supervisory official.

## Prisoners' Rights: Access to the Courts

### **07-897 Hust v. Phillips (9th Cir.)**

CFR 2/29. BIO 5/30, reply 7/7. Dist. for 9/29.

1. Did a prison librarian violate a prisoner's right of access to courts when she declined to let the prisoner use the library's comb-binding machine to bind a petition for writ of certiorari, even though comb-binding is not required by this Court's rules and is, in at least some circumstances, affirmatively discouraged?
2. Was the law imposing liability in this specific context so clearly established that a reasonable librarian would know that denying a prisoner's request to comb-bind his petition was unlawful?

## Pleading Requirements

### **07-958 Hunter v. Hydrick (9th Cir.)**

BIO 4/11, reply 4/18. Dist. for 5/8. Re-listed for 6/12. Held for 07-1015 *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Does a civil rights complaint against government actors sued in their individual capacities state a claim under Federal Rule of Civil Procedure 8(a)(2) if it alleges only that "defendants' policies, practices and customs" resulted in plaintiff's constitutional deprivations, without pleading any facts regarding the form, manner, or content of the "policies, practices and customs," or regarding the roles of the individual defendants in creating, promulgating or executing those "policies, practices, and customs?"

## Habeas Corpus: Statute of Limitations

### **07-1008 McNeil v. Ferreira (11th Cir.)**

CFR 3/17, filed 5/7. Dist. for 6/5. Likely held for 07-6984, *Jimenez v. Quarterman* (granted 3/17, arg. 11/4).

Whether a new one-year statute of limitations, applicable to the filing of a State prisoner's 28 U.S.C. § 2254 petition, is created whenever a State prisoner is resentenced, even when the one year limitation period for his original conviction and sentence has already expired, thereby allowing the prisoner to raise only claims challenging his original conviction, which were previously time-barred?

## Pleading Requirements

### **07-1150 Sawyer v. Iqbal (2d Cir.)**

BIO 5/12, reply 5/22. Dist. for 6/12. Held for 07-1015, *Ashcroft v. Iqbal* (granted 6/16, arg. 12/10).

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. § 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pled directly under the relevant constitutional provisions.

## Criminal Law: Evidence of Intent

### **07-1376 City of San Francisco v. Rodis (9th Cir.)**

BIO 7/1, reply 7/28. Dist. for 9/29. Held for 07-751 *Pearson v. Callahan* (granted 5/24, arg. 10/14).

1. 18 U.S.C. § 472 makes it illegal to pass a counterfeit bill “with intent to defraud.” Is probable cause to arrest an individual for a suspected violation of this statute established once the individual attempts to pass a counterfeit bill, as the Eleventh and Fifth Circuits have concluded, or must the arresting officer develop additional, independent evidence of “intent to defraud,” above and beyond the intent inferred from the passing of the counterfeit bill, before arresting the suspect, as the Ninth Circuit held below in this case?
2. Did the Ninth Circuit err in denying qualified immunity to officers who arrested a suspect for violation of 18 U.S.C. § 472, based on their reasonable belief that he had attempted to pass a counterfeit bill – even without additional evidence of intent – was sufficient to establish probable cause and where no court had ever held that additional evidence of intent was required? (A similar question relating to qualified immunity is pending before the Court in *Pearson v. Callahan*, 07-751).
3. Should *Saucier v. Katz*, 533 U.S. 194 (2001) be overruled? (This question is pending before the Court in *Pearson v. Callahan*, 07-751).

## Habeas Corpus: Statute of Limitations

### **07-1474 Pietrzak v. Quarterman (5th Cir.)**

CFR 7/18. BIO 10/17. Dist. for 11/14. Held for 07-6984 *Jimenez v. Quarterman* (granted 3/17, arg. 11/4).

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 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 granted post-conviction *habeas corpus* relief. 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 corpus* petitions were pending. Did 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. BIO 8/29, reply 9/11. 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?

## 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). (This case will likely be)

### Fourth Amendment: Probable Cause

#### **08-17 *Mercier v. Ohio* (Ohio)**

BIO 8/12, reply 8/13. Dist. for 9/29. Likely held for 07-1122 *Arizona v. Johnson* (granted 6/23, arg. 12/9).

Whether the Fourth Amendment requires probable cause for the search of a purse being worn or held by an automobile passenger.

### Criminal Law: Double Jeopardy

#### **08-40/08-58 *Hirko v. United States/Shelby v. United States* (5th Cir.)**

BIO 10/15, reply of Hirko 10/24, reply of Shelby 10/27. *Amicus* NACDL 8/5. Dist. for 11/14. Held for 08-67 *Yeager v. United States* (granted 11/14).

1. Whether the Fifth Circuit, in conflict with the Sixth, Seventh, Ninth, and Eleventh Circuits, but consistent with the First and D.C. Circuits, correctly refused to give collateral estoppel effect to an acquittal under *Ashe v. Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts.
2. Alternatively, whether the court of appeals' holding that an acquittal may have rested on the jury's *failure* to agree unanimously on the sole disputed element of the offence should be summarily reversed or certiorari granted to resolve the conflict between that decision and those by the Second and Ninth Circuits.

## LAST CONFERENCE

View the [December 5th](#) and [December 8th](#) order lists from the December 5th Conference.

### CERTIORARI GRANTED

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#### War on Terror: AUMF

**[08-368](#) *Al-Marri v. Pucciarelli* (4th Cir.)**

*Amici* Eskridge, Profs. of Constitutional Law and of the Fed. Cts., Former Fed. Judges, Constitution Project, Retired Military Officers 10/23. BIO 10/31, reply 11/10. Dist. for 11/25. Re-listed for 12/5. Cert. granted 12/5.

Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

#### Employment Discrimination: Mixed-Motive

**[08-441](#) *Gross v. FBL Fin. Servs., Inc.* (8th Cir.)**

BIO 11/4, reply 11/18. Dist. for 12/5. Cert. granted 12/5.

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

### CERTIORARI DENIED

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#### Habeas Corpus: Ineffective Assistance of Counsel

**[07-1566](#) *Marcum v. Roper* (8th Cir.)**

BIO 9/15, reply 9/26. *Amicus* NACDL 7/17. Dist. for 10/17. Record req. 10/15, rec'd 11/3, 11/14. Dist. for 12/5. Cert. denied 12/8.

Whether courts addressing Sixth Amendment claims of ineffective assistance of counsel must determine *Strickland* prejudice for each error of trial counsel individually or whether they may evaluate the cumulative effect of counsel's errors to determine whether they undermine confidence in the outcome of the trial.

#### Native American Rights: Treaty Rights

**[08-135](#) *City of Pocatello v. Idaho* (Idaho)**

BIO of United States 11/3, reply 11/13. Dist. for 12/5. Cert. denied 12/8.

1. Whether the water right that Congress granted in 1888 to the City of Pocatello “in common with” the Shoshone-Bannock Tribes, and upon which the City has relied for well over a century, should be set aside on the ground that, although Congress properly manifested its “clear and plain” intent to diminish Treaty rights, Congress lacked the constitutional power to do so in the absence of Tribal consent.

2. Whether the rule of *Caldwell v. United States*, 250 U.S. 14 (1919), which requires that Congress use express words to signify the sovereign's intent to convey its own lands to a non-governmental entity, should be extended to diminishment cases, where, as here, an act of Congress clearly manifests the sovereign's intent to diminish and convey tribal rights to water to another party.
3. Whether the Supreme Court of Idaho's construction of the Pocatello Townsite Act, as granting to the City of Pocatello only a federal right of access to reservation lands and a right to seek water rights under state law, rather than the grant of a federal water right, is inconsistent with the Supremacy Clause, which establishes that Indian reservations are to be governed by federal law, not state law, unless Congress has expressly provided to the contrary.

### **Disability Rights: Fair Housing Act**

#### **08-140 Thompson v. Turk (9th Cir.)**

CFR 9/2. BIO 11/3, reply 11/17. Dist. for 12/5. Cert. denied 12/8.

1. Whether the private enforcement of the Fair Housing Act is limited by a statute of repose (and not a statute of limitations) for claims brought alleging a discriminatory housing practice (in violation of 42 U.S.C. § 3604(f)(2)) where the alleged discrimination is a failure to design and construct multifamily housing to meet the accessibility requirements set forth at 42 U.S.C. § 3604(f)(3)(C).
2. Whether the "continuing violations doctrine" applies to private enforcement of the Fair Housing Act so that a discriminatory housing practice does not "terminate" as long as the discriminatory conditions remain extant.

### **First Amendment: Religious Student Speech**

#### **08-190 Curry v. Hensinger (6th Cir.)**

CFR 9/8. BIO 11/7, reply 11/18. Dist. for 12/5. Cert. denied 12/8.

1. Did the Sixth Circuit err by holding that a public elementary school student's religious speech presented in response to, and in compliance with, a class assignment, may be categorized as *per se* "offensive" because it is religious, and censored for that reason?
2. Did the Sixth Circuit err by holding that a student's religious speech presented in response to and in compliance with the terms of a school assignment is "reasonably perceived to bear the imprimatur of the school" because it is "part of school activities," and therefore subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)?

### **Fourth Amendment: Deadly Force**

#### **08-251 Long v. Slaton (11th Cir.)**

BIO 10/27. Dist. for 11/25. Re-listed for 12/5. Cert. denied 12/8.

1. Whether the Eleventh Circuit Court of Appeals' opinion in this case improperly expands or abrogates current Fourth Amendment law, which limits the use of deadly force when seizing an unarmed fleeing suspect to situations where the suspect poses an imminent or immediate threat of serious physical harm to the officer or others, or whether the Eleventh Circuit's opinion creates a split in the Circuits by focusing on the potential risk of harm posed by fleeing suspect in the future as opposed to the actual threat of harm at the time of the seizure.

2. Whether a law enforcement officer may use lethal force against an unarmed fleeing suspect, who he knows to be mentally ill, when the suspect is backing away from the officer in a police cruiser on a gravel driveway in a rural, isolated area with only one egress to a county road, when backup is already en route.
3. Whether *Tennessee v. Garner* and *Vaughn v. Cox* “clearly established” that a law enforcement officer’s use of deadly force to seize a fleeing, unarmed, previously non-violent, mentally ill suspect, while that suspect is backing away from an officer in a vehicle on a gravel driveway in a rural, isolated area with only one egress to a county road while backup is en route, is a violation of the suspect’s Fourth Amendment rights.

### **Due Process: Deliberate Indifference**

#### **08-272 Waybright v. Frederick County, Md. Dep’t of Fire & Rescue Servs. (4th Cir.)**

BIO 11/3, reply 11/18. Dist. for 12/5. Cert. denied 12/8.

After a firefighter died of heat stroke during training, his parents brought a § 1983 action. They argue that the fire department and the trainee were in a special relationship, and therefore, the deliberate indifference standard governs the department’s actions. Did the Fourth Circuit err when, in direct conflict with the Third, Sixth, and Tenth Circuits, it followed the D.C. Circuit’s rule that the deliberate indifference standard applies only in “special circumstances like custody” and instead utilized the “shocks the conscience” standard?

### **Back Pay Act: Jurisdiction**

#### **08-281 Weber v. Dep’t of Veterans Affairs (9th Cir.)**

BIO 11/3. Dist. for 12/5. Cert. denied 12/8.

Whether the district court has jurisdiction to hear a claim under the Back Pay Act, 5 U.S.C. § 5596, from a discharged Title 38 appointed employee of the Veterans Administration.

### **LGBT Rights: Child Custody Rights**

#### **08-306 Miller-Jenkins v. Miller-Jenkins (Va.)**

BIO 11/7. Dist. for 12/5. Cert. denied 12/8.

1. Whether the Parental Kidnapping Prevention Act (PKPA), which affords custody and visitation orders full faith and credit, or the later-enacted Defense of Marriage Act, which does not require full faith and credit be afforded to rights arising from same-sex unions treated as marriage, controls when a receiving state, whose laws expressly declare the same-sex union “void in all respects,” is asked to give full faith and credit to custody orders arising from a same-sex union.
2. Whether the jurisdictional preference provided in the PKPA to the first state issuing a custody determination consistent with the PKPA deprives a second state from issuing a parentage determination where the custody determination arose from a same-sex civil union and the second state, pursuant to the federal Defense of Marriage Act, has expressly adopted laws refusing recognition of rights or claims arising from same-sex unions.
3. Whether an award of parentage rights to a legal stranger, over the objections of a fit, biological parent, infringes the constitutional rights of a fit parent.
4. Whether a receiving state is required to give full faith and credit to sister state’s custody order that violated the federal parental rights of the biological mother, when the receiving state is where the mother conceived and gave birth to the child and continues to live with the minor child.

### **Due Process: Personal Jurisdiction**

**08-326 Beard v. Hannon (1st Cir.)**

BIO 11/7, reply 11/17. *Amici* Indiana, et al. 10/10. Dist. for 12/5. Cert. denied 12/8.

May a state official be sued in another State, consistent with principles of due process and state sovereignty, for a single decision made in the official's home State and pursuant to the official's duties?

### **First Amendment: Public Employees**

**08-427 Hodgson v. Davignon (1st Cir.)**

BIO 11/3. Dist. for 12/5. Cert. denied 12/8.

*Brian Wolfman of Public Citizen is assisting the respondents.*

1. Must deference be given to prison administrators when reviewing an employee disciplinary decision for purposes of the test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968)?
2. When applying the test set forth in *Pickering*, must the potential disruption that could result from the employee's behavior be expressly considered?

### **Fourth Amendment: Warrant Affidavits**

**08-458 Brothers v. County of Summit, Ohio (6th Cir.)**

BIO 11/7. Dist. for 12/5. Cert. denied 12/8.

1. Does the Fourth Amendment demand that law enforcement officers disclose in a second or subsequent search warrant affidavit information they discovered during an initial search that casts doubt upon the veracity of a confidential informant?
2. Must law enforcement officers disclose in a second or subsequent warrant affidavit the absence of items that, based upon their confidential informant's information, the expected to find?

## GRANTED CASES INVOLVING PUBLIC CITIZEN 2008 TERM

### Preemption: FDCA/State Consumer Remedy

#### 06-1249 Wyeth v. Levine (Vt.)

BIO filed 4/20, reply 4/30. *Amici Pharm. Research and Mfrs. of Am., Prod. Liability Advisory Council, Inc.*, filed 4/20. CVSG 5/21, filed 12/21 (urging that the case be held for resolution of 06-179 *Riegel v. Medtronic* (arg. 12/4) and 06-1498 *Warner-Lambert v. Kent* (arg. 2/25)). Dist. for 1/18. Cert. granted 1/18. Arg. 11/3.

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

#### Brief in Opposition

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

### Environmental Law: Standing/Nationwide Injunction

#### 07-463 Summers v. Earth Island Inst. (9th Cir.)

BIO filed 12/5, reply 12/21. Dist. for 1/11. Re-listed for 1/18. Cert. granted 1/18. Arg. 10/8.

*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.

*Brian Wolfman and Allison Zieve of Public Citizen assisted the respondents.*

1. Does the Federal Cigarette Labeling and Advertising Act (“FCLAA”) expressly preempt state law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its product to the public when: (a) the predicate state-law duty of such claims is the duty not to deceive; and (b) the Federal Trade Commission (“FTC”) has not only refused to approve or authorize the alleged misrepresentations, but has prohibited their use in a consent decree with a third party?
2. Are such claims impliedly preempted even though: (a) no court has ever held such claims impliedly preempted; (b) this Court has held that there is no implied preemption under FCLAA; (c) the FTC has never exercised its rule making power to address the conduct at issue; and (d) the FTC prohibited the challenged conduct in a consent decree with a third party?

## Environmental Law: Clean Water Act

### [07-588/07-589/07-597](#) **Entergy Corp. v. EPA/PSEG Fossil LLC v. Riverkeeper/Util. Water Act Group v. Riverkeeper (2d Cir.)**

Riverkeeper BIO filed 2/29, Federal respondents, State of Rhode Island BIOs filed 3/3. Dist. for 4/11. Cert. granted 4/14. Arg. 12/2.

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

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

## Environmental Law: Clean Water Act

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

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

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

### [Brief in Opposition](#)

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

### **Fourth Amendment: Pat-Down Search of Passenger**

**07-1122 Arizona v. Johnson (Ariz.)**

CFR 5/13. BIO 5/22, reply 6/3. Dist. for 6/19. Cert. granted 6/23. Arg. 12/9.

*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**

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.