



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
NOVEMBER 9, 2007 CONFERENCE**

Prepared by Julia M. Graff, 2007-08 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 Julia Graff, Supreme Court Assistance Project Fellow, at (202) 588-1000 or jgraff@citizen.org.

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RESOURCES

LINKS FOR MORE INFORMATION

- ✓ **Supreme Court’s Website:**
<http://www.supremecourtus.gov>. For info or status updates on a particular petition, click on the Docket Number included on this list for that petition. View the Orders List which comes out after each conference for news on all petitions here: <http://www.supremecourtus.gov/orders/06ordersofthecourt.html>
- ✓ **Alan Morrison Supreme Court Assistance Project of Public Citizen:**
<http://www.citizen.org/litigation/SupremeCourt>. SCAP Information.
- ✓ **SCOTUS Blog:**
<http://www.scotusblog.com>. Frequent Supreme Court Updates.
- ✓ **Office of Solicitor General:**
<http://www.usdoj.gov/osg>. Briefs Filed by the United States.

KEY TERMS & ABBREVIATIONS

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

NOVEMBER 9 CONFERENCE

Equal Access to Justice Act: Paralegal Fees

06-1717 Richlin Security Service Co. v. Chertoff (Fed. Cir.)

BIO 10/12, reply 10/22. Amici National Association of Legal Assistants, Paralyzed Veterans of America, 10/12. Dist. for 11/9.

Brian Wolfman and Scott Nelson of Public Citizen represent petitioner.

Petition for Certiorari

Reply Brief

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

6th Amendment: Jury Tampering

07-12 Tejada v. United States (1st Cir.)

CFR 7/12, filed 10/12. Dist. for 11/9.

1. Whether the rebuttable presumption of prejudice resulting from improper contact or tampering with jurors, set forth in *Remmer v. United States*, 347 U.S. 227 (1954), remains good law.
2. Whether in sentencing an individual defendant a district court may rely on the permissive presumption of reasonableness afforded any sentence within the applicable guidelines range for the offense of conviction and thereby disregard one or more of the 18 U.S.C. § 3553(a) factors—here, the factor of amenability to rehabilitation.

Legislative Immunity: Retaliatory Elimination of State Poet Laureate Position

07-79 Baraka v. McGreevey, et al. (3d Cir.)

CFR 9/10, filed 10/10. Reply, 10/23. Dist. for 11/9.

Bonnie Robin-Vergeer of Public Citizen is co-counsel for petitioner.

Petition for Certiorari

Petitioner's Reply Brief

1. Are the former governor of New Jersey and former chairperson of the New Jersey State Council on the Arts entitled to absolute legislative immunity from suit in their individual capacities for orchestrating and directing the elimination of petitioner Amiri Baraka's position as Poet Laureate of New Jersey, and for their actions leading up to that elimination, in response to Baraka's public reading of a controversial poem written by him? Moreover, in determining whether state officials have engaged in legislative acts, must a court evaluate whether their acts are substantively, as well as formally, legislative, and if so, what test should be used to assess whether an act is substantively legislative?

2. Even assuming that the former governor and former agency chairperson are entitled to absolute legislative immunity from suit in their individual capacities, does that immunity block Baraka's claims seeking prospective injunctive relief against these executive officials and their successors in their official capacities? In other words, can a personal immunity, such as absolute legislative immunity, ever bar a claim for prospective injunctive relief against a state official in his or her official capacity?

Corporate Responsibility for Human Rights Violations: Collateral Order Doctrine

07-81 Exxon Mobil Corp. v. Doe, et al. (D.C. Cir.)

BIO 10/9, reply 10/24. Dist. for 11/9.

Bonnie Robin-Vergeer is co-counsel for respondents.

Brief in Opposition

Whether the collateral order doctrine should be expanded to allow a private U.S. corporation sued in a federal district court for its tortious actions to appeal from an order that, in response to Statements of Interest by the Executive Branch notifying the court of potential U.S. foreign policy concerns, grants in part and denies in part the corporation's motion to dismiss the plaintiffs' claims under the political question doctrine.

Ineffective Assistance of Counsel: Alibi Witnesses

07-102 Randolph v. Raygoza (7th Cir.)

BIO filed 8/21, reply 8/31. Record requested 9/13, received 9/26, 10/10. Dist. for 9/24. Re-listed for 11/2. Re-listed for 11/9.

Whether a federal habeas court may disregard a state trial court's factual finding that witnesses lacked credibility, made after evaluating their in-person testimony, because that finding was made implicitly rather than explicitly?

State Action: "Joint Activity"

07-107 Nat'l Collegiate Athletic Ass'n, et al. v. Cohane (2d Cir.)

BIO filed 10/12, reply 10/23. Dist. for 11/9.

1. Whether the Second Circuit erroneously held, in conflict with decisions of this Court and other courts of appeals, that the NCAA could be held liable under § 1983 based on allegations that "the University willfully participated in joint activity with the NCAA to deprive Cohane of his liberty."
2. Whether this Court should grant, vacate, and remand the Second Circuit's decision in light of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Military Commissions Act

07-153 Paracha v. Bush, et al. (D.C. Cir.)

BIO filed 10/9. Dist. for 11/9.

Whether the regime established by Congress in the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), as applied to a lawful permanent resident detained in Guantánamo as an enemy combatant, violates the Suspension Clause and the Due Process Clause.

Certiorari Before Judgment: T.R.O. for Guantánamo Bay Detainee

07-173 Belbacha v. Bush (D.D.C.)

BIO filed 10/10, reply 10/24. Dist. for 11/9.

1. Whether granting certiorari before judgment is appropriate where the Court of Appeals has already concluded that it lacks jurisdiction to consider the case.
2. Whether the Court should resolve a conflict among the lower courts concerning the proper standard for granting a Temporary Restraining Order.
3. Whether the decision of an earlier panel of a Circuit that it lacks jurisdiction to consider a matter bars a later panel of that court from granting permanent relief to preserve the status quo pending this Court's resolution of the jurisdictional issue decided by an earlier panel.

2nd Amendment: D.C. Handgun Ban

07-290 / 07-335 District of Columbia, et al. v. Heller / Parker, et al. v. District of Columbia, et al. (D.C. Cir.)

BIO 10/4, reply 10/23. Amici American Civil Rights Union, American Academy of Pediatrics, New York, Hawaii, Illinois, and Maryland filed 10/5. Dist. for 11/9.

Whether the Second Amendment forbids the District of Columbia from banning private possession of handguns while allowing possession of rifles and shotguns.

PENDING FOR UPCOMING CONFERENCES

Preemption: National Labor Relations Act

06-939 Chamber of Commerce, et al. v. Brown, et al. (9th Cir.)

BIO filed 3/9, reply 3/20. Amici National Right to Work Legal Defense Foundation, Inc. filed 3/7, Associated Builders and Contractors, Inc. filed 3/9, Associated Builders and Contractors of California filed 3/9. CVSG 4/16, filed 10/19 (urging grant). Dist. for 11/20.

Is the State of California's regulation of noncoercive employer speech about union organizing, Cal. Gov't Code §§ 16645.2, 16645.7 (which forbids employers receiving state funds from using those funds to "assist, promote, or deter union organizing") preempted by federal labor law?

Voting Rights: Preclearance

07-77 Riley v. Kennedy, et al. (M.D. Ala.)

Jurisdictional statement filed 7/17. Motion to dismiss or affirm filed by respondents, 10/22. Dist. for 11/20.

1. Whether the decision of a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of state law is a change that affects voting that must be precleared before it can be enforced.
2. Whether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

Church and State: Courthouse Religious Displays

07-100 / Vide 07-286 Harris Co. v. Staley / Staley v. Harris Co. (5th Cir.)

BIO in 07-100 filed 8/29, reply 10/15. BIO in 07-286 filed 10/15. Dist. for 11/20.

Brian Wolfman is assisting respondent.

Whether the Court of Appeals correctly declined to vacate the judgment of the district court, thereby awarding fees to respondent as a "prevailing party," when factors unrelated to the litigation had mooted the appeal.

Qualified Immunity: Excessive Force

07-130 Edwards v. Kenyon (8th Cir.)

CFR 9/10. BIO filed 10/24. Dist. for 11/20.

Michael Kirkpatrick, Julia Graff, and Brian Wolfman of Public Citizen are co-counsel for respondent.

Respondent's Brief in Opposition

1. Whether the district court properly denied petitioner's motion for summary judgment based on a claim of qualified immunity.
2. Whether the two-step framework for analyzing claims of qualified immunity, set forth in *Saucier v. Katz*, should be abandoned.
3. Whether the rule that an evenly divided appellate court affirms the lower court's judgment should not apply to interlocutory appeals challenging the rejection of a claim of qualified immunity.

Deficit Reduction Act: Bicameralism Requirement

07-141 Public Citizen v. Clerk (D.C. Cir.)

BIO filed 11/7.

Allison Zieve, Adina Rosenbaum, Brian Wolfman, and Scott Nelson of Public Citizen represent petitioner.

Petition for Certiorari

Whether this Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), precludes the federal courts from considering a challenge to the validity of the Deficit Reduction Act of 2005 on the ground that it was enacted in violation of the bicameralism requirement.

4th Amendment: Home Searches of Social Services Applicants

07-211 Sanchez, et al. v. San Diego Co., et al. (9th Cir.)

BIO 10/17, reply 10/30. Dist. for 11/20.

Are suspicionless searches like those required by San Diego County as a condition of welfare eligibility, in which pursuant to a program developed by the district attorney's office, county fraud investigators from the district attorney's office enter all applicants' homes and look through their most intimate areas, a violation of the applicants' Fourth Amendment rights?

Ineffective Assistance of Counsel: Appearance by Speaker Phone

07-212 Wright v. Van Patten (7th Cir.)

CFR 9/17, filed 10/17. Dist. for 11/20.

1. By reinstating its original decision and opinion unchanged after this Court vacated the decision and remanded it for further consideration in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006), did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by holding that the Wisconsin Court of Appeals rendered a decision "contrary to . . . clearly established Federal law" when the Wisconsin court relied on *Strickland v. Washington*, 466 U.S. 668 (1984), rather than *United States v. Cronin*, 466 U.S. 648 (1984), to analyze respondent's claim that defense counsel provided ineffective assistance at a no-contest plea hearing by participating via speaker-phone rather than by physically appearing in court?

2. Did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(e)(1) when it relied on facts contrary to those found by the Wisconsin state courts and on debatable inferences from the facts?

Church and State: Faith-Based Programs

[07-362](#) *Teen Ranch, Inc., et al. v. Udow, et al.* (6th Cir.)

BIO filed 10/18, reply 10/29. Dist. for 11/20.

1. Did the Sixth Circuit err in holding, in conflict with *Locke v. Davey*, 540 U.S. 712 (2003), that a state official can require a faith-based provider of social services, which is not a seminary, to forfeit its religious beliefs and practices before it can participate in a government program, when the applicable state and federal legislation have expressed a directly opposite intent?
2. Did the Sixth Circuit err in holding, in conflict with the Seventh Circuit's opinion in *Freedom From Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003), that an individual's right to veto a religious placement, and thus be assured a secular placement, is not sufficient to make placement a private choice for Establishment Clause purposes?

Due Process: Virtual Representation

[07-371](#) *Taylor v. Sturgell* (D.C. Cir.)

Pet. filed 9/17. BIO due 11/19 (ext.).

Adina Rosenbaum, Brian Wolfman, and Scott Nelson of Public Citizen are co-counsel for petitioner.

[Cert Petition](#)

Can a party be precluded from bringing a claim, under a theory of "virtual representation," and thereby denied the due process right to a day in court, when the party had no legal relationship with any party to the previous litigation and did not receive notice of that litigation?

Due Process: Compensatory Damages

[07-384](#) *Daniel Measurement Services, Inc. v. Eagle Research Corp.* (W.Va.)

BIO filed 10/22, reply 11/2. Amici National Association of Manufacturers, Washington Legal Foundation, Product Liability Advisory Council, Inc. filed 10/22. Dist. for 11/20.

1. Whether a jury's award of compensatory damages that is based on no record evidence of loss to the plaintiff violates the Due Process Clause of the Fourteenth Amendment.
2. Whether the Due Process Clause guarantees meaningful judicial review of a jury verdict to ensure that an award of damages is based on at least some record evidence.

Due Process: Punitive Damages

[07-422](#) *Temple University Hospital v. Gallagher* (Pa.)

BIO filed 10/26, reply 11/2. Dist. for 11/20.

Where a trial court erroneously submits a constitutionally defective claim for punitive damages to a jury in tandem with an underlying claim for compensatory damages, whether a reviewing court may presume that the constitutional error was harmless.

CALL FOR RESPONSE

NEW CFR

Title VII: Ministerial Exception

07-323 Archdiocese of Washington, et al. v. Moersen (Md. Ct. App.)
CFR 11/5 (due 12/5).

Whether the “ministerial exception” to employment laws, which protects the First Amendment right of a church to select its ministers, applies to a church organist who selects and plays music for the church’s liturgical services.

PENDING CFR

4th Amendment: Qualified Immunity for Detention

06-1441 Romero v. Boyer (9th Cir.)
CFR 7/26, due 11/26 (ext.).

1. How should courts analyze the question left unanswered in this Court’s *Muehler v. Mena* decision, specifically, when and how is a legal detention extended beyond “the time reasonably required to complete [the] mission”?
2. Can qualified immunity be denied to officers who allegedly prolong a 20-25 minute detention even though the suspect admits to being released immediately upon the completion of the investigation?

National Environmental Policy Act: Regulation of Private Land Within Public Parks

06-1475 Hale, et al. v. Kempthorne, Sec. of the Interior, et al. (9th Cir.)
CFR 9/6, due 11/8 (ext.).

1. Does the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., allow the Park Service to deny “adequate and feasible access” to privately owned land when the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3170(b) expressly mandates that the Park Service cannot deny “adequate and feasible access” “notwithstanding any other . . . law?”
2. Is normal use and routine maintenance of a state-owned right-of-way subject to federal approval and regulation?
3. May an appellate court base a decision on factual determinations that were not reached by the trial court before it mistakenly dismissed the case on jurisdictional grounds?

Federal Arbitration Act: Scope of Arbitration Clause

07-164 Kinder Morgan CO₂ Company, L.P. v. Heimann, et al. (N.M. Ct. App.)
CFR 9/27, filed 10/29.

1. Did the New Mexico Court of Appeals err in holding that the presumption favoring arbitration under the Federal Arbitration Act is less applicable to narrow arbitration clauses than broad arbitration clauses, consistent with decisions of the Second, Third, Sixth, Eighth, and Tenth Circuits, and the Massachusetts Supreme Court., but contrary to the decisions of the Fifth, Eleventh, and D.C. Circuits, a district court in the Ninth Circuit, the Texas Supreme Court., and the Alaska Supreme Court?
2. Did the New Mexico Court of Appeals err in holding that arbitration under the Federal Arbitration Act may be denied based on lack of clarity in the plaintiffs' complaint, resolving doubts arising out of unclear allegations in favor of court litigation, contrary to the federal presumption in favor of arbitration and federal decisions requiring that doubts concerning arbitrability arising from vague pleadings be resolved in favor of arbitration?
3. Did the New Mexico Court of Appeals err in holding that arbitration under the Federal Arbitration Act may be denied based on plaintiff's characterization of its claims and the legal labels a plaintiff places on its claims, contrary to decisions of the Fourth and Seventh Circuits?
4. Did the New Mexico Court of Appeals err in adopting a rule permitting broad construction of exclusionary clauses in arbitration agreements governed by the Federal Arbitration Act, contrary to a Fourth Circuit decision requiring that exclusionary clauses be construed narrowly in light of the federal presumption favoring arbitration?

Habeas Corpus: Actual Innocence

07-199 Marshall v. Henry (9th Cir.)
CFR 9/28, due 11/8 (ext.).

Whether a federal court may order an evidentiary hearing on a freestanding claim of actual innocence by a noncapital habeas applicant making a "reasonably low threshold" showing of "a colorable claim for relief and the lack of a factual finding" in the state court.

6th Amendment: Self-Representation

07-208 Indiana v. Edwards (Ind.)
CFR 9/13, due 11/14 (ext.). Amicus State of Ohio, 9/13.

May a criminal defendant who, despite being legally competent, is schizophrenic, delusional, and mentally decompensatory in the course of a simple conversation, be denied the right to represent himself at trial when the trial court reasonably concludes that permitting self-representation would deny the defendant a fair trial?

Federal Arbitration Act: “Involving Commerce”

07-277 Arkansas Diagnostic Center v. Tahiri (Ark.)

CFR 10/4, due 12/5 (ext.).

1. Whether an agreement to arbitrate included in an employment agreement between a medical clinic and an employee-physician which involves purchases of materials and supplies from out-of-state vendors, the receipt of insurance payments from out-of-state companies, treatment of patients from out-of-state and reimbursement for attendance at out-of-state medical seminars represents commerce in fact and in the aggregate a general practice subject to federal control under the Federal Arbitration Act?
2. Whether the more stringent test for determining commerce in fact followed by the States of Arkansas, Oklahoma and Washington determines the enforcement of the Federal Arbitration Act or whether the broader test known as “slightest nexus,” *de minimus*,” “tangentially related,” recognized by many state courts and most federal courts, should apply.

Qualified Immunity: “Mixed Motive” for Termination

07-296 Drew v. McMillan (11th Cir.)

CFR 10/23, due 11/23.

1. Whether this Court’s review is necessary to resolve disputes among the Circuit Courts of Appeals on the proper application of the qualified immunity defense in motive-based cases;
2. Whether the Eleventh Circuit applied an overly broad analysis of the “clearly established” element of qualified immunity that is in conflict with this Court’s decisions in *Anderson v. Creighton*, *Saucier v. Katz* and *Hope v. Pelzer* and decisions of the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeals.
3. Whether the “indisputably establish” standard the Eleventh Circuit Court of Appeals required public official Marilyn Boyd Drew to satisfy in order to obtain qualified immunity is in conflict with the qualified immunity standard set forth in this Court’s decisions in *Harlow v. Fitzgerald*, *Anderson v. Creighton*, *Crawford-El v. Creighton*, *Hope v. Pelzer* and, most recently, *Scott v. Harris*.

Section 1983: Post–Conviction DNA Testing

07-350 Brown v. McKithen (2d Cir.)

CFR 10/17, due 12/17 (ext.).

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the respondent may seek post-conviction DNA testing pursuant to 42 U.S.C. § 1983, stand in contradiction to this Court’s determination that 42 U.S.C. § 1983 may not be used to challenge the fact or duration of a criminal conviction?

Peremptory Challenges

[07-386](#) *Wooten v. Texas* (Tex. Ct. App.)

CFR 10/18, due 11/19.

1. Should the “equally comparable” standard followed by a majority of the Texas Court of Appeals, which conflicts with the “significant difference” standard adopted by this Court in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and followed by other lower courts, be used in determining whether black venire members were the victims of disparate treatment?
2. Did the majority of the Texas Court of Appeals ignore the plain import of *Miller-El* when it failed to consider highly probative evidence of discriminatory intent and disparate treatment of black venire members similarly situated to white venire members?

Habeas Corpus: Original Writ

[07-6827](#) *In Re Al-Ghizzawi*

CFR 10/23, due 11/23. Like [06-1194](#) *In re Petitioner Ali*, dist. for 6/28/07.

Brian Wolfman of Public Citizen is assisting Petitioner.

CALL FOR THE VIEWS OF THE SOLICITOR GENERAL

PENDING CVSG

ERISA: Structural Conflict of Interest and ALJ Decision

[06-923](#) *Met Life v. Glenn* (6th Cir.)

BIO filed 3/7, reply 3/20. CVSG 4/16.

1. Whether the 6th Circuit erred in holding, in conflict with two other circuits, that the fact that a claim administrator of an ERISA plan also funds the plan benefits, without more, constitutes a “conflict of interest” which must be weighed in a judicial review of the administrator’s benefit determination under *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989)?
2. Whether the 6th Circuit erred in holding, in conflict with six other Circuits, that an ERISA claim administrator must consider and refute in its written disability determination a decision, without the underlying record, of a Social Security Administration administrative law judge?

Interpleader & Sovereign Immunity

06-1039 / Vide 06-1204 Estate of Roger Roxas, et al. / Philippines, et al. v. Pimentel, et al. (9th Cir.)

BIOs, waiver filed 3/26, 4/2, 4/6, replies 4/17, 4/24. Reply filed 4/24 by previously waiving respondents Estate and Golden Budha Corp. CVSG 5/14, filed 11/2 (urging the Court to grant 07-1204, and to hold 07-1039).

Whether a foreign government that is a “necessary” party to a lawsuit under Rule 19(a) and has successfully asserted sovereign immunity is, under FRCP 19(b), an “indispensable” party to an action brought in the courts of the United States to settle ownership of assets claimed by that government.

Preemption: Communications Act

06-1184 Sprint Nextel Corp. and T-Mobile USA, Inc. v. Nat’l Ass’n of State Utility Consumer Advocates, et al. (11th Cir.)

BIO filed 5/7, reply 5/17. CVSG 6/11.

1. Whether the 11th Circuit erred by relying on the presumption against preemption to guide its analysis of § 332(c)(3)(A) of the Communications Act (prohibiting states and localities from regulating “rates charged”) under *Chevron*.
2. Whether the 11th Circuit erred by overturning the FCC’s preemption decision under the first step of the *Chevron* analysis on the ground that Congress unambiguously preserved state and local laws prohibiting line item charges on wireless bills.

CERCLA: International Application / “Arranger” Liability

06-1188 Teck Cominco Metals Ltd. v. Pakootas, et al. (9th Cir.)

BIOs filed 5/2, reply 5/15. Amici Government of Canada; Nat’l Mining Ass’n and Nat’l Ass’n of Manufacturers; Canadian Chamber of Commerce and the Mining Ass’n of Canada; Consumer Electronics Ass’n; Chamber of Commerce of the United States; Her Majesty the Queen in Right of the Province of British Columbia all filed 5/2. CVSG 6/4.

1. Whether the 9th Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and by extension other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country’s laws; and
2. Whether the 9th Circuit erred in concluding, in direct and acknowledged conflict with the 1st Circuit, that “arranger” liability under CERCLA does not require the involvement of any “other party or entity.”

Preemption: FDCA / State Consumer Remedy

06-1249 Wyeth v. Levine (Vt.)

BIO filed 4/20, reply 4/30. Amici Pharmaceutical Research and Manufacturers of America, Product Liability Advisory Council, Inc., et al. filed 4/20. CVSG 5/21.

Brian Wolfman and Allison Zieve of Public Citizen are co-counsel for respondent.

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.

False Claims Act: Public Disclosure Bar

06-1269 United States ex rel. Charlotte Bly-Magee v. Premo, et al. (9th Cir.)

BIO filed 4/17 by Los Angeles County, waiver filed 4/16 by state respondents, reply 5/1. CVSG 5/29.

Under the “public disclosure bar” of the False Claims Act, a court generally may not hear a *qui tam* action based on “the public disclosure of allegations or transactions...in a congressional, administrative, or [GAO] report, hearing, audit, or investigation.” Does the phrase “administrative...report, hearing, audit, or investigation” encompass disclosures by *state and local* governments, as determined by three federal courts of appeals, or does it refer to disclosures only by the federal government, as held by the 3rd Circuit?

ERISA: Standard of Review

06-1398 AT&T Pension Benefit Plan v. Call (7th Cir.)

CFR 5/21. BIO filed 7/13, reply 7/31. Amicus American Benefits Council filed 5/16. Dist. for 9/24. CVSG 10/1.

1. Whether, under the abuse-of-discretion standard established in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and corollary interpretive principles adopted by the 2nd, 5th, 8th, 9th, and 10th Circuits but rejected by the 7th Circuit in this case, the Court of Appeals was required to defer to the plan administrator's interpretation of the plan.
2. Whether the Court of Appeals erred in awarding prejudgment interest and, in conflict with decisions of the 4th, 5th, 6th, 8th, and 9th Circuits, in calculating that interest at the prime rate.

06-1458 Geddes v. United Staffing Alliance Employee Medical Plan, et al (10th Cir.)
BIOs filed 8/2. Dist. for 9/24. CVSG, 10/1.

Did the United States Court of Appeals for the Tenth Circuit correctly rule that the decision to deny the Geddeses' claim for medical benefits was entitled to ERISA abuse of discretion review where it also ruled that the entity that made that decision was not a fiduciary, and is not even subject to suit under ERISA?

ADEA: "Reasonable Factors Other than Age"

06-1505 Meacham, et al. v. Knolls Atomic Power Laboratory, et al. (2d Cir.)
BIO filed 6/13, reply 6/25. Amici AARP and Nat'l Lawyers Ass'n. filed 6/14. Dist. for 9/24. CVSG 10/1.

1. Whether an employee alleging disparate impact under the Age Discrimination in Employment Act (ADEA) bears the burden of persuasion on the "reasonable factors other than age" defense, as held by the Second Circuit in this case in conflict with the decisions of other circuits and a regulation of the Equal Employment Opportunity Commission.
2. Whether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a "reasonable factor other than age" as a matter of law.

Title VII: Retaliation

06-1595 Crawford v. Metropolitan Gov't of Nashville and Davidson Co., Tenn. (6th Cir.)
BIO filed 7/16, reply 7/30. Amici Nat'l Employment Lawyers Assoc., Tenn. Educ. Assoc. and the Metropolitan Nashville Educ. Assoc. filed 7/16. Respondent's response to amici filed 7/27. Dist. for 9/24. CVSG 10/1.

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?

HELD / AWAITING ACTION

Sentencing: Reasonableness

06-378 Thurston v. United States (1st Cir.)
CFR 9/28. BIO 12/19, reply 1/3. Dist. for 1/19. Was held for 05-5618, *Claiborne v. United States* (argued 2/20), which was vacated as moot on 6/4. Dist. for 6/7. Held for **06-7949**, *Gall v. United States* (arg. 10/9).

1. Whether facts that increase a defendant's sentence must be proven beyond a reasonable doubt.

2. Whether it is permissible under the 6th Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range.
3. Whether a district court has discretion under § 3553(a) to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar.

Immigration: Tolling / Motion to Reopen

06-610 Moorani v. Keisler (5th Cir.)

BIO filed 2/23, reply 3/5. Dist. for 9/24. Held for 06-1181 *Dada v. Keisler* (cert. granted 9/25).

1. Whether Petitioner was rendered statutorily ineligible for adjustment of status to a lawful permanent resident because he did not depart the U.S. voluntarily pursuant to an order of the Bureau of Immigration Appeals (BIA) that was subsequently reopened and remanded.
2. Alternatively, whether the period of voluntary departure granted by the BIA was tolled by the timely filing of Petitioner's motion to reopen his removal.
3. Whether the Court of Appeals improperly affirmed the denial of Petitioner's adjustment of status on grounds that were never articulated by the Immigration Judge or the BIA.

Habeas Corpus: Original Writ

06-1194 In re Petitioner Ali (D.D.C.)

CFR 3/16. Motion to dismiss filed by respondent 5/16. Motion for leave to file an opposition to respondent's motion to dismiss under seal filed by petitioner 5/30. Dist. for 6/21, re-listed for 6/28. Held for 06-1195 / 06-1196, *Boumediene v. Bush / Al Odah v. United States* (arg. 12/5).

1. Whether the Court's habeas jurisdiction extends to this case.
2. Whether the Court should direct the District Court to lift its stay of Petitioner's habeas action and proceed to the merits, in view of the prolonged inaction of the Court of Appeals in resolving purported jurisdictional issue raised by the government.
3. Whether the definition of "enemy combatant" used by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), should govern the District Court's determination of the lawfulness of Petitioner's imprisonment.

Statute of Limitations: Jurisdictional

06-1250 Federal National Mortgage Ass'n v. United States (Fed. Cir.)

BIO filed 5/24, reply 6/5. Dist. for 6/21. Held for 06-1164, *John R. Sand & Gravel Co.* (arg. 11/6).

1. Whether a substantive provision's reference to a statute of limitations makes that provision a "jurisdictional" waiver of sovereign immunity that must be construed most favorably to the government.

2. Whether the rule of construction that waivers of sovereign immunity should be strictly construed in favor of the government is dispositive or merely a guide to congressional intent that can be overridden by contrary indicia of that intent.
3. Whether an indefinite extension of the statute of limitations can be treated as “expired” even though the specific terminating events identified in the extension have not occurred.

Preemption: Medical Devices

06-1262 Baker v. St. Jude Medical S.C., Inc., et al. (Tex. Ct. App.)

BIO filed 6/15. Dist. for 9/24. Held for 06-179, *Riegel v. Medtronic* (arg. 12/4).

1. Whether the express preemption provision of the Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a), was intended by Congress to preempt state-law product liability suits arising from the use of medical devices that have lost their FDA approval.
2. Whether the Medical Device Amendments were intended by Congress to preempt all state-law injury suits arising from medical devices that have Pre-Market Approval or Pre-Market Supplement Approval.

Immigration: Tolling / Motion to Reopen

06-1285 Dekoladenu v. Keisler (4th Cir.)

BIO 6/22, reply 7/5. Dist. for 9/24. Held for 06-1181, *Dada v. Keisler* (cert. granted 9/25).

Whether the balancing point [regarding the due process rights of non-citizens in removal proceedings] should be judicially altered by depriving a substantial number of aliens – those granted voluntary departure – of their one and only motion to reopen.

Securities Law: Deceptive Scheme

06-1341 Regents of Univ. of Cal. v. Merrill Lynch, et al. (5th Cir.)

BIO filed 6/1, reply 6/11. Dist. for 6/21. Held for 06-43, *Stoneridge Investment v. Scientific-Atlanta* (arg. 10/9).

Does liability exist under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 where an actor knowingly uses or employs deceptive devices and contrivances, as part of a scheme to defraud investors in another public company, but itself makes no affirmative misrepresentations to the market?

Sentencing: Crack v. Powder Cocaine

06-1474 Young v. United States (3d Cir.)

Memo. filed 5/24, reply 6/4. Suppl. br. filed 6/14. Dist. for 6/21. Held for 06-6330, *Kimbrough v. United States* (arg. 10/2).

Whether a district court is prohibited from considering as a factor in selecting a sentence the 100:1 weight ratio disparity between crack and powder cocaine contained in the U.S. Sentencing Guidelines.

ERISA: Equitable Relief

[06-1521](#) *Goeres v. Schwab & Co., Inc., et al.* (9th Cir.)

CFR 8/7, filed 10/5. Dist. for 11/2.

Does “equitable relief” under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), include make-whole monetary relief against an ERISA plan fiduciary to remedy individual harm suffered by a plan participant or beneficiary due to the fiduciary’s breach of obligations imposed by ERISA?

Money Laundering: Appearance of Legitimate Wealth

[06-1604](#) *Ness v. United States* (2d Cir.)

BIO filed 9/12. Amicus Nat’l Ass’n of Criminal Defense Lawyers, 9/12. Dist. for 10/12. Held for [06-1456](#), *Cuellar v. United States* (granted 10/15).

Whether, as the Sixth, Seventh and Tenth Circuits have held, the money laundering statute [18 U.S.C. § 1956] reaches conduct “designed to conceal or disguise” illegal proceeds by making illegitimate funds appear legitimate or whether, as the Second, Third, Fifth and Eleventh Circuits have held, the “designed to conceal or disguise” requirement is met by any conduct that hides money regardless of whether or not the conduct was designed to create the appearance of legitimate wealth.

Telephone Consumer Protection Act

[06-1634](#) *US Fax Law Center, Inc. v. Ihire, Inc.* (10th Cir.)

CFR 7/24, filed 9/24. Dist. for 10/26.

1. Whether the 10th Circuit’s failure to apply federal common law to determine the substance of the cause of action underlying Telephone Consumer Protection Act fax claims violates the Supremacy Clause.
2. Whether the 10th Circuit’s failure to apply federal common law to determine the assignability of federal TCPA fax claims violates the Supremacy Clause.
3. Whether an assignee has Art. III representational standing to bring suit for statutory damages and injunctive relief under Sec. 227(b)(3) of the TCPA for fax advertisements sent in violation of Section 227(b)(1)(c).

Habeas Corpus: Jurisdiction

[06-1666](#) *Munaf, et al. v. Geren, et al.* (D.C. Cir.)

BIO 9/21. Dist. for 10/26. Like [07-394](#) *Geren, et al. v. Omar, et al.* (D.C. Cir.).

1. When an American citizen is detained under the exclusive control of American military authorities abroad, is the jurisdiction of a federal court to entertain his petition for a writ of habeas corpus defeated by the fact that those American military authorities purport to act as part of a multi-national force and that they propose – with no valid legal authority – to deliver the citizen to a foreign nation for execution of a death sentence imposed by a court of that nation?

2. Does the decision of the Court of Appeals, holding that *Hirota v. MacArthur* deprives the federal courts of jurisdiction under these circumstances, extend the 1948 *per curiam* opinion in *Hirota* into conflict with this Court's post-1948 jurisprudence culminating in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, and should that conflict be resolved either by restricting *Hirota* to its proper sphere or by overruling it?
3. Did the Court of Appeals err in holding that the jurisdiction of the federal courts over a habeas corpus petition filed by an American citizen detained under the exclusive control of American military authorities abroad turns on whether those authorities propose to deliver him to a foreign nation for prosecution in its courts (in which case the Court of Appeals has held that habeas jurisdiction exists) or for execution of sentence after conviction by the foreign court (in which case the Court of Appeals here holds that jurisdiction ceases to exist)? If this distinction is valid, can the military authorities defeat federal habeas corpus jurisdiction *ex post* by doing what they did in this case – arranging the conviction and sentencing of their detainee by a foreign court after his habeas petition has been filed?

6th Amendment: Forfeiture by Wrongdoing

07-37 New Mexico v. Romero (N.M.)

BIO filed 8/21, reply 9/7. Dist. for 9/24. Re-listed for 10/26.

When the defendant kills a witness who had previously made testimonial statements against him, does he forfeit his constitutional right to confront her only if he killed her with the specific intent to prevent her from testifying at trial?

Punitive Damages: Due Process

07-257 Continental Carbon Co. v. Action Marine (11th Cir.)

BIO 9/26, reply 10/10. Dist. for 10/26.

1. Whether courts applying the reprehensibility guidelines should consider how the defendant's conduct compares to conduct in other punitive damages cases in determining whether the amount of punitive damages is out of proportion to the gravity of the offense.
2. Whether, and if so in what circumstances, a punitive/compensatory ration in excess of 1:1 is allowable when the amount of compensatory damages is "substantial" and other forms of punishment and deterrence, including significant attorneys' fees for "bad faith" and extensive injunctive relief, have already been imposed.
3. Whether, in applying the comparable penalties guidepost, a reviewing court may disregard the most realistic legislative penalty and instead speculate about the remote possibility of a severe, yet unprecedented and extremely unlikely, fine.

Death Penalty: Lethal Injection

07-303 Taylor v. Crawford, et al. (8th Cir.)

BIO filed 10/5, reply, 10/9. Motion to expedite, 9/25. No action taken on motion to expedite on 10/9. Dist. for 10/26. Held for **07-5439 Baze v. Rees, et al.** (cert. granted 9/25).

1. Did the Eight Circuit err in holding, in conflict with the Ninth Circuit, that a State's needlessly dangerous manner of implementing its execution protocol violates the Eighth Amendment only if state officials are deliberately indifferent to the unreasonable risks created by their practices?
2. Did the Eighth Circuit err in reversing the trial court's conclusion that Missouri's execution procedures as they existed at the time of trial were unconstitutional, as well as its remedial holding that the State's post-trial proposed written protocol failed to remedy the numerous dangers revealed by the trial record?

LAST CONFERENCE

[View the Orders List from the Last Conference.](#)

CERTIORARI GRANTED

07-110 Arave v. Hoffman (9th Cir.)

BIO filed 9/28, reply 10/12. Dist. for 11/2. Cert. granted 11/5.

1. Because the Ninth Circuit did not require Respondent to prove his attorney's recommendation to reject a plea offer constituted "gross negligence" and mandated that an attorney "be prescient about the direction the law will take," did the Ninth Circuit err by rejecting the use of hindsight to conclude Respondent established deficient performance?
2. What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial.

CERTIORARI DENIED

Sovereign Immunity: "Arm of the State"

07-132 2025 Emery Highway, L.L.C., dba Club Exotica v. Bibb County, Georgia, et al. (11th Cir.)

BIO filed 10/1, reply 10/12. Dist. for 11/2. Cert. denied, 11/5.

When a Georgia sheriff's particular area of law enforcement activity concerns enforcing his county's ordinances (in this case, ordinances regulating alcoholic beverages and adult entertainment), is he acting as an "arm of the state" and thus entitled to Eleventh Amendment immunity?

GRANTED CASES INVOLVING PUBLIC CITIZEN 2007 TERM

Preemption: FDCA / State Consumer Remedy

06-179 Riegel v. Medtronic (2d Cir.)

BIO filed 10/5. Reply filed 10/16. Dist. for 11/3. CVSG 11/6. [SG invitation brief](#) opposing a grant filed 5/23. Suppl. Pet. Br. filed 6/4. Dist. for 6/21. Cert. Granted 6/25.

Allison Zieve, and Brian Wolfman, and Scott Nelson of Public Citizen represent Petitioner.

[Cert Petition](#)

[Petitioners' Reply Brief](#)

[Supplemental Brief for Petitioners](#)

Whether the Food, Drug, and Cosmetic Act expressly preempts state-law actions brought by patients injured by medical devices that received premarket approval from the FDA.

Section 1981: Retaliation

06-1431 CBOCS West, Inc. v. Humphries (7th Cir.)

CFR 5/17. BIO 7/18, reply 7/27. Granted 9/25.

Brian Wolfman is assisting respondent.

Is a race retaliation claim cognizable under § 1981.

Preemption: FDA Approval / State Consumer Remedy

06-1498 Warner-Lambert v. Kent, et al. (2d Cir.)

BIO 7/20, reply 7/30. Granted 9/25.

Allison Zieve and Brian Wolfman are assisting the respondent.

1. Whether, under the conflict preemption principles in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), federal law preempts state law to the extent that it requires the fact-finder to determine whether the defendant committed fraud on a federal agency that impacted the agency's product approval, where the agency—which is authorized by Congress to investigate and determine fraud—has not found any such fraud, and thus—as in *Buckman*—the state requirement would interfere with the agency's critical functions.

2. Whether, under the conflict preemption principles in *Buckman*, federal law preempts the provision in a Michigan statute that allows a product liability claim to be maintained against a manufacturer of an FDA approved drug where, without an FDA finding of fraud on that agency, the fact-finder is required to make a finding under state law as to whether the manufacturer committed fraud-on-the-FDA and whether, in the absence of that fraud, the FDA would not have approved the drug.