



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
JANUARY 4, 2008 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, 2007-08 Supreme Court Assistance Project Fellow, at (202) 588-1000 or supremecourt@citizen.org.

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RESOURCES

LINKS FOR MORE INFORMATION

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

JANUARY 4 CONFERENCE

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). Dist. for 1/4.

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.

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, filed 11/20 (urging denial). Dist. for 1/4.

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."

4th Amendment: Qualified Immunity for Detention

06-1441 Romero v. Boyer (9th Cir.)

CFR 7/26. BIO filed 11/26. Dist. for 1/4.

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?

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). Dist. for 1/4.

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.

Armed Career Criminal Act: “Escape”

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

CFR 8/6, filed 10/26. Reply 11/2. Dist. for 1/4.

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?

Qualified Immunity

07-86 Crosby v. Mathews (11th Cir.)

CFR 10/1. BIO filed 11/29. Dist. for 1/4.

Adina Rosenbaum is co-counsel for respondent.

Brief in Opposition

Whether the Eleventh Circuit erred in holding that a prison warden was not entitled to qualified immunity for abuse of an inmate by correctional officers under his supervision, where the warden assigned correctional officers about whose abuse of prisoners he had been warned to areas with direct contact with high-risk inmates; delegated abuse-of-force complaints to his secretary; and discontinued a procedure used by his predecessor to reduce problems during uses of force.

Drivers’ Privacy Protection Act

07-197 Dickenson v. Collier (11th Cir.)

BIO filed 11/5, reply 11/19. Amicus Imagitas, Inc., 11/5. Dist. for 12/7. Re-listed for 1/4.

1. Whether the Drivers’ Privacy Protection Act (“DPPA”) creates a private right of action for damages against State officials for enforcing state laws, policies and practices that allegedly violate the DPPA.
2. Whether a cause of action for billions of dollars in damages against State officials for enforcing State law for the sole benefit of the State and in compliance with State law requirements violates the Eleventh Amendment to the United States Constitution.

3. Whether a federal right is “clearly established” for purposes of qualified immunity when it arises under a federal statute never previously held to create a private cause of action against state actors and when the State officials’ conduct complies with mandatory State law obligations.

RICO: Reliance on Misrepresentation

07-210 Bridge v. Phoenix Bond & Indemnity Co., et al. (7th Cir.)

BIO 11/16, reply 12/6. Amicus McKesson Corporation filed 11/16. Dist. for 1/4.

Whether a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove reliance on alleged misrepresentations by the defendant?

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. Re-listed for 11/30. Re-listed for 12/7.

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?

Patents: GMOs

07-241 McFarling v. Monsanto Co. (Fed. Cir.)

BIO 11/26, reply 12/10. Dist. for 1/4.

1. In determining a “reasonable royalty” under the patent-damages statute, 35 U.S.C. § 284, may the factfinder award the patentee either:
 - (a) a hypothetically negotiated royalty that vastly exceeds the established royalty charged in the marketplace, or
 - (b) a royalty that includes damages to the patentee’s third-party distributors and is intended to force the infringer to disgorge his profits— even though Congress eliminated the equitable disgorgement remedy in 1946?
2. Do the doctrines of patent exhaustion and patent misuse permit the purchaser of a patented good to use that good and dispose of its products as it sees fit, absent a valid contract?

Intervention: Sponsorship of Ballot Initiative

07-291 / 07-313 Standing Together to Oppose Partial-Birth Abortion v. Northland Family Planning Clinic / Cox v. Northland Family Planning Clinic (6th Cir.)

BIO 11/5. Dist. for 12/7. Re-listed for 1/4.

Whether petitioner, a public interest group, has a sufficient “interest” to intervene in an action challenging legislation it sponsored and supported.

1st Amendment: Vanity Plates

07-297 / 07-488 Hill, et al. v. Kemp, et al. (10th Cir.)

BIOS 10/9, reply 11/27. Dist. for 1/4.

1. Whether, for purposes of the Tax Injunction Act, the amount charged by the state and paid by those motorists who choose to purchase a special license plate is not a tax, as the lower courts held, but instead an alternative source of state revenue, such as a contractual debt between a buyer and a seller.
2. Whether the Tax Injunction Act is not, as the lower courts held, a jurisdictional bar to petitioners’ viewpoint discrimination claims where (a) petitioners do not challenge either the calculation of any motorist’s tax liability or the validity of the amount charged for any particular special license plate, (b) petitioners wish to purchase a special license plate expressing their own views, and (c) petitioners’ claims would exist even if special license plates were available to motorists free of charge.

Sentencing: Modification of Judgment in Favor of Non-Appealing Party

07-330 Greenlaw a/k/a Mikey v. United States (8th Cir.)

BIO 11/13, reply 11/29. Dist. for 1/4.

Whether a court of appeals may increase a criminal defendant’s sentence sua sponte and in the absence of a cross-appeal by the Government.

Death Penalty: Rape

07-343 Kennedy v. Louisiana (La.)

BIO 11/14, reply 11/27. Dist. for 1/4.

1. Whether the Eighth Amendment’s Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.
2. If so, whether Louisiana’s capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

Fair Housing Act: Organizational Standing

07-421 WKB Assocs. v. Fair Housing Council (6th Cir.)

BIO filed 11/28, reply 12/10. Dist. for 1/4.

1. Whether the injury in fact requirement for Article III standing is satisfied merely because a plaintiff incurred investigation and other pre-litigation expenses in preparation of filing the lawsuit.
2. Whether a continuing violation theory: (a) delays triggering the two-year statute of limitations in the Fair Housing Act, 42 U.S.C. 3613(a)(1)(A), until the date that the last unit in a housing development is sold or rented, regardless of when the unit was designed or constructed; or (b) allows suit against all prior sales of housing units, even if only a single sale occurs within the limitations period.

Death Penalty: Mitigation

07-452 Schriro v. Lambright (Az.)

1. Did the Ninth Circuit err when it held that *Tennard v. Dretke*, 542 U.S. 274 (2004), requires not merely that mitigating evidence with no causal connection to the crime be *considered* at a capital sentencing hearing, but also that a court may not take the absence of a causal connection into account when assessing whether the failure of counsel to present that evidence was prejudicial?
2. Did the Ninth Circuit err by failing to give proper deference to the district court's factual findings and credibility assessments regarding Lambright's proffered mitigation and regarding the persuasiveness of Lambright's argument that the proffered mitigation would have changed the outcome of the sentencing proceeding?

1st Amendment: Forum Analysis

07-459 Flint v. Dennison, et al. (9th Cir.)

BIO filed.11/16. Reply 12/4. Dist. for 1/4.

1. Whether, consistent with the First Amendment, the educational mission of a public university is sufficient to justify expenditure limits on privately funded extracurricular political speech by candidates for student government?
2. Whether a privately funded election for student government at a public university is a "limited public forum," as defined in the Ninth Circuit, and whether, in this context, the state needs only to show a rational basis to justify content-based limitations on political speech.

Employment Discrimination: Medical Peer Review Privilege

07-538 Christie v. Adkins (11th Cir.)

BIO filed 11/20. Reply 12/4. Amici American Hospital Ass'n, Joint Comm'n, Ass'n of Black Physicians, 11/21, 11/23. Dist. for 1/4.

Julia Graff is assisting respondent.

Whether federal courts should recognize an evidentiary privilege against compelled disclosure of confidential, internal medical peer review communications under Rule 501 of the Federal Rules of Evidence.

AEDPA: Tolling

07-478 Hartmann v. Burris (3d Cir.)

BIO filed 11/30, reply 12/10. Dist. for 1/4.

Whether a motion filed in state court for discretionary review of a sentence is an “application for State post-conviction or other collateral review,” 28 U.S.C. § 2244(d)(2), thus tolling the Antiterrorism and Effective Death Penalty Act’s one-year limitations period for a state prisoner to file a federal *habeas corpus* petition.

Standing: Assignees

07-552 Sprint Communications Co., et al. v. APCC Services, Inc. (D.C. Cir.)

CFR, filed 12/7. Reply, 12/12. Dist. for 1/4.

Whether the assignment of a claim “for purposes of collection” confers standing on assignees which have no personal stake in the case and which avowedly litigate “on behalf of” the assignors.

1st Amendment: Prior Restraint

07-587 Covenant Media of South Carolina v. City of North Charleston (4th Cir.)

BIO filed 11/30, reply 12/28. Dist. for 1/11.

Whether an ordinance that operates as a prior restraint on speech need not contain any procedural safeguards to ensure prompt decision-making and access to judicial review merely because the permitting regulation is deemed content-neutral.

PENDING FOR UPCOMING CONFERENCES

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, filed 12/18 (urging grant). Dist. for 1/11.

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?

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. Dist. for 1/11.

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).

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. Motion to dismiss pursuant to Rule 46 rec'd 12/26. Dist. for 1/11.

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?

Immigration: Stays of Voluntary Departure

07-259 Iouri v. Mukasey (2d Cir.)
BIO filed 12/10, reply 12/26. Dist. for 1/11.

Whether the Second Circuit erred by holding, in express disagreement with the rule applied by the Sixth, Eighth, and Ninth Circuits, that a motion to stay deportation does not necessarily also include a request to stay the running of the voluntary departure period.

Federal Arbitration Act: “Involving Commerce”

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

CFR 10/4, filed 12/5. Reply 12/17. Dist. for 1/11.

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.

Administrative Law: Clean Air Act

07-311 Nat’l Petrochemical & Refiners Ass’n v. South Coast Air Quality Management Dist. (D.C. Cir.)

BIOs filed 12/12, 12/13. Reply 12/21. Brief in support of petition from respondent National Environmental Development Association, 9/26. Dist. for 1/11.

1. Whether the lower court correctly held that Section 172(e) of the Clean Air Act applies to require retention of measures related to a revoked National Ambient Air Quality Standard (NAAQS) that the EPA replaced with a more stringent standard.
2. Even if Section 172(e) applies when EPA tightens a NAAQS, whether the lower court correctly held that EPA violated the terms of Section 172(e), leaving no room for EPA’s reasonable exercise of discretion.

Campaign Finance Reform: “Millionaire’s Amendment”

07-320 Davis v. Federal Elections Commission (D.C. Cir.)

Motion to dismiss or affirm filed 12/4. Dist. for 1/11.

1. Whether the three-judge district court erred in finding that Congress’s attempt to equalize a potential imbalance in resources between congressional candidates violates neither the First Amendment to the United States Constitution nor the Equal Protection Clause of the Fifth Amendment.
2. If equalizing a potential imbalance in resources of congressional candidates is constitutional, whether the federal statutory provision accomplishes the stated purpose.

Title VII: Retaliation

07-367 James v. Metropolitan Gov't of Nashville (6th Cir.)

BIO filed 12/3, reply 12/17. Dist. for 1/11.

Is a jury or the court responsible for determining whether a retaliatory act was sufficiently serious to satisfy the standard laid out in *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405 (2006)?

Due Process: Virtual Representation

07-371 Taylor v. Sturgell (D.C. Cir.)

Pet. filed 9/17. BIOs filed 12/7 and 12/10. Reply filed 12/18.

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

[Cert Petition](#)

[Reply Brief](#)

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?

Peremptory Challenges

07-386 Wooten v. Texas (Tex. Ct. App.)

CFR 10/18, filed 12/6. Dist. for 1/11.

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?

Due Process: Investigational Drugs for the Terminally Ill

07-444 Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach (D.C. Cir.)

BIO filed 12/14, reply 12/21. Amici Senior Citizens League and Inst. for Justice, 12/13, 12/14. Dist. for 1/11.

Whether the Due Process Clause protects the right of a terminally ill patient with no remaining approved treatment options to attempt to save her own life by deciding, in consultation with her own doctor, whether to seek access to investigational medications that the Food and Drug Administration concedes are safe and promising enough for substantial human testing.

Administrative Law: Environmental Regulations

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

BIO filed 12/5, reply 12/21. Dist. for 1/11.

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

Brief in Opposition

1. Did the Court of Appeals err in allowing a facial challenge to one set of regulatory provisions and dismissing challenges to seven others on ripeness grounds, where there is no dispute that the one set of rules allowed to be reviewed had been applied countless times by the Forest Service, including an application of the rules to a site-specific action challenged in the district court?
2. Did the respondents have standing, where it is undisputed that the challenged regulations had been applied to them countless times, including an application of the rules to a site-specific action challenged in the district court for which standing was not challenged?
3. Did the facial rule challenge become moot, where the site-specific action was preliminarily enjoined and then the challenges to it were settled, but there is no dispute that the agency continued to apply the regulations to countless other site-specific actions that adversely affected respondents?
4. Did the Ninth Circuit err in finding that the district court did not abuse its discretion in completely setting aside the challenged regulations instead of limiting relief to the Eastern District of California, where respondents are organizations affected by the challenged regulations throughout the country?

FMLA: Waiver

07-539 Progress Energy v. Taylor (4th Cir.)

BIO filed 12/19, reply 12/21. Amici Chamber of Commerce, Equal Employment Advisory Council, North Carolina Retail Merchants Ass'n, Soc'y for Human Resource Management, Ass'n of Corporate Counsel filed 11/21, 11/23. Dist. for 1/11.

Whether the Fourth Circuit correctly concluded that the plain language of 29 C.F.R. § 825.220(d), which provides that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA,” precludes the unsupervised waiver of all FMLA rights, including substantive, proscriptive and remedial rights, and that the Department of Labor’s recent interpretation is inconsistent with the regulation.

CALL FOR RESPONSE

PENDING CFR

Title VII: Ministerial Exception

07-323 Archdiocese of Washington, et al. v. Moersen (Md. Ct. App.)

CFR 11/5, due 1/4 (ext.).

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.

Section 1983: Post–Conviction DNA Testing

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

CFR 10/17, due 1/16 (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?

Bankruptcy: Dischargeability of Bond Forfeiture Judgments

07-482 Texas v. Soileau (5th Cir.)

CFR 11/6, due 1/7 (ext.).

1. Whether the Fifth Circuit decision in the present case and the Fifth Circuit Court decision in *Hickman (In re Hickman) v. Texas*, 260 F.3d 400 (5th Cir. 2001) allowing a commercial bondsman in bankruptcy to discharge criminal bond forfeiture judgments are in direct conflict with the Third Circuit Court decision in *Dobrek v. Phelan*, 419 F.3d 259 (3d Cir. 2005) which held that a commercial bondman's criminal bond forfeiture judgments are not dischargeable in bankruptcy.

2. Whether the U.S. Supreme Court decisions in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) prevents the State of Texas from asserting sovereign immunity when a bankruptcy court's *in rem* jurisdiction offends traditional state sovereignty over a state's criminal justice system.

5th Amendment: Double Jeopardy

07-506 Gibson v. United States (7th Cir.)

CFR 11/14, due 1/14 (ext.).

1. Whether any authority exists for a district or appellate court to vacate a validly entered and validly accepted guilty plea without an express request by the defendant.

2. Whether jeopardy attaches at the time of entry of a guilty plea, thus barring, under principles of double jeopardy, the reinstatement of counts dismissed as a result of the plea when the plea is vacated without an express request by the defendant.

3. If the answer to Question 1 is yes and to Question 2 is no, whether contract principles and due process considerations require the government to honor promises and commitments made in the plea agreement.

Prosecutorial Immunity: Review of Search Warrant

07-516 Knox v. Mink and the Howling Pig (10th Cir.)

CFR 11/27, filed 12/21.

Is a prosecutor entitled to absolute immunity from a 42 U.S.C. § 1983 claim based on her review of a search warrant for sufficiency of probable cause pursuant to a specific state statute requiring her to do so before the search warrant's presentation to a judge by the police?

Habeas Corpus: Original Writ

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

CFR 10/23, due 12/26 (ext.). Motion to dismiss filed by the United States, 12/20. 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, filed 12/21 (urging a grant on the first question and a denial on the second question).

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?

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, filed 12/20 (urging denial) .

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.

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, filed 12/21 (urging that the case be held for resolution of 06-179 *Riegel v. Medtronic* (arg. 12/4)).

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 LA County, waiver filed 4/16 by state respondents, reply 5/1. CVSG 5/29, filed 12/21 (urging denial).

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, filed 12/21.

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.

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. CVSG 11/13.

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.

Title VII: Disparate Impact

07-270 Bd. of Educ. of the New York City School Dist. v. Gulino, et al. (2d Cir.)
BIOs 9/18, 10/29. Reply 11/9. Dist. for 11/30. CVSG 12/3.

Did the Second Circuit err and create a split with other Circuits by holding that because Petitioner otherwise functions as the employer of New York City public school teachers, its compliance with challenged State licensing requirements subjects it to liability under Title VII?

HELD / AWAITING ACTION

Immigration: Tolling / Motion to Reopen

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

BIO filed 2/23, reply 3/5. Dist. for 9/24. Held for 06-1181 *Dada v. Mukasey* (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. Mukasey (4th Cir.)

BIO 6/22, reply 7/5. Dist. for 9/24. Held for 06-1181, *Dada v. Mukasey* (arg. 1/7).

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?

ERISA: Equitable Relief

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

CFR 8/7, filed 10/5. Dist. for 11/2. Held for *LaRue v. DeWolff, Boberg & Assoc.* (arg. 11/26).

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.

Military Commissions Act

[07-153](#) *Paracha v. Bush, et al.* (D.C. Cir.)

BIO filed 10/9. Dist. for 11/9. Held for [06-1195 / 06-1196](#), *Boumediene v. Bush / Al Odah v. United States* (arg. 12/5).

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.

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.* (arg. 1/7).

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

Habeas Corpus: Jurisdiction

06-1666 Munaf, et al. v. Geren, et al. (D.C. Cir.)

BIO 9/21. Dist. for 10/26. Reply, 11/5. Re-listed for 12/7. Cert. granted 12/7. Consolidated with **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: Self-Representation

07-208 Indiana v. Edwards (Ind.)

CFR 9/13, filed 11/6. Reply 11/16. Amicus State of Ohio, 9/13. Dist. for 12/7. Cert. granted 12/7.

May States adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?

Habeas Corpus: Jurisdiction

07-394 Geren, et al. v. Omar, et al. (D.C. Cir.)

BIO 11/5, reply 11/20. Dist. for 12/7. Cert. granted 12/7. Consolidated with 06-1666, *Munaf v. Geren*.

1. Whether the United States courts have jurisdiction to entertain a habeas corpus petition filed on behalf of an American citizen challenging his detention by U.S. military personnel acting as part of the Multinational Force-Iraq.
2. Whether, if such jurisdiction exists, the district court had the power to enjoin the multinational force from releasing respondent to Iraqi custody or allowing respondent to be tried before the Iraqi courts.

War on Terror: Explosives Carried “in Relation to” a Felony

07-455 United States v. Ressam (9th Cir.)

BIO 11/5, reply 11/20. Dist. for 12/7. Cert. granted 12/7.

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who “carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.” The question presented is whether Section 844(h)(2) requires that the explosives be carried “in relation to” the underlying felony.

Disability Rights: Reasonable Accommodation

07-480 Huber v. Wal-Mart Stores, Inc. (8th Cir.)

BIO 11/9, reply 11/16. Dist. for 12/7. Cert. granted 12/7.

1. If a disability prevents an employee from performing the essential functions of his or her current position, does the ADA require: (a) that the employer reassign the employee to a vacant, equivalent position for which he or she is qualified, as the Tenth and District of Columbia Circuits have held; or (b) that the employer merely permit the employee to apply and compete with other applicants for the vacant, equivalent position for which he or she is qualified, as the Seventh and Eighth Circuits have held?
2. Is the EEOC’s interpretation of its regulation entitled to deference under *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) – a case decided twelve days after the Eighth Circuit rendered its decision in this case?

CERTIORARI DENIED

**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, filed 11/6. Reply, 11/15. Dist. for 12/7. Cert. denied 12/10.

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?

Deficit Reduction Act: Bicameralism Requirement

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

BIO filed 11/7, reply 11/15. Dist. for 12/7. Cert. denied 12/10.

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.

Due Process: Name-Clearing Hearing

07-159 Newport News v. Sciolino (4th Cir.)

BIO 11/9, reply 11/19. Dist. for 12/7. Cert. denied 12/10.

When a government employer takes no steps to publicize the reasons for an employee’s termination, but places the allegedly false stigmatizing reasons for the termination in the employee’s personnel file, does the Due Process Clause require the employer to provide the terminated employee with a name-clearing hearing?

Habeas Corpus: Actual Innocence

[07-199](#) **Marshall v. Henry (9th Cir.)**

CFR 9/28, filed 11/8. Dist. for 12/7. Cert. denied, 12/10.

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.

1st Amendment: Limited Purpose Public Figure

[07-285](#) **American Future Systems v. Better Business Bureau of Eastern Pennsylvania (Pa.)**

Blo 11/5, reply 11/19. Dist. for 12/7. Cert. denied 12/10.

Does the Constitution require that a corporate defamation plaintiff be treated as a “limited purpose public figure” based upon the corporation’s conducting direct mail and telephone solicitation as a part of its regulate business, where the corporation did not inject itself into any public controversy?

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. Argued 12/4/07.

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

[Cert Petition](#)

[Petitioners’ Reply Brief](#)

[Supplemental Brief for Petitioners](#)

[Petitioner’s Brief on the Merits](#)

[Petitioner’s Reply Brief on the Merits](#)

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. Arg. 2/20.

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. Arg. 2/25.

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.

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. Cert. granted 11/13.

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?