



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
FEBRUARY 22, 2008 CONFERENCE**

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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.

WATCH LIST CONTENTS

Issue Index	<u>3</u>
Resources	<u>5</u>
Links for More Information	<u>5</u>
Key Terms & Abbreviations	<u>6</u>
February 22 Conference	<u>7</u>
Pending for Upcoming Conferences	<u>10</u>
Call For Response	<u>11</u>
Pending CFR	<u>11</u>
Call for the Views of the Solicitor General	<u>13</u>
New CVSG	<u>13</u>
Pending CVSG	<u>14</u>
Held / Awaiting Action	<u>16</u>
Last Conference	<u>19</u>
GVR	<u>19</u>
Certiorari Granted	<u>20</u>
Certiorari Denied	<u>21</u>
Granted Cases Involving Public Citizen 2007 Term	<u>24</u>

ISSUE INDEX

1st Amendment

- Non–Union Public Employees* [20](#)
- Qualified Immunity* [12](#)

4th Amendment

- Exclusionary Rule* [20](#)
- Passenger Search* [7](#)

5th Amendment

- Double Jeopardy* [11](#)
- Takings Clause* [10](#)

AEDPA

- Ineffective Assistance of Counsel* [23](#)

Anti-Trust

- Telecommunications* [15](#)

Arbitration

- Union-Negotiated Waiver* [20](#)

Armed Career Criminal Act

- “Escape”* [17](#)

Bankruptcy

- Dischargeability of Bond Forfeiture
Judgments* [21](#)

Communications Regulation

- “Fleeting Expletives”* [10](#)

Corporate Responsibility for Human Rights Violations

- Collateral Order Doctrine* [14](#)

Criminal Law

- Double Jeopardy* [7](#)
- Jury Instructions* [8](#)
- Plea Agreements* [12](#)
- Sentencing* [10](#)

Death Penalty

- Lethal Injection* [18](#)
- Procedural Default* [23](#)

Dormant Commerce Clause

- Business Activities Tax* [22](#)

Due Process

- Punitive Damages* [9, 24](#)
- Virtual Representation* [26](#)

Energy Regulation

- 10th Amendment / Federal Power
Act* [8](#)
- Jurisdiction and Preemption* [23](#)

Environmental Law

- Clean Water Act* [23](#)
- Standing / Nationwide Injunction* [26](#)

Equal Access to Justice Act

- Hourly–Rate Cap* [8](#)
- Paralegal Fees* [26](#)

ERISA

- Equitable Relief* [17](#)
- Standard of Review* [14](#)
- “Accrued Benefits”* [19](#)

Family Medical Leave Act

- Waiver* [15](#)

Federal Tort Claims Act

- Respondeat Superior* [22](#)

Foreign Sovereign Immunity Act

- “Direct Effects”* [11](#)

Habeas Corpus

- Original Writ* [16, 19](#)

Immigration

- Stays of Voluntary Departure* [18](#)
- Tolling / Motion to Reopen* [16, 17](#)

Military Commissions Act [18](#)

Native American Rights [7](#)

Occupational Health & Safety Act

- Knowing Violation* [22](#)

Preemption

- Cigarette Labeling* [27](#)
- FDA Approval / State Consumer
Remedy* [25](#)
- FDCA / State Consumer Remedy* [24,](#)

	<u>25</u>	<i>Post–Conviction DNA Testing</i>	<u>21</u>
<i>Medical Devices</i>	<u>16</u>	Title IX	
<i>Navigable Airspace</i>	<u>15</u>	<i>Actual Notice</i>	<u>9</u>
Prisoners’ Rights		Title VII	
<i>Due Process</i>	<u>22</u>	<i>Disparate Impact</i>	<u>14</u>
Public Citizen		<i>Ministerial Exception</i>	<u>21</u>
<i>Cert Pending</i>	<u>19</u>	<i>Pregnancy Discrimination</i>	<u>15</u>
<i>Cert. Denied</i>	<u>23</u>	U.S. Jurisdiction	
<i>Cert. Granted</i>	<u>24-27</u>	<i>Anti-Suit Injunction</i>	<u>13</u>
<i>CVSG</i>	<u>14</u>	Voting Rights Act	
Punitive Damages		<i>Vote Dilution</i>	<u>11</u>
<i>Due Process</i>	<u>18</u>	War on Terror	
Qualified Immunity		<i>Seizure of Foreign Assets</i>	<u>13</u>
<i>Lethal Force on Suicide Call</i>	<u>19</u>	Warrantless Wiretapping	
Section 1981		<i>Standing</i>	<u>21</u>
<i>Retaliation</i>	<u>25</u>		
Section 1983			
<i>IDEA</i>	<u>9</u>		

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.

FEBRUARY 22 CONFERENCE

Criminal Law: Double Jeopardy

07-515 *Carpenter v. United States* (1st Cir.)

BIO 1/18, reply 1/29. Amicus Nat'l Ass'n of Criminal Defense Lawyers, 11/19. Dist. for 2/15.
Re-listed for 2/22.

1. Whether the Double Jeopardy Clause entitles a defendant to interlocutory review of his claim that the government failed to introduce legally sufficient evidence at his first trial *before* he is retried after a motion for a new trial is granted?
2. Whether the First Circuit erred by holding, in conflict with the Fourth Circuit, that a defendant is not entitled to cross-appeal a district court's denial of his motion for judgment of acquittal based on the insufficiency of the evidence, if the *government* first takes an interlocutory appeal under 18 U.S.C. § 3731 from an order of the district court granting a new trial?

Native American Rights

07-526 *Carcieri v. Kempthorne* (1st Cir.)

BIO 1/25, reply 2/5. *Amici* Alabama, et al., Citizens Equal Rights Foundation, et al., 11/21, 1/25;
Dist. for 2/22.

1. Whether the 1934 Indian Reorganization Act empowers the Secretary of the Interior to take land into trust for Indian tribes that were not recognized under federal jurisdiction in 1934.
2. Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there.
3. Whether providing land "for Indians" in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust.

4th Amendment: Passenger Search

07-542 *Arizona v. Gant* (Az.)

CFR 12/11. BIO 1/24, reply 2/5. Dist. for 2/22.

Did the Arizona Supreme Court effectively "overrule" this Court's bright line rule in *New York v. Belton*, 453 U.S. 454 (1981), by requiring in each case that the State prove after-the-fact that the dangers to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant actually existed at the time of the search?

Criminal Law: Jury Instructions

07-544 Chrones v. Pulido (9th Cir.)

BIO 12/26, reply 1/10. Dist. for 2/15. Re-listed for 2/22.

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

Equal Access to Justice Act: Hourly–Rate Cap

07-547 Lopez v. Astrue (5th Cir.)

BIO 1/25, reply 2/6. Dist. for 2/22.

Under the Equal Access to Justice Act, whether in adjusting the nationwide hourly rate cap for attorneys fees (now \$125) to reflect “an increase in the cost of living,” district courts must use the Consumer Price Index for All Urban Consumers (“CPU-U”) in their calculations, or whether they must base the increase on factors unique to the locale in which the district court sits.

Energy Regulation: 10th Amendment / Federal Power Act

07-658 Nat’l Ass’n of Regulatory Utility Commissioners v. Federal Energy Regulatory Commission (D.C. Cir.)

BIO 1/22, reply 2/11. Dist. for 2/22.

1. Whether the Federal Energy Regulatory Commission (“FERC”) has statutory authority to regulate transmission providers’ use of State-granted eminent domain power, and if so, whether the provisions of FERC Order *No. 2003* that effectively commandeer this core State function are barred by the Tenth Amendment of the United States Constitution?
2. Whether the FERC’s extension of its statutory authority over *transmission facilities* and wholesale sales of electric power to regulate *physical* interconnections between *generation and local distribution facilities* is barred by Federal Power Act Section 201(b)(1), which specifies the FERC shall not have jurisdiction “...over facilities used for the generation of electric energy or over facilities used in local distribution?”
3. Whether the FERC’s acceptance of a facially inadequate method for identifying when State jurisdictional distribution facilities are “subject to an Open Access Transmission Tariff” results in arbitrary and capricious action?

Title IX: Actual Notice

07-692 Dale v. White County, Ga. School District (11th Cir.)

BIO 1/25, reply 2/5. Dist. for 2/22.

1. In an action for damages under Title IX, the plaintiff must demonstrate that the defendant had “actual notice” of discrimination. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998). Does “actual notice” mean:
 - (a) notice that a violation of the plaintiff’s Title IX rights is occurring, or
 - (b) notice of a substantial risk that the plaintiff’s Title IX rights are being or will be violated?
2. In an action under 42 U.S.C. § 1983, in what circumstances may a supervisor be held liable for constitutional violations engaged in by his or her subordinate?

Due Process: Punitive Damages

07-806 Philip Morris USA, Inc., et al. v. Accord, et al. (W.Va.)

BIO filed 1/14, reply 1/29. *Amici* U.S. Chamber of Commerce, Ciba Corp., 1/16. Dist. for 2/15. Re-listed for 2/22.

Whether the Due Process Clause bars the use of “reverse bifurcation” in a consolidated mass-tort trial, whereby a defendant’s liability for punitive damages to hundreds of plaintiffs is adjudicated, based entirely on aggregate proof, prior to any finding of compensatory liability to even a single plaintiff.

Section 1983: IDEA

07-825 Blanchard v. Morton School District (9th Cir.)

BIO 1/18, reply 1/29. Dist. for 2/22.

Does 42 U.S.C. § 1983 provide a cause of action to enforce the Individuals with Disabilities Education Act?

PENDING FOR UPCOMING CONFERENCES

Criminal Law: Sentencing

07-548 Beasley v. United States (4th Cir.)

BIO 1/25, reply 2/15. Dist. for 2/29.

1. Whether the government's failure to provide timely notice (i.e., "before trial") under 21 U.S.C. § 851(a) jurisdictionally bars a court from imposing an enhanced sentence for a drug offense based on a defendant's prior criminal conviction.
2. Whether notice is untimely under § 851(a) when it is not provided until after trial has commenced but before the jury selection has been completed.

Communications Regulation: "Fleeting Expletives"

07-582 Federal Communications Commission v. Fox Television Stations, Inc., et al. (2d Cir.)

BIOs 2/1, reply 2/15. Dist. for 2/29.

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

5th Amendment: Takings Clause

07-635 Peters v. Village of Clifton, Ill. (7th Cir.)

CFR 1/4. BIO 1/31, reply 2/8. *Amici* Joyce Yamagiwa; American Farm Bureau Federation; Coalition for Property Rights; Elizabeth J. Neumont, et al., 12/17. Dist. for 2/29.

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires property owners to seek compensation in state courts to ripen a federal takings claim, where four Justices of this Court recognized in *San Remo Hotel v. City and County of San Francisco* that such a rule lacks any legitimate doctrinal basis and causes tremendous and unintended jurisdictional confusion?
2. Is a claim against a traditional physical taking – occurring without any contemporaneous provision of compensation – subject to *Williamson County's* state procedures ripeness rule, where that rule was articulated in the regulatory takings context, and effectively strips the federal courts of any role in the development of physical takings law?

Foreign Sovereign Immunity Act: “Direct Effects”

07-721 American Telecom Co., LLC, et al. v. Republic of Lebanon (6th Cir.)

BIO 2/1. Dist. for 2/29.

1. Was there a “direct effect” in the United States pursuant to the FSIA where the Republic of Lebanon, a foreign state, fraudulently induced ATC and ATG, two American corporations, to participate in a bid on a contract, then tortiously and intentionally disqualified them from the bidding solely because ATC and ATG are American corporations and where such intentional, tortious and fraudulent conduct caused effects in the United States?
2. What standard should be used to determine whether an effect is a “direct effect” under the “commercial activity exception,” the “legally significant acts” test, as has been adopted by the Second, Eighth, Ninth and Tenth Circuits and has been explicitly rejected by the Fifth and Sixth circuits, or the test used by Fifth and Sixth Circuits?

CALL FOR RESPONSE

PENDING CFR

5th Amendment: Double Jeopardy

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

CFR 11/14, filed 2/13.

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.

Voting Rights Act: Vote Dilution

07-689 Bartlett v. Strickland (N.C.)

CFR 1/15, filed 2/14. Amici Honorable Vernon Sykes and Honorable Roger Corbin; League of Women Voters; Illinois, Louisiana, Maryland, and Ohio; NAACP, Cindy Moore, Milford Farrior, and Mary Jordan filed 12/21.

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

1st Amendment: Qualified Immunity

07-811 Morris v. Center for Bio-Ethical Reform, Inc. (6th Cir.)

CFR 1/29, due 2/28.

1. Whether, in rejecting federal law enforcement officers' qualified immunity defense to a First Amendment retaliation claim, the Sixth Circuit ruled in conflict with this Court's precedents by holding that a factual dispute as to the officers' motive was dispositive of qualified immunity without considering whether it was clearly established that the officers' actions would chill speech.
2. Whether, in assessing a First Amendment retaliation claim, a court should consider whether a person of ordinary firmness "similarly situated" to the plaintiff would be chilled by the government conduct, as some Courts of Appeals have held, or whether a court should consider only whether an "average law abiding citizen" would be chilled, as the Sixth Circuit held in this case.
3. Whether a federal law enforcement officer who participates in a *Terry* stop may be held personally liable for money damages if a reasonable officer could have believed that his individual actions comported with the Fourth Amendment.

Criminal Law: Plea Agreements

07-818 Nunez v. United States (7th Cir.)

CFR 1/14, due 3/14 (ext.).

Whether the Seventh Circuit erred in holding – in conflict with seven of its sister circuits – that a criminal defendant who enters a plea agreement containing a waiver of the right to appeal also forfeits the protections recognized by this Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which held that if the defendant requests an appeal and counsel fails to file a timely notice of appeal, the defendant is entitled to habeas relief in the form of a new direct appeal without first being required to show that the forfeited appeal would have had merit.

CALL FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

War on Terror: Seizure of Foreign Assets

07-615 Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Darish Elahi (9th Cir.)

BIO 1/8, reply 1/17. Dist. for 2/15. CVSG 2/19.

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

U.S. Jurisdiction: Anti-Suit Injunction

07-618 Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd., et al. (8th Cir.)

BIO 1/9, reply 1/22. Amici Law Professors; New Hampshire and Oregon, 12/7, 12/10. Dist. for 2/15. CVSG 2/19.

1. Whether the Eight Circuit erred by holding that once a defendant pays a money judgment, the federal courts lose jurisdiction to maintain an injunction precluding the defendant from pursuing litigation in a foreign court to nullify the U.S. judgment.
2. Whether the Eight Circuit erred by giving dispositive weight to concerns about international comity at the expense of the courts traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation.

07-619 PT Pertamina (Persaro) v. Karaha Bodas Co., LLC (2d Cir.)

BIO 12/10, reply 12/19. *Amicus* Republic of Indonesia 12/10. Dist. for 1/11. Re-listed for 2/15. CVSG 2/19.

1. Whether a federal district court has “ancillary” subject matter jurisdiction, after a judgment for money damages has been fully satisfied, to issue an anti-suit injunction barring foreign litigation.
2. Whether a federal district court exercising its limited authority under the treaty governing enforcement of international arbitration awards may issue an anti-suit injunction barring foreign litigation on the ground that the district court views the foreign litigation as seeking to relitigate matters decided in the underlying arbitration that were never considered or decided in the federal court.
3. Whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy.

PENDING CVSG

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 Geddases' 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?

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 of Public Citizen 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?

Preemption: Navigable Airspace

07-373 Clark Co. v. Vacation Village (9th Cir.)

BIO filed 11/19, reply 12/4. Amicus Air Line Pilots Ass'n, Int'l filed 11/19. Dist. for 1/4. CVSG 1/7.

Whether a State's recognition and constitutional protection of an unqualified compensable ownership interest in 500 feet of navigable airspace above a landowner's property is preempted by federal laws that confer on the federal government "exclusive sovereignty" over the navigable airspace of the United States and grant the public the right to traverse navigable airspace less than 500 feet above ground level to ensure safe takeoffs and landings of aircraft.

Anti-Trust: Telecommunications

07-512 Pacific Bell Telephone Company v. linkLine Communications, Inc. (9th Cir.)

BIO filed 12/17, reply 12/28. Amici Verizon Communications Inc., Commonwealth of Virginia and Nine Other States Professors and Scholars in Law and Economics, 11/15, 11/16. Dist. for 1/18. CVSG 1/22.

Whether a plaintiff states a claim under Section 2 of the Sherman Act by alleging that the defendant - a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors - engaged in a "price squeeze" by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete.

Family Medical Leave Act: 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. CVSG 1/14.

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.

Title VII: Pregnancy Discrimination

07-543 AT&T Corp. v Hulteen (9th Cir.)

BIO filed 12/21, reply 1/2. Dist. for 1/18. CVSG 1/22.

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

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* (arg. 1/7).

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.

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* (decided in respondent's favor 2/20).

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.

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.* (decided in petitioner’s favor, 2/20).

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.

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?

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 ratio 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.

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.

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?

ERISA: "Accrued Benefits"

07-663 AK Steel Corporation Retirement Accumulation Pension Plan v. West (6th Cir.)
BIO filed 12/20, reply 1/2. Dist. for 1/18. Held for **06-1398 AT&T Pension Benefit Plan v. Call** (CVSG 10/1).

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

Habeas Corpus: Original Writ

07-6827 In Re Al-Ghizzawi
CFR 10/23, filed 12/20. Reply, 12/31. Like **06-1194 In re Petitioner Ali**, dist. for 6/28/07. Dist. for 1/18. Held for **06-1195 / 06-1196, Boumediene v. Bush / Al Odah v. United States** (arg. 12/5).

Brian Wolfman of Public Citizen is assisting Petitioner.

LAST CONFERENCE

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

GVR

Qualified Immunity: Lethal Force on Suicide Call

07-470 Robinson v. Lehman (9th Cir.)
BIO filed 12/7, reply 12/18. Record requested 1/3. Dist. for 1/11. Record rec'd 1/15. Dist. for 2/15. GVR'd in light of *Scott v. Harris*, 550 U.S. ____ (2007).

1. Whether police officers' acts are "objectively reasonable" and therefore do not violate the Fourth Amendment right to be free from unlawful "seizure" of a felony suspect when the officers make split-second decisions to protect the lives of multiple fellow officers and multiple at-risk bystanders because it reasonably appears to the officers the suspect is about to drive in a manner which puts them at serious risk?

2. When at the time of this incident, neither this Court nor any circuit court had ruled the Fourth Amendment is violated when an officer uses deadly force to protect innocent persons from the risk of dangerous vehicular flight by a felony suspect, was the law “clearly established” and thus the officer properly denied qualified immunity from civil rights liability?

CERTIORARI GRANTED

4th Amendment: Exclusionary Rule

07-513 Herring v. United States (11th Cir.)

BIO 1/18, reply 1/30. Dist. for 2/15. Cert. granted 2/19.

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

Arbitration: Union-Negotiated Waiver

07-581 14 Penn Plaza LLC v. Pyett (2d Cir.)

BIO 1/16, reply 1/29. Dist. for 2/15. Cert. granted 2/19.

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

1st Amendment: Non-Union Public Employees

07-610 Locke, et al. v. Karass, et al. (1st Cir.)

BIO of Maine State Employees Association, SEIU Local 1989, 1/9, reply 1/29. Waiver by Karass, State Controller, 12/5. Dist. for 2/15. Cert. granted 2/19.

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

CERTIORARI DENIED

Title VII: Ministerial Exception

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

CFR 11/5, filed 1/4. Dist. for 2/15. Cert. denied 2/19.

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, filed 1/16. Dist. for 2/15. Cert. denied 2/19.

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?

Warrantless Wiretapping: Standing

07-468 American Civil Liberties Union v. National Security Agency (6th Cir.)

BIO filed 12/17, reply 12/21. Dist. for 1/18. Re-listed for 2/15. Cert. denied 2/19.

1. Whether the Court of Appeals erred in holding that plaintiffs who have been injured because of government surveillance are precluded from challenging the lawfulness of that surveillance if the government refuses to disclose whether plaintiffs’ communications have been intercepted.
2. Whether the President possesses the authority under Article II of the Constitution to engage in intelligence surveillance within the United States that Congress has expressly prohibited.

Bankruptcy: Dischargeability of Bond Forfeiture Judgments

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

CFR 11/6, filed 1/7. Reply, 1/18. Dist. for 2/15. Cert. denied 2/19.

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.

Federal Tort Claims Act: Respondeat Superior

07-501 Shirley v. United States (5th Cir.)

BIO 1/17, reply 1/30. Amicus Stop Prisoner Rape, 11/9. Dist. for 2/15. Cert. denied 2/19.

Whether the Federal Tort Claims Act, 28 U.S.C. § 2860(h), is properly construed to incorporate state rules of respondeat superior that would effectively foreclose the liability mandated by Congress for the intentional torts of federal law enforcement officers.

Prisoners' Rights: Due Process

07-575 Phelps v. Stevenson (3d Cir.)

BIO 12/27, reply 1/8. Amici Pennsylvania, et al, 12/3. Dist. for 2/15. Cert. denied 2/19.

1. Whether, as the Third Circuit held, Respondent inmates were entitled under the Due Process Clause to receive an explanation of the reason for their transfer to a high-security housing area and an opportunity to respond.
2. Whether, as the Third Circuit held, Respondent inmates stated a substantive due process claim upon which relief could be granted because they alleged that their transfer to SHU constituted punishment.

Occupational Health & Safety Act: Knowing Violation

07-606 John Carlo, Inc. v. Secretary of Labor (11th Cir)

BIO 1/4, reply 1/15. Dist. for 2/15. Cert. denied 2/19.

Can the Secretary of Labor establish knowledge of a violation of the Occupational Health & Safety Act of 1970 by imputing to the employer as a matter of law the knowledge of a supervisor who intentionally violates the Act and the employer's work rules without proving the supervisor's misconduct was foreseeable to the employer?

Dormant Commerce Clause: Business Activities Tax

07-623 Ford Motor Co. v. City of Seattle (Wa.)

BIO 1/14, reply 1/25. Amicus Council on State Taxation, et al., 12/13. Dist. for 2/15. Cert. denied 2/19.

Whether the closely divided Washington Supreme Court erred in concluding – contrary to the Supreme Courts of Pennsylvania and Virginia – that the dormant Commerce Clause does not bar a city from imposing a business activities tax on 100 percent of a taxpayer's gross receipts derived from activities carried on in part within the city and in part in other States.

Environmental Law: Clean Water Act

07-625 *City of Healdsburg v. Northern California River Watch* (9th Cir.)

BIO filed 1/14. Dist. for 2/15. Cert. denied 2/19.

Scott Nelson of Public Citizen assisted the respondent.

Should this Court review the Ninth Circuit's affirmance of a trial court's determination that a municipal sewage treatment plant requires a National Pollutant Discharge Elimination System (NPDES) permit issued under the Clean Water Act before it may discharge partially treated wastewater into a pond that is part of an extensive system of wetlands adjacent to, and hydrologically connected with, the navigable-in-fact Russian River?

Energy Regulation: Jurisdiction and Preemption

07-651 *Entergy Corp. v. Jenkins* (Tex. Ct. App.)

BIO 1/16, reply 1/29. Dist. for 2/15. Cert. denied 2/19.

Whether, under *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent?

Death Penalty: Procedural Default

07-653 *Norris v. Simpson* (8th Cir.)

BIO 1/16, reply 1/28. Dist. for 2/15. Cert. denied 2/19.

Whether the legal basis for respondent's Eighth Amendment mental-retardation claim was unavailable at the time of his state court proceedings, and therefore excuses his procedural default, even though precisely the same claim was available under state law at the time of his trial, conviction, and appeal.

AEDPA: Ineffective Assistance of Counsel

07-683 *Schriro v. Lopez* (9th Cir.)

BIO filed 12/26. Dist. for 2/15. Cert. denied 2/19.

1. Did the Ninth Circuit disregard this Court's long-standing jurisprudence relating to the doctrines of exhaustion and procedural default when it determined that Lopez had properly exhausted all of his ineffective assistance of counsel claims?

2. Did the Ninth Circuit err by rejecting the district court's finding that Lopez did not establish a claim for relief under *Strickland*, when Lopez failed to establish in state court how he was prejudiced by counsel's alleged deficient performance, notwithstanding the opportunity to develop his claim in a 4-day evidentiary hearing?

Due Process: Punitive Damages

07-793 United American Insurance Company v. Merrill (Miss.)

BIO 1/14, reply 1/22. Dist. for 2/15. Cert. denied 2/19.

This case presents the same issue that this Court addressed in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007): “[W]hether the Constitution’s Due Process Clause permits a jury to base [a punitive-damages] award in part upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent).” *Id.* at 1060 (emphasis in the original).

The specific question presented is whether this Court should GVR for further consideration in light of *Williams*.

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. Lost 8-1 (2/20/08).

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.

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) and 06-1498 *Warner-Lambert v. Kent* (arg. 2/25). Dist. for 1/18. Cert. granted 1/18.

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.

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 of Public Citizen 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, Brian Wolfman and Scott Nelson of Public Citizen are co-counsel for the respondent.

Respondents’ Merits Brief

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. Arg. 3/19.

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?

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. Dist. for 1/11. Cert. granted 1/11. Arg. 4/16.

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

[Cert Petition](#)

[Reply Brief](#)

[Opening Brief \(Merits\)](#)

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?

Environmental Law: Standing / Nationwide Injunction

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

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

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?

Preemption: Cigarette Labeling

07-562 Philip Morris USA, et al. v. Good (1st Cir.)

BIO filed 12/28, reply 1/2. Amici R.J. Reynolds Tobacco Co. and U.S. Chamber of Commerce, 11/28. Dist. for 1/18. Cert. granted 1/18.

Scott Nelson, Brian Wolfman, and Allison Zieve of Public Citizen are assisting the respondents.

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