



ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

**CERT. PETITIONS OF PUBLIC INTEREST
FEBRUARY 29, 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.

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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.

FEBRUARY 29 CONFERENCE

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). Re-listed for 2/22. Re-listed for 2/29.

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?

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?

PENDING FOR UPCOMING CONFERENCES

Criminal Law: Confrontation Clause

07-591 Melendez-Diaz v. Massachusetts (Mass.)

CFR 12/6. BIO 2/5, reply 2/19. Amici Professors Pamela R. Metzger, et al.; Richard D. Friedman, 12/3. Dist. for 3/14.

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

ERISA: “Accrued Benefits”

07-906 Rohm and Haas Pension Plan v. Williams, et al. (7th Cir.)

BIO 2/7, reply 2/19. Amici U.S. Chamber of Commerce, Nat’l Ass’n of Manufacturers, 2/8. Dist. for 3/14.

Whether a cost-of-living adjustment that a defined benefit pension plan has the discretion to provide to participants who elect to receive their benefits as a monthly annuity payment and that is explicitly excluded from the plans definition of “accrued benefit” nevertheless constitutes part of every participant’s “accrued benefit” under ERISA, 29 U.S.C. § 1002(23)(A), and therefore must also be provided to participants who select a one-time lumps-sum distribution of their benefits.

Fair Labor Standards Act: Compensation for “Donning and Doffing”

[07-910](#) Anderson, et al. v. Cagle’s, Inc, et al. (11th Cir.)

BIO 2/7, reply 2/20. Dist. for 3/14.

Whether the court of appeals erred in holding that the time petitioners spent donning and doffing protective equipment was excluded from mandatory compensation under Section 3(o) of the Fair Labor Standards Act?

CALL FOR RESPONSE

PENDING CFR

5th Amendment: Double Jeopardy

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

CFR 11/14. BIO 2/13, reply 2/20.

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

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 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?

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 and 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.

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.

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.

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.

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* (arg. 2/25).

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 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.

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.

Criminal Law: “Violent Felony”

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

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

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

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.

CERTIORARI GRANTED

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. Cert. granted 2/25.

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.

4th Amendment: Passenger Search

[07-542](#) *Arizona v. Gant* (Az.)

CFR 12/11. BIO 1/24, reply 2/5. Dist. for 2/22. Cert. granted 2/25.

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

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. Cert. granted 2/25.

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?

CERTIORARI DENIED

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). Cert. denied 2/25.

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.

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. Cert. denied 2/25.

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?

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. Cert. denied 2/25.

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. Cert. denied 2/25.

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. Cert. denied 2/25.

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. Cert. denied 2/25.

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. Cert. denied 2/25.

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

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?