ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT

CERT. PETITIONS OF PUBLIC INTEREST
May 13, 2010

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about this list

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 some chance of a grant. SCAP also offers pro bono assistance to litigants involved in some cases.

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WATCH LIST CONTENTS

ISSUE INDEX

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/08ordersofthecourt.html

✓ **Alan Morrison Supreme Court Assistance Project of Public Citizen:**
http://www.citizen.org/litigation/SupremeCourt. SCAP Information.

✓ **SCOTUS Blog:**
http://www.scotusblog.com. Frequent Supreme Court Updates.

✓ **Office of the Solicitor General:**
http://www.usdoj.gov/osg. Briefs Filed by the United States.

KEY TERMS & ABBREVIATIONS

Petition for Certiorari *"Cert" Petition*	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 *grant* 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 *deny* cert.
BIO *Brief in Opposition*	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 *Call For a Response*	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. *Conference*	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 *Call for the Views of the Solicitor General*	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**.
Dist. *Distributed*	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 *Granted, Vacated, and Remanded*	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 *Question/s Presented*	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.

MAY 13TH CONFERENCE

09-697 Robinson v. Lehman (9th Cir.) **Fourth Amendment: Excessive Force**
CFR 3/18. BIO 4/14. Reply 4/26. Dist. for 5/13.

1. Viewed in a light most favorable to plaintiff, was it objectively reasonable for defendant officers to believe the lethal risks presented by Lehman justified deadly force where Lehman nearly killed several officers in a pursuit, was non-compliant once stopped by a dangerous PIT maneuver, slashed at officers with a knife and backed up at full throttle nearly crushing an officer in an apparent attempt to hit the officer and escape while numerous law enforcement officers were around Lehman and rush hour traffic was stopped in both directions on a major highway?
2. Were the defendant officers improperly denied qualified immunity 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 significant risk of highly dangerous vehicular flight?

09-750 Textron Inc. v. U.S. (1st Cir.) **Civil Procedure: Work-Product Privilege**
BIO 4/12. Reply 4/26. Dist. for 5/13.

Whether the work-product privilege in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation.

09-830 Contreras-Martinez v. Holder (4th Cir.) **Immigration Law: "Particular Social Group"**
BIO 4/14. Reply 4/26. Dist. for 5/13.

Under the Immigration and National Act (INA), 8 U.S.C. 1101(a)(42)(A), an alien qualifies as a "refugee" and therefore is eligible for asylum if, *inter alia*, the alien is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of * * * membership in a particular social group." The question presented is as follows:
Whether a group must be "socially visible" and "particularized," as the Board of Immigration Appeals requires, in order to qualify as a "particular social group" for purposes of the INA.

09-862 Magyar v. Mississippi (Miss.) **Criminal Law: Sex Offender Registration**
CFR 3/16. BIO 4/15. Dist. for 5/13.

Do the due process principles of the Fifth Amendment to the United States Constitution require that trial courts advise criminal defendants of mandatory lifetime sex offender registration prior to accepting a guilty plea to a sex offense?

09-868 Wall v. Kholi (1st Cir.) **Habeas Corpus: Tolling**
CFR 3/17. BIO 4/15. Reply 4/26. Dist. for 5/13.

Does a state court sentence-reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. 2244(d)(2), thus tolling AEDPA's

one-year limitations period for a state prisoner to file a federal habeas corpus petition, an issue as to which there is a 3-2 circuit split?

09-929 Hargrove v. U.S. (7th Cir.) **Honest Services Fraud: Private Gain**
BIO 4/7. Reply 4/9. Dist. for 5/13.
(NOTE: Will likely be held for 08-1394 *Skilling v. U.S.*)

1. Whether 18 U.S.C. § 1346, by omitting comprehendible standards concerning "intangible rights and honest services" in private actor cases, renders petitioner's private actor convictions invalid because § 1346 is unconstitutional, pursuant to this Court's Fifth Amendment's void for vagueness jurisprudence, based on the absence of fair notice regarding prohibited conduct which creates an undue risk of arbitrary and discriminatory criminal enforcement.
2. Whether petitioner's convictions for conspiring to violate federal mail and wire fraud statutes, where those convictions incorporated - honest services and intangible rights - should be reversed where the trial court refused to charge the jury that petitioner's "compensation" as a corporate officer/employee did not comprise "private gain."

09-940 U.S. v. Juvenile Male (9th Cir.) **Ex Post Facto: Sex Offender Registration**
BIO 4/13. Reply 4/27. Dist. for 5/13.

Whether the application of the registration and notification provisions of the Sex Offender Registration and Notification Act (SORNA) to a juvenile who was adjudicated delinquent under the Federal Juvenile Delinquency Act before SORNA's enactment violates the Ex Post Facto Clause of the Constitution.

09-1059 Electronic Trading Group, LLC. v. Banc of America Securities LLC (2nd Cir.) **Antitrust Law: Prime Brokers**
BIO 4/7. Reply 4/15. Dist. for 5/13.

1. Does a Second Circuit decision immunizing Wall Street prime brokers from the antitrust laws materially conflict with this Court's recent holding in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007)?
2. Should a court of appeals, without statutory interpretation and without hearing the views of any of the agencies concerned, delineate jurisdictional boundaries between different federal agencies in the context of a private dispute?
3. Can enforcement of the antitrust laws prohibiting price-fixing properly coexist with securities regulation in the arena of securities short selling?

09-1085 Louisiana v. Goza (La. Ct. App.) **Civil Procedure: Accident Reports**
BIO 4/7. Dist. for 5/13.

When state and local law enforcement officers, in conjunction with their traditional accident investigation duties, compile highway hazards data in uniform motor vehicle accident reports which are funded, designed, and formatted by the Louisiana Department of Transportation and Development using federal highway safety funds, and where those officers are trained with federal safety funds in accurately compiling the safety data, all for the purpose of gathering highway hazards data pursuant to the mandate of

the Hazard elimination program of 23 U.S.C. § 152, do those reports constitute "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident cites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title [title 23 of the United States Code] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds" such that "they shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data"?

09-1092 Williams v. Louisiana (La.) **Criminal Law: Death Penalty**
BIO 4/9. Reply 4/21. Dist. 5/13.

Whether the Petitioner's death sentence violates the Fifth, Sixth, Eighth, or Fourteenth Amendment where: (1) the Louisiana Supreme Court failed to provide meaningful appellate proportionality review; and (2) the jury did not determine beyond a reasonable doubt that death should be imposed.

09-1104 Whittier v. Kobayashi (11th Cir.) **Fourth Amendment: "Knock and Announce"**
BIOs 4/12, 4/15. Reply 4/26. Dist. for 5/13.

Whether in light of the precedents of this Court and the rulings of many other Circuits it is clearly established law that the suspicion of drugs and weapons in the home does not create a blanket exception excusing police from the Fourth Amendment requirement of knocking and announcing before entering a residence.

09-1105 AIG Baker Sterling Heights, L.L.C. v. Am. Multi-Cinema (11th Cir.) **Arbitration: Court Review**
BIO 4/15. Dist. for 5/13.

Does the Federal Arbitration Act preclude a federal court from using Rule 60(B) to review the merits of an arbitration award after entering judgment confirming the award when no basis for disturbing the award exists under §§ 10 or 11 of the FAA?

PENDING FOR UPCOMING CONFERENCES

08-1314 Williamson v. Mazda Motor of Am. (Cal. Ct. App.) **Preemption: Motor Vehicle Safety Standards**
BIO 6/25. Dist. for 9/29. CVSG 10/5. SG br. 4/23.
Sup. br. of Resp. 5/4. Dist. for 5/20.

Allison Zieve of Public Citizen is assisting counsel for petitioner.

1. Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

2. Under this Court's recent ruling in *Wyeth v. Levine*, does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

08-1438 Sossamon v. Texas (5th Cir.) **RLUIPA: Eleventh Amendment**
BIO 7/22. Reply 8/4. Dist. for 10/30. CVSG 11/2. SG br. 3/18.
Dist. for 4/16. Supp. br. of Pet. 3/31. Supp br. of Resp. 4/1.
Letter of Pet. 4/12. Re-listed for 5/20.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides an express private right of action to "obtain appropriate relief against the government." 42 U.S.C. § 2000cc-2. The statute defines "government" to include state and local governmental entities and any "official of [such] an entity." *Id.* § 2000cc-5(4)(A). The Fifth Circuit held, in conflict with the decisions of other courts, that the Constitution prohibits Congress from authorizing damages claims against states, or against state officials in their individual or personal capacities, for violations of the statute. The question presented is whether states and state officials may be subject to suit for damages for violations of RLUIPA.

09-109 Cardinal v. Metrish (6th Cir.) **RLUIPA: Eleventh Amendment**
BIO 9/28. Reply 10/14. Dist. for 10/30. CVSG 11/2. SG br. 3/18.
Dist. for 4/16. Letter of Resp. 4/1. Letter of Pet. 4/12. Re-listed for 5/20.

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. Exacerbating a circuit split, the Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against states and state officials in their official capacities. The question presented is:

Whether states and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

09-617 Basham v. U.S. (4th Cir.) **Criminal Law: Juror Misconduct**
BIO 4/26. Dist. for 5/27.

1. Whether the jury foreperson's conduct during the penalty phase of a capital trial – which included calling three local television stations and two newspapers, seeking more publicity about the case, expressing "concern" and "fear" that her fellow jurors would not impose the death penalty, and requesting an on-camera interview after the verdict was returned – was a structural error that requires a new sentencing hearing without an independent showing of prejudice.

2. Whether the prosecution properly was required, but failed, to overcome a presumption of prejudice when the jury foreperson had lengthy phone conversations during trial with news organizations about the case and demonstrated that she was neither impartial nor disinterested, the foreperson later gave perjured testimony about those calls, and significant uncertainty remains whether the foreperson received extrajudicial information.

3. Whether, in a case involving admitted and extreme juror misconduct, the District Court improperly restricted investigation into 71 phone calls (totaling nearly 18 hours) that the jury foreperson made during trial to two other jurors, some of which occurred after the foreperson called five media outlets, because that type of inquiry might reveal "romantic relationships" between jurors.

09-745 Andrews v. Fairley (7th Cir.) **First Amendment: Prior Restraint**
CFR 2/17. BIO 4/19. Reply 4/29. Dist. for 5/20.

Whether the doctrine of Prior Restraint makes actionable harassment or physical "threats of punishment" alleged to have been made to "discourage future speech."

09-803 Denson v. U.S. (11th Cir.) **Federal Tort Claims Act: Fetal Injuries**
BIO 5/7.

1. Whether, notwithstanding state law to the contrary, the injuries and claims of a child who was injured as a fetus, but born alive, are necessarily derivative of his mother's injuries and claims under the Federal Tort Claims Act.

2. Whether, under the Federal Tort Claims Act, the standards for liability for intentional torts committed by federal law enforcement officers are determined solely by federal law.

3. Whether a subsequent appellate panel can conclude that government officials are entitled to qualified immunity, as a matter of law, when a prior appellate panel had concluded that they were not entitled to qualified immunity, as a matter of law.

09-812 Ileto v. Glock, Inc. (9th Cir.) **Preemption: Firearms**
BIOs 4/23. Reply 5/4. Dist. for 5/20.

1. Whether the "predicate exception" of the Protection of Lawful Commerce in Arms Act ("PLCAA") for conduct that violates state statutes "applicable to" the marketing or sales of firearms encompasses the violation of state statutes that apply to firearms sales and marketing practices, or instead is limited to the violation of statutes expressly and exclusively regulating firearms sales and marketing?

2. Whether Congress may, consistent with the Due Process and Takings Clauses, abrogate an accrued and pending right of action recognized to be "property" under state law, without providing any alternative remedy, compensation, or means of recovering from the wrongdoer?

3. Whether a statute like the PLCAA that retroactively removes all legal means of redress for an accrued and cognizable state-law tort claim, without providing an alternative remedial scheme, is subject to mere rational basis review or instead is subject to more searching scrutiny?

4. Whether Congress violated separation-of-powers or federalism principles in enacting the PLCAA, purportedly under its Commerce Power, by which it strips state and federal courts of jurisdiction over a plaintiff's accrued and pending state-law tort claims, while providing no alternative remedial scheme, having found that such claims are "based on theories without foundation in hundreds of years of the common law"?

09-821/09-953 Sisney v. Reisch/Reisch v. Sisney (8th Cir.)

09-821: **Preemption: Airlines**

Letter of Pet. 3/26. BIOs 4/9, 4/12. Replies 5/3. Dist. for 5/20.

The Airline Deregulation Act of 1978, as amended, 49 U.S.C. § 41713(b)(1), preempts state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." In this case, Texas courts declined to preempt an airlines' business tort claims made against persons engaged in commerce with the airlines' frequent flyer miles. The questions presented are:

1. Whether 49 U.S.C. § 41713(b)(1) only preempts claims against certificated air carriers.

2. If preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim against a particular person is preempted.

3. Whether 49 U.S.C. § 41713(b)(1) preempts state business tort claims that act as a "law, regulation, or other provision having the effect of law related to a price, route, or service of an air carrier."

09-953: **Spending Clause: State Prisons**

BIOs 4/16, 4/19. Reply 5/3. Dist. for 5/20.

Whether federal spending for state prisons violates the "general Welfare" limitation of the Spending Clause, and this Court's precedent in *United States v. Butler* and *South Dakota v. Dole*, because it constitutes spending for local, rather than national purposes, and because it intrudes upon the states' police power, which is a core function of government, traditionally reserved to the states?

09-837 Mayo Foundation v. U.S. (8th Cir.) **Social Security: Medical Residents**

BIO 4/19. Reply 5/3. Dist. for 5/20.

Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 29 U.S.C. § 3121(b)(1), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university."

09-852 Sch. Dist. of the City of Pontiac v. Secretary of U.S. Dep't of Educ. (6th Cir.) **Spending Clause: No Child Left Behind**
BIO 5/7.

Whether, given Section 9527(a) of the No Child Left Behind Act, Congress provided clear and unambiguous notice, as required by this Court's Spending Clause jurisprudence, that the acceptance of funds under the Act by States and school districts is conditioned upon an obligation that they spend their own funds and incur costs to comply with the requirements of the Act even if the Federal funding provided under the Act falls far short of paying for the costs of satisfying those requirements.

09-882 Ruelas v. Wolfenbarger (6th Cir.) **Criminal Law: Harmless Error**
CFR 2/16. BIO 4/21. Reply 5/3. Dist. for 5/20.

Whether an involuntary guilty plea is subject to harmless-error review.

09-908 Cooney v. Rossiter (7th Cir.) **Section 1983: Judicial Immunity**
BIOs 3/31, 4/23. Dist. for 5/20.

Whether the Seventh Circuit Court of Appeals erred in finding as a matter of law that court-appointed custodial evaluators and child representatives are entitled to absolute quasi-judicial immunity in claims brought against them under 42 U.S.C. § 1983, despite the fact that these positions did not exist in 1871 and there were no functional equivalents to these positions that were afforded absolute immunity in 1871, when section 1983 was enacted.

09-911 R. J. Reynolds Tobacco Co. v. State of Montana ex rel. Bullock (Mont.) **Arbitration: Tobacco Lawsuits**
BIO 4/26. Dist. for 5/27.

Whether the Montana Supreme Court violated the Federal Arbitration Act by refusing to compel arbitration of a dispute that courts of 47 other States and Territories have held arbitrable under the plain terms of the nationwide Master Settlement Agreement between tobacco companies and settling states.

09-948 Jones v. Williams (10th Cir.) **Habeas Corpus: Plea Agreements**
BIO 5/3.

Respondent was convicted of first-degree murder following a fair trial and received a sentence of life without the possibility of parole. The Oklahoma Court of Criminal Appeals held, however, that his Sixth Amendment right to counsel was violated because his counsel improperly rejected a pre-trial plea offer for a 10-year sentence in exchange for a guilty plea to second-degree murder. To remedy that Sixth Amendment violation, the Oklahoma Court modified his sentence to life with the possibility of parole - the lowest sentence for first-degree murder under Oklahoma law. The Tenth Circuit granted habeas relief on the ground that the remedy was constitutionally inadequate. The question presented is:

Did the Tenth Circuit contravene the limits Congress imposed in 28 U.S.C. § 2254(d)(1) when it granted habeas relief on the ground that the remedy the Oklahoma Court of Criminal Appeals gave was constitutionally inadequate, even though this Court has not clearly established what remedy, if any, is

appropriate for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?

09-958 Maxwell-Jolly v. Ind. Living Ctr. of S. Cal., Inc. (9th Cir.) **Preemption: Medicaid Act**
BIOs 4/19. Reply 4/30. Dist. for 5/20.

Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in Gonzaga University v. Doe, 536 U.S. 273 (2002), concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the text of the statute, and because the reductions were motivated by budgetary considerations. The questions presented are:

1. Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates?

2. Whether a state law reducing Medicaid reimbursement rates may be held preempted by § 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute?

09-962 LaSalle Group Inc. v. Trustees of the Detroit Carpenters Fringe Benefit Funds (6th Cir.) **Labor Law: Collective Bargaining**
BIO 4/20. Reply 5/3. Dist. for 5/20.

Does the alter ego doctrine prohibit a finding that prior employer LaSalle Group, Inc., a non-union construction company that properly terminated a collective bargaining agreement negotiated under §8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), can be held to all the provisions of subsequent employer Industrial Contracting, LLC's collective bargaining agreement executed after LaSalle terminated, absent evidence that nonunion LaSalle was a disguised continuance of union Industrial?

09-987/09-988/09-991 Arizona Christian Sch. Tuition Org. v. Winn/ Arizona Christian Sch. Tuition Org. v. Winn/Garriott v. Winn (9th Cir.) **First Amendment: Religious Schools**
BIOs 4/23. Replies 5/3. Dist. for 5/20.

09-987:

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents' alleged injury–which is solely based on the theory that Arizona's tax credit reduces the state's revenue–too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where to donate their private money?

09-988:

In direct conflict with this Court's precedents, and a factually indistinguishable Arizona Supreme Court decision, the Ninth Circuit declared that an educational tax credit program that permits–but in no way encourages or promotes–donations to religious scholarship-granting organizations has the unconstitutional purpose and effect of advancing religion. The questions presented are:

1. May courts reject as a sham a legislature's stated secular purpose for enacting a tax credit simply because it allows taxpayers to choose among religious or nonreligious charities in making their donations?

2. Does a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorse or advance religion simply because the tax-payers choose to direct more contributions to religious organizations that non-religious ones.

09-991:

Under Arizona Revised Statutes (A.R.S.) Section 43-1089, individuals who contribute money to school tuition organizations (STOs) that provide scholarships to students wishing to attend private schools are entitled to an income tax credit. Respondents alleged that Section 1089's neutral language and the Legislature's stated secular purpose for enacting it were a pretense and that the tuition tax credit had the primary effect of advance religion because a majority of taxpayers who contributed to STOs chose to contribute to STOs that awarded scholarships to students attending religious schools. The question presented is the following:

Did the court of appeals err in holding that if most taxpayers who contribute to STOs contribute to STOs that award scholarships to students attending religious schools, Section 1089 as the prupose and effect of advancing religion in violation of the Establishment Clause even though Section 1089 is a neutral program of private choice on its face and the State does nothing to influence the taxpayers or the STOs' choice?

09-993/09-1039 PLIVA, Inc. v. Mensing/Actavis Elizabeth, LLC v. Mensing (8th Cir.) **Preemption: Generic Drugs**

CFR 3/22. BIOs 4/21. Replies 5/3, 5/4. Dist. for 5/20.

09-993:

Whether the Eighth Circuit abrogated the Hatch-Waxman Amendments by allowing state tort liability for failure to warn in direct contravention of the Act's requirement that a generic drug's labeling be the same as the FDA-approved labeling for the listed (or branded) drug.

09-1039:

The Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Amendments" to the Food, Drug and Cosmetic Act (FDCA)) and its implementing regulations require a generic drug manufacturer to maintain the labeling for a generic the "same as" the labeling for the "brand" or "listed" drug that is its bioequivalent. The question presented is whether the Eighth Circuit Court of Appeals misinterpreted that requirement and the doctrine of conflict preemption when it concluded that generic drug manufacturers could be held liable under state law for failing to strengthen the warnings in the labeling for the generic drug.

09-1006 Microsoft Corp. v. Lucent Techs. (Fed. Cir.) **Patent Law: Infringement**
BIO 4/23. Reply 5/3. Dist. for 5/20.

1. Whether a jury verdict of patent infringement can stand when it is supported only by speculative "evidence" and lawyer argument, or whether the standards for entry of judgment as a matter of law that apply in all other federal cases should apply equally in patent cases.
2. Whether a new trial is required in a patent infringement case, as in all other cases, when the verdict is found to be contrary to the weight of the evidence.

09-1011 Trull v. Feinberg (Ill.) **State Action: Restrictive Trusts**
BIO 4/26. Reply 5/5. Dist. for 5/27.

Does state court enforcement of a testamentary trust instrument that disqualifies and deems "deceased" a beneficiary who later marries "outside" of a specific religious faith violate the Equal Protection and Establishment Clauses of the United States Constitution?

09-1028 Clifford v. Missner (Ill. App. Ct.) **First Amendment: Attorney Speech**
BIO 4/28. Dist. for 5/27.

1. Can state defamation law, consistent with the First and Fourteenth Amendments, force a lawyer to refrain from ethically permitted speech in zealously representing a client in order for the lawyer to avoid the threat of personal liability?
2. Are statements to the press, issued by a law firm and merely repeating the allegations in a client's complaint, protected expressions under the First and Fourteenth Amendments, as the public would reasonably understand that the statements are not facts that have already been established in court?

09-1052 Keith v. Ohio (Oh. App. Ct.) **Criminal Law: Withheld Evidence**
BIO 4/30. Dist. for 5/27.

When a death-sentenced defendant discovers withheld evidence of his innocence, does a state court act contrary to this Court's decisions when it denies relief by relying on the sufficiency of the evidence presented a trial?

09-1097 Peck v. Baldwinsville Cent. Sch. Dist. (2nd Cir.) **First Amendment: Student Speech**
BIO 5/6.

1. Whether a student can be denied standing to continue his challenge of school officials' censorship of religious viewpoint in the student's work when the student remains enrolled in the school district and subject to the district-wide policy which results in viewpoint discrimination.
2. Whether a court of appeals can effectively overrule *Tinker v. Des Moines Independent Community School District* by holding that a student must show that a school district regularly violates students' free speech rights in order to maintain a challenge of school censorship of religious viewpoint in the student's work.

3. Whether a court of appeals can use a procedural rule specifying the requirements for an appellate brief to find that a First Amendment claimant involuntarily waived his right to seek damages for deprivation of his free speech rights when he failed to mention damages in his brief.

09-1111 City of Los Angeles v. County of Kern (9th Cir.) **Dormant Commerce Clause: Standing**
BIO 4/30. Dist. for 5/27.

Whether the Ninth Circuit erred in holding that an in-state plaintiff lacks prudential standing under the "zone of interest" test to assert a dormant Commerce Clause challenge to a local ordinance that impedes the flow of commerce, contrary to the holdings of the First and Eighth Circuits.

09-1125 Glenn Allen Adair DBA Super D 229 v. Lease Partners, Inc. (5th Cir.) **Civil Procedure: Pendent Jurisdiction**
BIO 4/19. Reply 5/3. Dist. for 5/20.

Did the Fifth Circuit err in holding, contrary to this Court's reasoning in *Carnegie-Mellon University v. Cohill*, and contrary to the decisions of the Second, Third, Eighth, Ninth, and Tenth Circuits, that 12 U.S.C. § 1819(b)2() strips the District Court of its discretion to remand pendent state law claims against parties unrelated to the FDIC, even after the FDIC is dismissed?

09-1128 Segal v. Fifth Third Bank, N.A. (6th Cir.) **Preemption: Securities Law**
BIO 4/19. Reply 4/29. Dist. for 5/20.

Did the Sixth Circuit err in holding that, in conflict with other circuits, a class action alleging traditional state-law breach of fiduciary duty and contract claims that are not premised on any misrepresentation, omission, or other deceptive conduct that could violate the federal securities laws or induce the purchase, sale, or retention of a security, is precluded by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §78bb(f)(1), if any conduct incidental to those claims involved a transaction in a security?

09-1145 Max v. Republican Comm. of Lancaster County (3d Cir.) **State Action: Political Parties**
BIO 4/22. Dist. for 5/20.

1. Whether political parties are state actors during primary elections where the State has granted the party a role in the election process by giving the party the right to have their candidates appear with party endorsement on the general election ballot.
2. Whether the state action doctrine applies with equal force to political parties exercising delegated state power during primary elections in violation of the First Amendment as it does when parties exercise that power in derogation fo the Fifteenth Amendment.

09-1147 Lohman v. Borough (3rd Cir.) **Attorney's Fees: Settlement Negotiations**
BIO 4/21. Dist. for 5/20.

1. Whether the Supreme Court will endorse the holdings of the 2nd, 4th and 10th Circuits that "settlement negotiations" cannot be used to reduce a fee petition or the 3rd and 7th Circuits' pronouncement that "settlement negotiations" even when not FRCP 68, Offers of Judgment, can be used to reduce a fee request?

2. Whether an enhancement is warranted in cases in which defendants make a lower settlement offer than the jury verdict?

3. Whether hourly rates from the defense bar can rebut the market rate of plaintiff's counsel.

09-1186 Ferguson v. McNeil (11th Cir.) **Habeas Corpus: Ineffective Assistance**
BIO 4/29. Dist. for 5/27.

1. Whether the Eleventh Circuit's decision, which issued three months before this Court summarily reversed a different Eleventh Circuit opinion applying the same rule of decision, should likewise be summarily reversed or, at the least, vacated and remanded for further consideration in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009).

2. Whether the Eleventh Circuit correctly held—in conflict with decisions of this Court and at least four other circuits—that a petitioner suffers no prejudice where (i) his counsel failed to present any significant mitigation evidence during a capital-sentencing hearing and (ii) there existed substantial evidence concerning the petitioner's acute mental-health deficiencies and history of childhood abuse and privation.

3. Whether, in conflict with this Court's decisions, the Eleventh Circuit correctly held that a jury instruction to consider only statutory mitigation evidence in direct violation of *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), was harmless error.

09-1199 Bapte v. W. Caribbean Airways (11th Cir.) **International Law: *Forum Non Conveniens***
BIO 5/5.

1. Did the District Court err in applying *forum non conveniens* to the Montreal Convention claims brought by Petitioners when Petitioners are given the express right to select jurisdiction under the treaty?

2. Did the District court err in allowing Newvac to confess to liability only to then apply a *forum non conveniens* venue analysis, limited only to damage claims, which resulted in dismissal to Martinique?

CALLS FOR RESPONSE

NEW CFR

09-1115 Sammis v. Nance (8th Cir.) **Section 1983: Failure to Act**
CFR 5/7, due 6/7.

1. Whether the Eighth Circuit departed from established principles of qualified immunity in holding that a police officer may be held liable on a claim under 42 U.S.C. § 1983 for failing to act to prevent another officer's use of force where the use of force occurred such that a reasonable officer faced with the same circumstances would not have had a realistic opportunity to intervene.

2. Whether the commands "get on the ground, drop the gun" are sufficient to satisfy the warning required to be given prior to the use of deadly force.

3. Whether a party's self-serving testimony that contradicts his or her prior statement is sufficient to create a fact question and thereby avoid an adverse summary judgment ruling on the defense of qualified immunity.

09-1131 Morgan v. Plano Indep. Sch. Dist. (5th Cir.) **First Amendment: Student Speech**
CFR 4/28, due 5/28.

Whether the constitutionality of a public school district's student speech policy imposing a sweeping ban on the distribution of any written material should be evaluated under the "substantial disruption" standard established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which this Court has generally applied to restrictions on student speech, or whether because the student speech policy is facially content- and viewpoint-neutral, it should be evaluated under the less exacting "intermediate scrutiny" standard established in *United States v. O'Brien*, 391 U.S. 367 (1968), which this Court has applied to restrictions on expressive conduct that have only an incidental effect on First Amendment freedoms.

09-1143 Wilson v. Johnson (4th Cir.) **Civil Procedure: Appeal of Denial of Counsel**
CFR 5/4, due 6/3.

Whether the denial of the appointment of counsel in a civil case is an order that is immediately appealable.

PENDING CFR

09-866 Pendergrass v. Indiana (Ind.) **Sixth Amendment: Confrontation Clause**
CFR 3/10, due 5/10 (ext.).

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analysis through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

09-875 Raff v. California (Cal. Ct. App.) **Fifth Amendment: Pre-Arrest Silence**
CFR 3/16, due 5/17 (ext.).

Petitioner Joshua Raff was detained by a police officer, and when asked inquisitorial questions, stood silent. He was immediately handcuffed and formally arrested. He did not testify at trial, yet this silence was the subject of testimony by the police officer during the state's case-in-chief and argument by the prosecutor to the jury that they should affirmatively consider it as evidence of guilt.

The constitutionality of using silence in this question was specifically left undecided in Jenkins v. Anderson, 447 U.S. 231, 236 n.2 (1980): "Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment" and has resulted in a split of decisions among the Circuit Courts and the courts of several states.

Does the state violate a Defendant's Fifth Amendment "right to remain silent," as applied to the states by the Due Process Clause of the Fourteenth [sic], by 1) eliciting testimony from the arresting police officer in their [sic] case-in-chief and over objection that during his initial detention the defendant said nothing in response to the officer's inquisitorial questions, and 2) the prosecutor arguing to the jury that such silence should be affirmatively considered as substantive evidence of his guilt?

09-951 Nat'l Right to Work Legal Defense Found. v. UNITE (3rd Cir.) **Labor Law: Driver's Privacy Protection Act**
CFR 4/13, due 6/14 (ext).

Does the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq.*, prohibit courts from authorizing the disclosure of evidence of violations of the Driver's Privacy Protection Act?

09-996 Walker v. Martin (9th Cir.) **Habeas Corpus: Delay**
CFR 3/29, due 5/19 (ext.).

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

09-1027 City of New Albany, Ind. v. New Albany DVD (7th Cir.) **First Amendment: Zoning**
CFR 4/13, due 5/13.

The First Amendment allows a city to regulate the location of sexually oriented businesses based on any evidence "reasonably believed to be relevant" to the city's interest in preventing the negative secondary effects of such businesses. City of Renton v. Playtime Theatres, Inc., 475 U.S. 31 (1986) (upholding 1,000-ft buffer from churches, schools, and residences); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (reaffirming deferential Renton standard). New Albany, Indiana relies upon eighteen land use and crime impact reports, seventeen judicial decisions, eyewitness observations of adverse impacts, and expert testimony in defending its Renton-type regulation prohibiting respondent's adult bookstore from operating at its chosen cite–adjacent to a residence and across the street from a church. The Seventh Circuit (Easterbrook, C.J.), after observing "the problems of interpretation and application created by the fractured

decision in Alameda Books," held that the City had not sufficiently supported its regulation. The question presented is:

Does the legal standard applied by the Seventh Circuit–that the City must prove "that the restrictions actually have public benefits great enough to justify" an ordinance targeting secondary effects–contravene this Court's precedents?

09-1067 McFadin v. Gerber (5th Cir.) **Civil Procedure: Personal Jurisdiction**
CFR 4/27, due 5/27.

1. Whether the *Calder* "effects" test requires tortious conduct to be aimed specifically at the forum state as opposed to at a known forum resident to establish personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

2. Whether *Burger King* allows a court to ignore extensive and systematic electronic communications and transactions related to the performance of the contract at issue to establish personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

3. Whether parties are entitled to conduct limited jurisdictional discovery prior to an adverse ruling on a motion to dismiss for lack of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

09-1142 FIA Card Servs. v. Gorman (9th Cir.) **Preemption: Fair Credit Reporting Act**
CFR 4/21, due 5/21.

Deepak Gupta of Public Citizen is assisting counsel for respondent.

1. Whether Section 1681s-2(b) of the Fair Credit Reporting Act ("FCRA") makes unlawful a furnisher's failure to echo back to the consumer reporting agencies ("CRAs") a consumer dispute of which the CRA advised the furnisher, when the obligation to notify CRAs of disputes is expressly found [sic] Section 1681s-2(a), and FCRA's private rights of action are available to enforce violations of Section 1681s-2(b) but not Section 1681s-2(a).

2. Whether, as every court before the Ninth Circuit decision below had concluded, Section 1681t of FCRA, 15 U.S.C. § 1681t, preempts a California statute that creates a private damages remedy for violations of state law with respect to the obligations of furnishers of information to the CRAs.

09-1149 City of Warren v. Moldowan (6th Cir.) **Section 1983: Police *Brady* Claims**
CFR 4/20, due 5/20.

1. What standard governs the civil liability of a police officer on a claim that he violated a criminal defendant's right to due process by withholding exculpatory evidence?

2. In an interlocutory appeal, when a court of appeals awards qualified immunity to the only individual municipal defendant, does the court have jurisdiction to recognize that the municipality will be entitled to summary judgment on that basis?

09-1156 Matrixx Initiatives Inc. v. Siracusano (9th Cir.) **Securities Fraud: Drug Safety**
CFR 4/14, due 5/14.

Respondents filed suit under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, alleging that petitioners committed securities fraud by failing to disclose "adverse event" reports–i.e., reports by users of a drug that they experienced an adverse event after using the drug. The First, Second, and Third Circuits have held that drug companies have no duty to disclose adverse event reports until the reports provide statistically significant evidence that the adverse events may be caused by, and are not simply randomly associated with, a drug's use. Expressly disagreeing with those decisions, the Ninth Circuit below rejected a statistical significance standard and allowed the case to proceed despite the lack of any allegation that the undisclosed adverse event reports were statistically significant. The question presented is:

Whether a plaintiff can state a claim under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 based on a pharmaceutical company's nondisclosure of adverse event reports even though the reports are not alleged to be statistically significant.

09-1188 Skinner v. U.S. Dep't of Justice (DC Cir.) **Habeas Corpus: Exhaustion**
CFR 4/21, due 5/21.

Whether a prisoner's federal damages claims challenging disciplinary segregation and the loss of visitation rights and commissary privileges resulting from certain alleged prisoner misconduct – claims that otherwise could proceed without exhaustion of habeas remedies – nonetheless must be dismissed in favor of habeas because prison officials also chose to revoke good-time credits based on the same incident, and any challenge to the revocation of good-time credits would lie exclusively in habeas.

09-1191 Daniels v. U.S. (7th Cir.) **Fourth Amendment: Inevitable Discovery**
CFR 4/21, due 5/21.

Did the Circuit Court improperly interpret the inevitable discovery doctrine when it affirmed the admission of evidence seized during a warrantless search, where at the time of the search the police were not actively pursuing other lawful means to obtain a search warrant?

CALLS FOR THE VIEWS OF THE SOLICITOR GENERAL

NEW CVSG

09-920 Simmons v. Galvin (1st Cir.) **Voting Rights Act: Felon Disenfranchisement**
CFR 2/26. BIO 3/25. Dist. for 4/23.
Re-listed for 4/30. CVSG 5/3.

1. Does Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. 1973, apply to state felon disenfranchisement laws that result in discrimination on the basis of race?

2. Does the Massachusetts felon disenfranchisement scheme established in 2000 violate the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet had the right to vote prior to 2000?

PENDING CVSG

08-1515 Golden Gate Restaurant Ass'n v. San Francisco (9th Cir.) **ERISA: Preemption**
BIO 8/24. Reply 9/8. Dist. for 9/29. CVSG 10/5.

San Francisco's Health Care Security Ordinance–a "pay-or-play" law–mandates either ongoing employer contributions at set minimum rates for employee health-benefits or equal payments to the City's Health Access Program, along with extensive record-keeping and reporting and disclosure requirements. In a decision directly conflicting with Supreme Court ERISA preemption decisions, the Ninth Circuit rejected petitioner's ERISA-preemption challenge despite repeated *amicus* support by the Secretary of Labor. Identifying "an issue of exceptional national importance," an eight Judge dissenting opinion from denial of rehearing *en banc*, including Chief Judge Alex Kozinski, observed that the decision "creates a circuit split with the Fourth Circuit . . . , renders meaningless the [ERISA preemption] tests the Supreme Court set out in *Shaw v. Delta Airlines* . . . , and disregards the "need for nationally uniform plan administration." [sic] It also warned that the decision "will undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures, thereby creating the very kind of health care balkanization ERISA was intended to avoid." The Question Presented is:

Whether ERISA section 514(a), 29 U.S.C. § 1144(a) preempts local laws mandating ongoing employer contributions for employee health-benefits, or alternative payments to a local government, and extensive recordkeeping and reporting and disclosure requirements, a question on which the courts of appeals are in conflict.

09-1 Holy See v. Doe (9th Cir.) **Federal Jurisdiction: Foreign Sovereign Immunities Act**
CFR 9/15. BIO 10/15. Reply 10/27. Dist. for 11/13. CVSG 11/16.

Respondent John V. Doe seeks to hold petitioner Holy See, a recognized foreign sovereign, vicariously liable for sexual abuse committed by a Catholic priest in Portland, Oregon. To establish jurisdiction over a foreign sovereign, the tort exception of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(5), requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment[.]" This case presents the following question:

Whether the FSIA's tort exception confers jurisdiction when the tortious act itself falls outside the scope of the employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.

09-34 Pfizer v. Abdullahi (2d Cir.) **Alien Tort Claims Act: State Action**
BIO 8/10. Reply 8/25. Dist. for 9/29. Re-listed for 10/9.
Re-listed for 10/19. Re-listed for 10/30. CVSG 11/2.

1. Whether jurisdiction under the Alien Tort Statute ("ATS") can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law.

2. Whether, absent state action, a complaint that a private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar to new private causes of action" under the ATS recognized by the Supreme Court in *Sosa*.

09-115 Chamber of Commerce v. Candelaria (9th Cir.) **Preemption: Undocumented Alien Hiring**
BIO 9/28. Dist. for 10/30. CVSG 11/2.

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 525 U.S. 137, 147 (2002).

09-233 Triple-S Management Corp. v. Municipal Revenue Collection Center (P.R.) **Due Process: Retroactivity**
CFR 10/13. BIO 12/2. Reply. 12/14. Dist. for 1/8. CVSG 1/11.

For nearly 30 years, the executive branch invited specific reliance on its interpretation of law by issuing numerous authoritative, formal, and expressly binding rulings that a private entity was legally entitled to tax-exempt status as long as it complied with a long list of conditions. The executive branch then reversed its legal position. Rather than make that change prospective only, however, it reached back to impose 15 years of retroactive financial liability as well. The question presented is:

Is the executive branch, unlike the legislative branch, free of all due process constraints on retroactive government action, no matter how far back in time that retroactivity runs, how harsh and oppressive the retroactivity might be, how justified a private entity's reliance might be, or whether the government has any rational basis for making its change retroactive, as long as the executive branch asserts that its earlier interpretation of law was "wrong"?

09-291 Thompson v. North American Stainless, LP (6th Cir.) **Title VII: Third-Party Retaliation**
BIO 11/9. Reply 11/24. Dist. for 12/4. Re-listed for 12/11. CVSG 12/14.

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

1. Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member, or fiancé, closely associated with the employee who engaged in such protected activity?

2. If so, may that prohibition be enforced in a civil action brought by the third party victim?

09-329 Chase Bank v. McCoy (9th Cir.) **Truth in Lending Act: Regulation Z**
BIO 11/30. Reply 12/15. Dist. for 1/8. Re-listed for 1/15.
Re-listed for 1/22. CVSG 2/19.

Deepak Gupta and Allison Zieve of Public Citizen are co-counsel for respondent.
Brief in Opposition.

The Federal Reserve Board's Regulation Z, which implements the Truth in Lending Act, requires creditors to provide an initial disclosure statement, before any transaction on an open-end credit plan takes place, containing "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires that when a creditor later changes any term that it was required to disclosure in the initial disclosure statement, the creditor must "mail or deliver written notice" of that change in terms before the effective date of the change. 12 C.F.R. § 226.6(c). Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card amount. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate. The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.6(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

09-438 Providence Hosp. and Med. Centers v. Moses (6th Cir.) **EMTALA: Stabilization Requirement**
BIO 12/16. Dist. for 1/15. Re-listed for 1/22. CVSG 1/25.

Allison Zieve is assisting counsel for respondent.

1. Whether the Emergency Medical Treatment and Labor Act's, 42 U.S.C. § 1395dd ("EMTALA"), requirement that any individual who comes to a hospital's emergency department with an emergency medical condition be screened and stabilized should be expanded to continue indefinitely, after the individual has been admitted as an inpatient to the hospital for care or treatment?

2. Whether the CMS's regulation clarifying that EMTALA is inapplicable to hospital inpatients, 42 C.F.R. § 489.24(d)(2)(I), is valid, and applies retroactively?

09-520 CSX Transp., Inc. v. Alabama Dept. of Revenue (11th Cir.) **RRRRA: Tax Exemptions**
CFR 12/15. BIO 1/13. Reply 1/25. Dist. for 2/19. CVSG 2/22.

Whether a state's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge as "another tax that discriminates against a rail carrier" under Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4).

09-525 Janus Capital Group v. First Derivative Traders (4th Cir.) **Securities Fraud: Participatory Liability**
BIO 12/2. Reply 12/17. Dist. for 1/8. CVSG 1/11.

1. Whether the Fourth Circuit erred in concluding–in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits–that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.
2. Whether the Fourth Circuit erred in concluding–in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits–that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

09-529 Virginia Office for Protection and Advocacy v. Reinhard (4th Cir.) **Eleventh Amendment: *Ex Parte Young***
BIO 12/18. Reply 12/29. Dist. for 1/15. CVSG 1/19.

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

09-654 Ortho Biotech Prods. v. U.S. Ex. Rel. Duxbury (1st Cir.) **False Claims Act: Public Disclosure**
BIO 1/7. Reply 1/20. Dist. for 2/19. CVSG 2/22.

Greg Beck of Public Citizen is assisting counsel for respondent.

1. Whether a federal court lacks subject-matter jurisdiction over a *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, that repeats publicly disclosed allegations from prior litigation, where the FCA relator did not provide the government with information on the suit's allegations before the public disclosure.
2. Whether an FCA relator, alleging that the defendant induced a third party to submit false or fraudulent claims, can satisfy Rule 9(b) of the Federal Rules of Civil Procedure without identifying a single false or fraudulent claim, but merely by alleging facts sufficient to "strengthen the inference of fraud beyond possibility."

09-683 Carmichael v. Kellogg, Brown & Root Servs., Inc. (11th Cir.) **Justiciability: Military Contractors**
BIO 1/11. Dist. for 2/19. Re-listed for 2/26. Re-listed for 3/5.
CVSG 3/8.

1. Whether a private military contractor in Iraq should be afforded *de facto* immunity under the political question doctrine for catastrophically injuring a U.S. soldier in an automobile wreck during a routine convoy.

2. Whether a U.S. solider catastrophically injured in Iraq during a routine convoy can recover against a private military contractor when the civilian driver who caused the wreck was unqualified and overworked.

09-784/09-804 Amara v. CIGNA Corp., CIGNA Corp. v. Amara (2d Cir.) **ERISA: Disclosure Requirements**
BIOs 2/5. Replies 2/16. Dist. for 3/5. CVSG 3/8.

Allison Zieve of Public Citizen is assisting counsel for respondent Amara.

09-784:

1. Whether a district court, after finding violations of the advance notice of reduction requirement in ERISA §204(h), errs in concluding that it lacks the authority to require the prior benefit provisions to be reinstated.

2. Whether a district court, after finding that participants were promised "comparable" or "larger" future retirement benefits in a Summary of Material Modification that ERISA §102 requires to be accurate and understandable to the average plan participant, errs in concluding that it lacks the authority to require at least "comparable" future benefits to be provided.

09-804:

Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

09-944 Placer Dome, Inc. v. Provincial Gov't of Marinduque (9th Cir.) **Jurisdiction: Foreign Relations**
BIO 3/18. Reply 3/29. Dist. for 4/16. CVSG 4/19.

1. Did the Ninth Circuit's reversal of the district court's dismissal on grounds of *forum non conveniens* before deciding jurisdictional issues improperly restrict the discretion granted in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), and apply an incorrect standard of review?

2. Does federal question jurisdiction exist based on the federal common law of foreign relations where substantial foreign policy concerns are implicated, though not expressly stated on the face of the complaint? The Second, Fifth, and Eleventh Circuits extend jurisdiction in such cases but the Ninth Circuit applies a more restrictive test that excludes such cases from federal court.

09-960 Hogan v. Kaltag Tribal Council (9th Cir.) **Native American Law: Jurisdiction**
BIO 3/25. Reply 4/7. Dist. for 4/23. CVSG 4/26.

Whether the Ninth Circuit correctly held–in conflict with the decisions of this Court and other courts as well as with the express intent of Congress–that the hundreds of Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a non-member and then to compel the State to give full faith and credit to the decrees entered in such proceedings.

HELD/AWAITING ACTION

08-775 Duran v. Beaumont (2d Cir.) **International Law: Child Abduction**
CFR 2/11. BIO 3/13. Reply 3/23. Suppl. br. of Pet. 3/23.
Dist. for 4/17. Re-listed for 6/25. 2nd Supp. br. of Pet. 3/5.
(NOTE: Likely held for 08-645 *Abbott v. Abbott*.)

1. Should the Supreme Court resolve the circuit split between the Second Circuit, on one hand, and the Fourth and Tenth Circuits, on the other hand, regarding whether a foreign sovereign's statement of its own law, provided pursuant to a duly-ratified treaty, is entitled to deference?

2. Is Supreme Court review warranted to correct the Second Circuit's disregard of this Court's precedents requiring deference to a foreign sovereign's authoritative interpretation of its own domestic law?

3. Is Supreme Court review warranted because the uncertainty caused by the circuit split could hamper international efforts to combat inter-county child abduction?

08-1120 Am. Home Prods. Corp. v. Ferrari (Ga.) **Preemption: Vaccine Act**
BIO 5/8. Reply 5/18. Dist. for 6/4. CVSG 6/8. Supp. br. of Resp. 10/8.
Supp. br. of Pet. 10/20. SG Br. 1/29. Dist. for 3/5.
(NOTE: Likely held for 09-152 *Bruesewitz v. Wyeth, Inc.*.)

The National Childhood Vaccine Injury Act of 1986 shielded vaccine manufacturers from categories of tort litigation, directed federal agencies to develop safer childhood vaccines, and established a Vaccine Court to administer a no-fault remedy for vaccine-related injuries. The Act's express preemption provision states that "[n]o vaccine manufacturer shall be held liable in a civil action" if the injury "resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). The question presented is:

Does the Vaccine Act expressly preempt a state-law claim against a vaccine manufacturer based on an allegation that the vaccine-related injury could have been avoided by a vaccine design allegedly safer than the one approved by the U.S. Food and Drug Administration for use nationwide?

08-1131 Phon v. Kentucky (Ky.) **Criminal Law: Sentencing**
CFR 5/4. BIO 6/16. Reply 6/26. Dist. for 9/29.
(NOTE: Likely held for 08-7412 *Graham v. Florida* and 08-7621 *Sullivan v. Florida.*)

1. Whether petitioner, a juvenile under the age of eighteen at the time of his offense, is entitled to a new sentencing hearing in light of *Roper v. Simmons*, given that his original sentencing was premised on the theory that the death penalty was permissible and as such, the jury was instructed on the mitigating sentence of life without parole, which was an otherwise inapplicable sentence.

2. In light of *Roper v. Simmons*, the evolving standards of decency in this country, and overwhelming international opinion, does the sentence of life imprisonment without the possibility of parole constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

08-1335 Astrue v. Wilson (8th Cir.) **Attorney's Fees: "Prevailing Party"**
BIO 7/29. Reply 8/13. Dist. for 9/29. Letter from SG 8/24.
(NOTE: Likely held for 08-1332 *Astrue v. Ratliff*.)

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing child-support debt owed by the prevailing party.

08-1509 Classen Immunotherapies, Inc. v. Biogen IDEC, Inc. (Fed. Cir.) **Patent Law: "Business Methods"**
BIO of two parties and waiver of third party filed 8/7. Dist. for 9/29.
CFR 9/22. BIO 10/22. Supp. br. of pet. 10/26. Supp. br. of resp. 11/9. Dist. for 11/24.
(NOTE: Likely held for 08-964, *Bilski v. Kappos*.)

Is the Federal Circuit's test for patentability under 35 U.S.C. § 101, the "machine or transformation test" as defined in *Bilski*, appropriate for determining patentability of a method of using pharmaceuticals and medical activities?

08-1592 Maloney v. Rice (2nd Cir.) **Second Amendment: Incorporation**
BIO 8/28. Reply 9/9. *Amicus* NRA 6/16. Dist. for 9/29.
(NOTE: Likely held for 08-1521, *McDonald v. Chicago.*)

A New York statute makes the possession of a type of weapon known as nunchaku a criminal misdemeanor. Petitioner was arrested in his home and charged with possessing nunchaku. No other conduct, such as misusing the weapon or bearing it in public, was involved. The possession charge was ultimately dropped, though Petitioner was required to destroy the nunchaku.

Desiring to continue freely exercising his individual constitutional right to keep such arms in his home for self-defense, Petitioner brought this declaratory judgment action seeking to have the New York statute pronounced invalid insofar as it applies to criminalize the mere possession of nunchaku in one's home. The second Circuit held that under this Court's precedent, it was constrained to rule that the Second Amendment does not apply against the States, and dismissed his complaint. The questions presented are:

1. Whether the Second Amendment's individual right to keep and bear arms is incorporated against the States through the Due Process Clause of the Fourteenth Amendment.

2. Whether the Second Amendment's individual right to keep and bear arms is a privilege or immunity of citizens of the United States applicable to the States under the Privileges or Immunities Clause of the Fourteenth Amendment.

09-167/09-182 Scrushy v. U.S./ Siegelman v. U.S. (11th Cir.) (vided) **First Amendment: Campaign Finance**
BIOs 11/13. Reply of Siegelman 11/20. Reply of Scrushy 11/23.
Dist. for 12/11.

09-167:

1. Does the *McCormick v. United States*, 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute bribery unless "the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act" mean what it says, or may a conviction be obtained by implying or inferring that such a promise occurred?

2. Did *Evans v. United States*, 504 U.S. 255 (1992), which was not a campaign contribution case, modify the *McCormick v. United States* "explicit promise" requirement?

09-182:

1. Under *McCormick v. United States*, 500 U.S. 257, 273 (1991), a connection between a campaign contribution and an official action is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." Does this standard require proof of an "explicit" *quid pro quo* promise or undertaking in the sense of actually being communicated expressly, as various Circuits have stated; or can there by a conviction based instead only on the inference that there was an *unstated* and *implied* agreement, a state of mind, connecting the contribution and an official action?

2. Does the "intent" clause of the obstruction of justice statute 18 U.S.C. § 1512(b)(3)("with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .") require proof of the specific intent to interfere with communications to law enforcement? Or is this element of the statute satisfied by proof of an intent to engage in a "coverup" or generally?

09-213 Northeastern Land Services v. NLRB (1st Cir.) **NLRB: Quorum Requirement**
BIO 12/4. Dist. for 1/8.
(NOTE: Likely held for 08-1457 *New Process Steel v. NLRB*).

1. Does the National Labor Relations Board ("Board") have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that "three members of the Board shall, at all times, constitute a quorum of the Board"? If so, what deference should be afforded said decision on Appeal?

2. Assuming *arguendo* authority, did the two (2) member Board panel err in abandoning *sub silencio* a long standing precedent, *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), in favor of a rule of law, to determine a violation of 29 U.S.C. § 158(a)(1)?

3. In a matter involving no union or concerted activity, no anti-union animus, and no express violation of the National Labor Relations Act, did the Board have authority to order relief to an individual who engaged in no activity protected by the Act?

09-377 NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc. (D.C. Cir.) **NLRB: Quorum Requirement**
BIOs 10/2, 10/7. Reply 10/16. Dist. for 10/30.
(NOTE: Likely held for 08-1457 *New Process Steel v. NLRB*)

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

09-466 U.S. v. Williams (2d Cir.) **Criminal Law: Sentencing**
BIO 11/19. Reply 12/1. Dist. for 1/8. Re-listed for 1/22.

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the

extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law."

The question presented is whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

09-539 Cardona-Lopez v. Holder (5th Cir.) **Immigration Law: Felony Convictions**
BIO 1/4. Reply 2/25. Dist. for 2/19.
(NOTE: Likely held for 09-60 *Carachuri-Rosendo v. Holder*)

Whether a second conviction for simple drug possession under State law is a felony under the Controlled Substance Act, because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844(a).

09-594 De la Rosa v. Holder (11th Cir.) **Immigration Law: Deportability**
BIO 3/22. Reply 4/6. Dist. for 4/23. Re-listed for 4/30.

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* leave the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act.

09-600 Abebe v. Holder (9th Cir.) **Immigration Law: Deportability**
BIO 3/29. Reply 4/13. Dist. for 4/30.

Whether a lawful permanent resident who is deportable on account of a pre-April 1, 1997 guilty plea to a certain specified "aggravated felony" offense that is also a basis for exclusion, but who did not leave the United States between his conviction and the commencement of removal proceedings, it categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act.

09-636 Shabaz v. U.S. (7th Cir.) **Sixth Amendment: Right to Counsel**
BIO 2/1. Reply 2/9. Dist. for 3/5.

This case presents the Court with the opportunity of resolving a split among the circuits regarding the correct interpretation of *Davis v. United States* regarding a suspect's invocation and waiver of his right to counsel. Specifically, the split focuses on the question of whether the "unambiguous and unequivocal request" rule, as announced by the Court in *Davis*, applies in both pre-waiver and post-waiver settings, thereby eliminating the government's heavy burden of proving that a waiver has occurred, as interpreted by the Third, Fourth, Fifth, Sixth, and Tenth Circuits, or applies only in post-waiver or re-invocation settings, after the heavy burden has been met, as interpreted by the Second and Ninth Circuits.

09-733 Young v. Holder (5th Cir.) **Immigration Law: Felony Convictions**
SG Memo 3/24, recommending hold for 09-60 *Carachuri-Rosendo v. Holder*.
Dist. for 4/23.
(NOTE: Likely held for 09-60 *Carachuri-Rosendo v. Holder*.)

Whether an alien convicted only of simple possession of a controlled substance – a misdemeanor under both state and federal law – may be deemed "convicted" of an "aggravated felony" under federal immigration law simply because he theoretically *could* have been prosecuted as a recidivist possessor.

LAST CONFERENCE

View the **May 3rd Order List** from the April 30th Conference.

CERTIORARI GRANTED

07-1489 Trainer Wortham & Co. v. Betz (9th Cir.) **Statute of Limitations: Inquiry Notice**
BIO 6/30/08. Reply 7/10/08. Dist. for 9/29/08. CVSG 10/6/08.
SG br. 4/22 (urging the Court to deny cert.). Dist. for 5/21.
Re-listed for 4/30. GVR 5/3 in light of 08-905 *Merck & Co., Inc. v. Reynolds*.

1. Did the Court of Appeals err in concluding that the statute of limitations begins to run not from the moment the plaintiff is on inquiry notice that there may have been a misrepresentation (as some circuits have held), and not from the subsequent point at which a reasonable investigation would have revealed that she had a possible fraud claim (as other circuits have held), but only from the point at which she receives evidence that the investment advisor intended to defraud her?
2. Did the Court of Appeals err in holding that an investor who is on inquiry notice that she has a basis for a fraud claim, and is, therefore, obliged to make a reasonable inquiry, may reasonably end her investigation just because the suspected defrauders have made assurances that contradict known facts.

08-1473 American Express Co. v. Italian Colors Rest. (2d Cir.) **Arbitration: Class Arbitration**
BIO 7/21. Reply 8/5. Dist. for 9/29. Re-listed for 4/30.
GVR 5/3 in light of 08-1198, *Stolt-Nielsen S.A. v. Animalfeeds Int'l.*

1. Whether, under the Federal Arbitration Act (FAA), courts may invalidate a commercial agreement to arbitrate claims only on an individual basis—and not on a classwide basis—upon a "showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual" Sherman Act claim, even though nothing in the FAA evidences any intent by Congress to preclude parties from agreeing exclusively to individual arbitration and Congress expressly rejected adding a class action procedure when it enacted the Sherman Act.
2. Whether, under this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), costs that a plaintiff would incur in either arbitration or litigation—such as expert and attorney's fees—provide a basis to invalidate a provision of an arbitration agreement providing for individual rather than class arbitration.

CERTIORARI DENIED

08-1222 Boy Scouts of America v. Barnes-Wallace (9th Cir.) **First Amendment: Standing**
BIO 6/3. Reply 6/16. Dist. for 6/25. Re-listed for 4/30.
Cert. denied 5/3.

Pursuant to leases from the City of San Diego, San Diego Boy Scouts built and operates a campground ans an aquatic center for use by Scouts and the general public. There are no religious symbols at either facility. Plaintiffs have never visited either facility, but feel offended that the City leases public property to Boy Scouts. The district court found an Establishment Clause violation because the City's leases

were not the result of a competitive bidding process. The Ninth Circuit held that Plaintiffs have standing to bring an Establishment Clause challenge based on feeling offended. The questions presented:

1. Whether Plaintiffs have Article III standing to bring an Establishment Clause challenge to City leases of recreational facilities to the Boy Scouts when Plaintiffs have never visited the facilities and the facilities are available for use by the public and display no religious symbols.

2. Whether Plaintiffs have Article III standing bring an Establishment Clause challenge to City leases to the Boy Scouts where the violation found by the district court was the lack of competitive bidding and Plaintiffs are not potential bidders, but rather object to Boy Scouts being the lessee under any circumstance.

09-766 Palmyra Pacific Seafoods, LLC v. U.S. (Fed. Cir.) **Fifth Amendment: Takings**
BIO 3/31. Reply 4/12. Dist. for 4/30. Letter from Pet. 4/19.
Cert. denied 5/3.

1. Are private contracts property protected by the Takings Clause of the Fifth Amendment to the Constitution?

2. Assuming that private contracts are property protected by the Takings Clause, is the federal government liable for regulatory as well as appropriative takings of private contracts?

09-914 Markell v. Office of the Comm'r of Baseball (3rd Cir.) **Professional Sports: Lotteries**
BIO 4/2. Reply 4/13. Dist. for 4/30. Cert. denied 5/3.

1. Whether the Professional and Amateur Sports Protection Act ("PASPA") prohibits Delaware from offering sports lotteries to generate revenues to help alleviate its substantial budget deficits and satisfy its constitutional balanced-budget obligations.

2. Whether the panel below erred as a matter of law in deciding the merits in an appeal of a denial of a preliminary injunction brought pursuant to 28 U.S.C. § 1292(a), where the factual record had not been developed and final adjudication fo the merits turned on contested factual considerations.

09-1022 Bayer Schering Pharma AG v. Barr Labs., Inc. (Fed. Cir.) **Patent Law: "Obvious"**
BIO 3/29. Reply 4/13. Dist. for 4/30. Cert. denied 5/3.

Under 35 U.S.C. § 103(a) and this Court's precedents, a claimed invention is not patentable if it would have been "obvious" at the time it was made to a person having ordinary skill in the art. This Court has used terms like "plainly foreshadowed," "plainly indicated," "immediately recognized," and "predictable" to describe the standard.

Question presented: Whether the Federal Circuit has deviated from the statutory text and this Court's precedents by holding that an invention is "obvious" when there were a finite number of "viable" options that provided a so-called "reasonable expectation" of success, even though it remained necessary to conduct further experimentation, the results of which were unpredictable.

GRANTED CASES INVOLVING PUBLIC CITIZEN - 2009 TERM

08-970 Perdue v. Kenny A. (11th Cir.) **Attorney's Fees: Enhancements**
BIO 3/4. Cert. granted 4/3. Argued 10/14.
Decided 4/21, 5-4 in favor of Petitioner.

Public Citizen joined an amicus brief in support of respondent.
Amicus Brief in Support of Respondents

1. Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?

2. Is an enhancement to the lodestar based on quality of representation and results obtained contrary to this Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed?

08-1198 Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp. (2d Cir.) **Arbitration: Class Arbitration**
BIO 5/11. Reply 5/26. Cert. granted 6/15. Argued 12/9.
Decided 4/27, 5-3 in favor of Petitioner.

Scott Nelson and Brian Wolfman of Public Citizen assisted respondent at the cert. stage.
Public Citizen filed an amicus brief in support of respondent at the merits stage.
Amicus Brief in Support of Respondent

In *Green Tree Financial Corp. v. Bazzle*, this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act (FAA) permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that th arbitrator first needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here—which continues to divide the lower courts—is the same on presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the FAA.

08-1200 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (6th Cir.) **FDCPA: Defenses**
CFR 5/7. BIO 6/8. Reply 6/11. Cert. granted 6/29. Argued 1/13.
Decided 4/21, 7-2 in favor of Petitioner.

Public Citizen filed an amicus brief in support of petitioner.
Amicus Brief in Support of Petitioner

Whether a debt collector's legal error qualifies for the bona fide error defense under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692.

08-1322 Astrue v. Ratliff (8th Cir.) **Attorneys Fees: "Prevailing Party"**
BIO 6/25. Reply 8/13. Dist. for 9/29. Cert. granted 9/30. Argued 2/22.

Scott Nelson of Public Citizen is co-counsel for respondent.
Brief in Opposition

Whether an attorney fee awarded under the Equal Access to Justice Act in an *in forma pauperis* Social Security case is invariably and as a matter of law property of the plaintiff subject to offset based on the plaintiff's debts to the federal government, without regard to any property rights of the attorney in the fee.

08-1423 Costco Wholesale Corp. v. Omega, S.A. (9th Cir.) **Copyright Law: First-Sale Doctrine**
BIO 7/17. Reply 7/28. Dist. for 9/29. CVSG 10/5. SG br. 3/17. Supp. br. pet. 3/29. Dist. for 4/16. Cert. granted 4/19.

Adina Rosenbaum and Greg Beck were counsel for amicus Public Citizen at the cert. stage.
Amicus Brief in Support of the Petition

Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135, 138 (1998), this Court posed the question presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King*, which answered the question affirmatively, is limited to its facts, which involved goods manufactured in the United States, sold abroad, and then re-imported. The question presented is whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.

09-475 Monsanto v. Geertson Seed Farms (9th Cir.) **Administrative Law: National Environmental Policy Act**
BIOs 12/23. Reply 12/30. Dist. for 1/15. Cert. granted 1/15. Argued 4/27.

Scott Nelson and Allison Zieve of Public Citizen were co-counsel for respondent at the cert. stage.
Brief in Opposition

1. Whether the Ninth Circuit erred in holding that National Environmental Policy Act ("NEPA") plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.

2. Whether the Ninth Circuit erred in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.

3. Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court's decision in *Winter v. NRDC*, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.

09-448 Hardt v. Reliance Standard Life Insurance Co. (4th Cir.) **ERISA: Attorney's Fees**
CFR 11/17. BIO 12/16. Reply 12/29. Dist. for 1/15. Cert. granted 1/15.
Argued 4/26.

Allison Zieve of Public Citizen is assisting respondent.

Section 502(g)(1) of ERISA provides: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonably attorney's fee and costs of the action to either party." 29 U.S.C. 1132(g)(1).

The Fourth Circuit in the decision below held that "only a prevailing party is entitled to consideration for attorneys' fees in an ERISA action," while the Second, Fifth and Eleventh Circuits have declined to read a "prevailing party" requirement into 502(g)(1) and other circuits have issued conflicting authority. The Fourth Circuit also held that the "prevailing party" standard was not met and vacated an award of attorneys' fees to petitioner, even where the district court found "compelling evidence that [petitioner] is totally disabled," ruled that petitioner "did not get the kind of review to which she was entitled under applicable law" and remanded for a redetermination of benefits with an instruction that respondents "act on [petitioner's] application by adequately considering all the evidence discussed within this Opinion within thirty (30) days of its date of issuance" or "judgment will be issued in favor of [petitioner]" and petitioner obtained the requested long-term disability benefits upon remand. The questions presented are:

1. Whether the Fourth Circuit erred in holding that ERISA 502(g)(1) provides a district court discretion to award reasonable attorney's fees only to a prevailing party?

2. Whether a party is entitled to attorney's fees pursuant to 502(g)(1) when she persuades a district court that a violation of ERISA has occurred, successfully secures a judicially-ordered remand requiring a redetermination of entitlement to benefits, and subsequently receives the benefits sought on remand?

09-497 Rent-A-Center, West, Inc. v. Jackson (9th Cir.) **Arbitration: Unconscionability**
CFR 11/24. BIO 12/17. Dist. for 1/15. Cert. granted 1/15. Argued 4/26.

Scott Nelson and Deepak Gupta of Public Citizen are co-counsel for respondent.

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?