2009

Supreme Court of the United States, October Term 2009 Preview

Georgetown University Law Center, Supreme Court Institute

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Supreme Court Overviews

Georgetown University Law Center *Year* 2009

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OCTOBER TERM 2009 PREVIEW

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A LOOK AHEAD AT OCTOBER TERM 2009

This report previews the Supreme Court's plenary docket for the October Term 2009. Section I presents general observations about the upcoming Term and discusses some especially noteworthy cases. Section II organizes next Term's cases into subject-matter categories and provides brief summaries of each.

SECTION I: TERM OVERVIEW

Introduction

Before it recessed for the summer on June 29, 2009, the Court had granted 45 petitions for certiorari in cases to be reviewed during October Term 2009 and issued one unusual order for rehearing of a 2008 Term case. Nearly half the cases granted to date implicate business interests, with several arising in the areas of securities, bankruptcy, and labor and employment law. The Court has agreed to hear 14 criminal cases, including several raising constitutional questions under the Fifth, Sixth and Eighth Amendments. Constitutional questions outside the criminal area are well-represented on the Court's docket, as well; the Court will consider a range of cases under the Free Speech, Establishment, Takings, Commerce, and Appointments Clauses. The Court also is poised to interpret an important provision of the Hague Convention on International Child Abduction and to issue a landmark patent-law decision.

If the Court maintains its recent practice of granting plenary review in a relatively small number of cases (79 last Term)[1], then it has already granted review on more than half the cases it will hear in October Term 2009. As it did last year, the Court has "front-loaded" its calendar, scheduling 26 of those cases for its October and November sittings. To accommodate that number, the Court will once again schedule afternoon as well as morning argument sessions.

The Court has granted cases coming from every federal circuit except the Tenth; the Second, Seventh, and Ninth Circuits have the highest number of granted cases at five each. The Court also will hear one original jurisdiction case and seven cases coming directly from state courts, including four high-profile cases from Florida.[2] Statistics suggest that the Court will reverse (or vacate) in a large majority of these cases; last Term, the Court reversed nearly 76 percent of the cases it reviewed.

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[1] Last year's 79 cases mark a slight increase over the 71 cases decided in October Term 2007 and the 72 decided in October Term 2006. But over the past 10 years, the number of cases decided has remained relatively consistent, and (compared to historical practice) relatively low, ranging from the 2007 Term's 71cases to October Term 2000's 85. All statistical data in this report related to prior Supreme Court Terms can be found at http://www.scotusblog.com/wp/wp-content/uploads/2009/07/summary-memo-final.pdf.

[2] *Graham v. Florida* (08-7412); *Sullivan v. Florida* (08-7621); *Stop the Beach Renourishment, Inc. v. FL Department of Environment Protection* (08-1151); *Florida v. Powell* (08-1175).

A few unusual procedural issues have surfaced already this Term. Most notably, the Court ordered rehearing in a case from October Term 2008, *Citizens United v. Federal Election Commission* (08-205), and directed the parties to submit briefing on whether the Court should overrule prior precedent upholding restrictions on corporate spending in support of political candidates. Technically a part of last Term's case load, *Citizens United* will be reargued this fall before the official start of the new Term. The Court also has been required to appoint counsel as *amicus* to defend the lower-court ruling in two cases,[3] a procedure invoked in the rare situation in which even the party who prevailed below chooses not to defend that ruling.

Term Highlights

Constitutional Law

The Court will review several important constitutional law cases, including two high-profile First Amendment free speech cases. *Citizens United v. Federal Election Commission* (08-205) technically falls under the Court's 2008 term; argued for the first time last spring, the case will be reheard in September at a special argument session before the official start of the 2009 Term. *Citizens United* originally presented a relatively narrow question: whether video-on-demand broadcasts of a movie criticizing Hillary Clinton constituted "electioneering communications" subject to Bipartisan Campaign Reform Act ("BCRA") constraints on corporate electoral advocacy. Rather than resolving that question, however, the Court ordered additional briefing and argument on whether it should overrule two precedents upholding the threshold prohibition on corporate and union independent expenditures on behalf of particular candidates: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which sustained a bar on corporate financing of express electoral advocacy; and, as recently as 2003, *McConnell v. FEC*, 540 U.S. 93, which upheld BCRA's arguably broader ban on any communication referring to a political candidate, whether express advocacy or its functional equivalent. That the Court asked for briefing on this question indicates that it is seriously considering what would be a significant shift in First Amendment law with dramatic practical implications for the funding of elections. Justices Scalia, Kennedy and Thomas have previously stated that the Court's campaign-finance precedent is inconsistent with fundamental Free Speech Clause protections and should be overruled, so the outcome of *Citizens United* is likely to turn on just how sweeping a constitutional statement other potential critics of campaign-finance regulation, including Chief Justice Roberts and Justice Alito, are ready to make.

United States v. Stevens (08-769), another noteworthy free speech case, involves 18 U.S.C. § 48, a federal statute banning depictions of animal cruelty. Stevens' case was the first to be tried under the ten-year old statute. He was prosecuted for selling videos showing dog fights and attacks; while the government portrays the videos as nothing more than brutal depictions of animal abuse with no serious redeeming social value, Stevens claims they are dog-training videos that show animal attacks to demonstrate incorrect hunting techniques. Stevens' conviction and 37-month jail sentence were overturned by the United States Court of Appeals for the Third Circuit,[4] sitting en banc, which ruled the law facially unconstitutional under the First

[3] *Reed Elsevier v. Muchnick* (08-103); *Kucana v. Holder* (08-911).

[4] The United States Courts of Appeals will be referred to hereinafter only by circuit name (e.g., Third Circuit, Ninth Circuit, etc.).

Amendment as a content-based prohibition on protected speech. Before the Supreme Court, the government seeks a new exception to the First Amendment for depictions of animal cruelty, in part by analogy to the child-pornography exception, arguing that where, as here, the social cost of speech outweighs its value, that speech should not be protected by the First Amendment. Alternatively, even if depictions of animal cruelty are protected under the First Amendment, the government contends that the statute is narrowly drawn to serve compelling governmental interests, and thus survives strict scrutiny. Respondent rejects both the appropriateness of the proposed balancing test under the First Amendment and the government's weighing of interests, arguing that speech of great social value, including that of animal-rights advocates, may involve depictions of inhumane treatment of animals. The case also raises issues under First Amendment overbreadth doctrine, with the government arguing that even if § 48 impermissibly reaches some protected speech, the Third Circuit erred in holding it facially unconstitutional given its many valid applications.

The Court will address a novel Fifth Amendment Takings Clause question in *Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection* (08-1151): whether and under what circumstances a judicial decision may constitute a taking. Petitioners claimed a taking when a beach replenishment program interposed new publicly-owned sand dunes between their formerly beach-front property and the ocean. The Florida Supreme Court denied their claim by holding that petitioners had no preexisting common-law right to have their property extend to the water line, and hence no property right to be "taken" – a holding that petitioners now argue is so directly contrary to years of established state-law precedent that it is itself a taking (or, in the alternative, a Due Process violation). Second-guessing a state court on a question of state common law is normally beyond the purview of the Supreme Court; on the other hand, without some review for "judicial takings," state courts theoretically could evade Takings Clause limits by refusing to recognize what were in fact preexisting state-law property rights. Takings Clause issues rose in prominence after the Court's last Takings Clause case, *Kelo v. City of New London*, 545 U.S. 469 (2005), which upheld a city's destruction of private residences under an economic renewal plan and generated substantial public criticism. *Stop the Beach* presents a relatively narrow question and is unlikely to be as controversial as *Kelo*, but public interest in Takings issues combined with the environmental-protection aspect of the case could elicit strong opinions on both sides of the issue.

Another case that could break important jurisprudential ground for this Court is *United States v. Comstock* (08-1224), challenging a federal civil commitment statute that authorizes continued detention of "sexually dangerous" federal prison inmates after their criminal sentences are served. The Fourth Circuit, labeling the statute an unprecedented federal intrusion into the state-controlled area of civil commitment, held that Congress lacks Commerce Clause authority to confine on the basis of "sexual dangerousness" without showing some connection between that dangerousness and a specific federal offense. The court also rejected the government's reliance on the Necessary and Proper Clause as applied to federal inmates, reasoning that the Clause, standing alone, provides no additional authority to regulate inmates after their sentences expire. *Comstock* could prove an interesting test of the Roberts Court approach to the Commerce Clause. After years of deference to congressional authority, the Rehnquist Court limited Congress' Commerce Clause power in a pair of cases relied on by the Fourth Circuit here –

United States v. Lopez, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000) – but later sustained Congress' power to ban marijuana use in *Gonzalez v. Raich*, 545 U.S. 1 (2005). Whether *Lopez* and *Morrison* will be outlier decisions confined to their facts by later decisions or the start of more sustained limits on Commerce Clause authority may turn in part on how Justices new to the Court since *Raich* – Chief Justice Roberts and Justices Alito and Sotomayor – respond to the Commerce Clause issue in *Comstock*.

Business Law

True to recent form, the Court has granted review on a number of business cases for next Term, totaling about half the grants of certiorari to date. But while business cases figure more prominently in the mix of granted cases than was the case before the Chief Justice and Justice Alito joined the Court, the outcomes remain far from predictable.

Some of this Term's cases raise questions that may have special salience in light of the current financial crisis. The highly-charged issue of executive compensation, for instance, will come before the Court in *Jones v. Harris Associates* (08-586), in which mutual-fund shareholders have sued the funds' investment advisor over its fees. According to petitioners, Harris Associates breached the fiduciary duty it owes under the Investment Company Act of 1940 by charging substantially more to manage funds under its own control than it would in an arms-length transaction with an independent client. The Seventh Circuit (per Judge Easterbrook) disagreed, holding that the Act does not impose a "cap on compensation" or make actionable claims for excessive fees; so long as an investment advisor does not mislead the fund directors who approve its compensation, it may charge whatever the fund is willing to pay. Judge Posner dissented from denial of rehearing en banc, citing rampant abuses in the financial services industry and arguing that boards of directors lack incentives to adequately police executive compensation. Now the Supreme Court may find itself resolving a very high-profile debate over the economics of executive pay.

Free Enterprise Fund v. Public Accounting Oversight Board (08-861) challenges the constitutionality of legislation passed in response to another period of high-profile financial controversy—the accounting scandals at Enron and other companies that made headlines nearly a decade ago. The Sarbanes-Oxley Act of 2002 established a Public Accounting Oversight Board to regulate firms that audit public companies, with members appointed and removable only for cause by the SEC, itself an independent agency, rather than by the President. Petitioners in *Free Enterprise Fund* argue that Congress' effort to insulate the Board from political pressure goes too far, violating separation-of-powers principles and the Constitution's Appointments Clause by vesting significant executive authority in a body that is not subject to adequate presidential oversight or control.

Even the Court's patent docket touches indirectly on the current financial crisis. *Bilski v. Doll* (08-964), a case that could have sweeping effects on patent law, centers on the patentability of a complex "business method" for hedging the risk associated with commodity sales. The Federal Circuit rejected petitioner's claim to a patent, applying a "machine or transformation" test under which a process is patent-eligible only if it is tied to a particular machine or transforms a particular article into a different state or thing. Petitioner argues that this standard, effectively

limited to manufacturing processes, is a relic of the Industrial Age poorly suited for today's information-based economy, and that it would exclude software and other cutting-edge technologies from patent protection. Though the formula for hedging commodity prices at issue in *Bilski* does not itself involve such high-tech enterprises, concerns about the broader effects of the Federal Circuit decision have generated a remarkable 43 *amicus* briefs before the Supreme Court in support of petitioner or neither party. (Respondent's brief and *amicus* filings are yet to come.) Whether the Court will be receptive remains to be seen; some commentators view the Court as increasingly hostile to patent claims. Regardless of which party prevails, *Bilski* has the potential to be a landmark decision on the limits of patentable subject matter.

Criminal Law

The Court will hear two high-profile cases considering whether juveniles may be sentenced to life without parole for non-homicide crimes. Four years ago, a closely divided 5-4 Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the imposition of the death penalty for crimes committed by offenders under the age of 18 violates the Eighth Amendment's ban on cruel and unusual punishment, largely because of the diminished moral culpability of juveniles. Now the petitioners in *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) argue that the same reasoning should apply to life-without-parole sentences for crimes committed by juveniles, pointing to the rarity of such sentences as well as to their severity. The petitioner in *Graham*, convicted at age 16 of armed robbery, was sentenced to life without parole for that crime when he violated his probation at 17; the petitioner in *Sullivan* was 13 when he received the same sentence for sexual battery. The Court chose not to consolidate the two cases, leading some to speculate that the Court may have wished to preserve the option of deciding them differently, using *Graham* to avoid potential procedural hurdles presented by the *Sullivan* case or distinguishing between the very young 13-year old in *Sullivan* and the older teen in *Graham*.

In *Briscoe v. Virginia* (07-11191), the Court will revisit and perhaps refine its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), an important Confrontation Clause ruling issued just last Term. By a 5-4 vote, the Court held in *Melendez-Diaz* that state forensic reports are "testimonial" under the Sixth Amendment Confrontation Clause, and thus may not be used against a defendant at trial unless the crime-laboratory analyst is available for cross-examination. Faced with the dissent's warning that *Melendez-Diaz* could impose a "crushing burden" on state criminal justice systems, the Court in *Briscoe* will consider whether the state may meet its obligations by allowing the defense to call the analyst as its own witness if it wishes, rather than automatically producing the analyst as a prosecution witness. Because the Court granted certiorari in *Briscoe* immediately after deciding *Melendez-Diaz*, instead of first allowing the lower courts to sort through the issue, it will have an unusually early opportunity to clarify the precise scope of the *Melendez-Diaz* rule. *Briscoe* also may provide an indication as to whether Justice Sotomayor, who worked as a prosecutor for many years, will take a different approach to such issues than her predecessor, Justice Souter, part of the narrow 5-4 majority in *Melendez-Diaz*.

At issue in another pair of criminal cases is a provision of the federal mail fraud statute that criminalizes the denial of the "intangible right to honest services" by a public servant or employee. 18 U.S.C. §§ 1341, 1346. In a dissent from denial of certiorari last Term, Justice

Scalia sharply criticized the "honest services" provision, arguing that its indeterminate language "has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior" and could make a federal criminal of an employee who simply "phone[s] in sick to go to a ball game."[5] Now *Black v. United States* (08-876) and *Weyhrauch v. United States* (08-1196) present the Court with two different potential limits on "honest services" criminal prosecutions. Petitioners in *Black*, including convicted financier Conrad Black, argue that if the honest services provision is to have any application in the private sector, it must be limited to those breaches of fiduciary duty that involve actual economic harm to an employer or other victim. The petitioner in *Weyhrauch*, who held public office in Alaska, invokes federalism concerns in arguing that federal "honest services" liability requires an independent state-law violation; the alternative, prosecutions under a broad federal common-law standard, would promote federal micromanagement of state-government administration.

International Law

Finally, the Court will decide an important international law issue next Term when it hears *Abbott v. Abbott* (08-645), regarding the Hague Convention on the Civil Aspects of International Child Abduction. Under the Convention, to which the United States is a party, a parent whose child is wrongfully removed from his home country in violation of a "right of custody" is entitled to have the child returned. The question in *Abbott* is whether a "ne exeat" order, which prohibits one parent from removing a child from the country without the other's consent, constitutes a "right of custody" that triggers the return remedy under the Hague Convention. The case arose when Jacquelyn and Timothy Abbott, American and British citizens, divorced while living in Chile; Jacquelyn subsequently violated a ne exeat order by bringing their son to Texas. When Timothy sought return under the Hague Convention, the lower courts, like the majority of United States courts to consider the question, ruled that the ne exeat order did not qualify as a "right of custody." The majority of foreign courts, by contrast, have held that violation of a ne exeat order is sufficient to require return under the Convention. We have a strong indication of how at least one Justice may rule in the case: While a Second Circuit judge, Justice Sotomayor, dissenting from the panel decision in *Croll v. Croll*, 229 F.3d 133 (2000), took the position that a ne exeat order is indeed a right of custody for purposes of the Hague Convention.

SECTION II: CASE SUMMARIES

Overview

Constitutional Law

- Government Powers:
  United States v. Comstock
  Free Enterprise Fund v. Public Company Accounting Oversight Board

[5] Sorich v. United States, 523 F.3d 702 (7th Cir.), *cert. denied*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting).

- Property Rights:
  Alvarez v. Smith
  Stop the Beach Renourishment, Inc. v. FL Dept. of Environmental Protection

- First Amendment:
  Citizens United v. Federal Election Commission
  Salazar v. Buono
  United States v. Stevens
  Milavetz v. United States

Business Law

- Intellectual Property:
  Reed Elsevier, Inc. v. Muchnick
  Bilski v. Doll

- Securities:
  Jones v. Harris Associates
  Merck & Co. v. Reynolds

- Antitrust:
  American Needle, Inc. v. NFL

- Bankruptcy:
  United Student Aid Funds, Inc. v. Espinosa
  Schwab v. Reilly

- Labor and Employment:
  Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers
  Granite Rock Co. v. International Brotherhood of Teamsters
  Conkright v. Frommert

- Arbitration:
  Stolt-Nielsen v. AnimalFeeds International Corp.

- Consumer Protection:
  Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA

- False Claims Act:
  Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson

- Civil RICO:
  Hemi Group LLC v. City of New York

- Federal Practice and Procedure:
  Mohawk Industries, Inc. v. Carpenter

Shady Grove Orthopedic Assoc. v. Allstate Insurance Co.
Hertz Corp. v. Friend

Criminal Law

- Fifth Amendment:
  Maryland v. Shatzer
  Florida v. Powell

- Sixth Amendment:
  Briscoe v. Virginia
  Padilla v. Kentucky

- Eighth Amendment:
  Graham v. Florida
  Sullivan v. Florida

- Habeas and AEDPA Review:
  McDaniel v. Brown
  Smith v. Spisak
  Beard v. Kindler
  Wood v. Allen

- Prosecutorial Immunity:
  Pottawattamie County v. McGhee

- Mail and Wire Fraud – Deprivation of Honest Services:
  Black v. United States
  Weyhrauch v. United States

- Speedy Trial Act:
  Bloate v. United States

- Sentencing:
  Johnson v. United States

Other Public Law Cases

- Original Jurisdiction:
  South Carolina v. North Carolina

- Immigration:
  Kucana v. Holder

- Attorney's Fees:
  Perdue v. Kenny A.

- Public Utilities:
  NRG Power Marketing, LLC v. Maine Public Utilities Commission

- Petroleum Franchises:
  Mac's Shell Service v. Shell Oil Products Co./Shell Oil Products Co. v. Mac's Shell Service, Inc.

International Law

- *Abbott v. Abbott*

Constitutional Law

Government Powers

***United States v. Comstock* (08-1224)**

Question Presented:

Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial. [6]

Summary:

Congress enacted 18 U.S.C. § 4248, part of the Adam Walsh Child Protection and Safety Act, to provide for civil commitment of "sexually dangerous" federal prison inmates after their criminal sentences have expired. The Act defines a sexually dangerous person as one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others" and suffers from mental illness such that he would "have serious difficulty in refraining from sexually violent conduct." The Act is triggered if a district court finds an inmate meets that standard by clear and convincing evidence. The district court held the statute unconstitutional on two grounds, finding that it violates the Due Process Clause because it allows for continued detention of inmates under a standard of proof less rigorous than "beyond a reasonable doubt" and also that it is not authorized by the Commerce Clause. The Fourth Circuit affirmed on Commerce Clause grounds alone, holding that the statute exceeds Congress' enumerated powers because it allows for detention without a showing of some connection between an inmate's "sexual dangerousness" and the commission of a specific federal crime.

[6] The "Questions Presented" listed in this document are those presented to the Court in the parties' petitions for certiorari, without any editorial changes except for the italicization of case names. The questions presented may be found on the Supreme Court's on-line docket.

Decision Below: 551 F.3d 274 (4th Cir. 2009)
Petitioner's Counsel of Record:
Elena Kagan, Solicitor General, US DOJ
Respondent's Counsel of Record:
Jane E. Pearce, Assistant Federal Public Defender

Free Enterprise Fund v. Public Company Accounting Oversight Board **(08-861)**
Questions Presented:
1. Whether the Sarbanes-Oxley Act of 2002 violates the Constitution's separation of powers by vesting members of the Public Company Accounting Oversight Board ("PCAOB") with far-reaching executive power while completely stripping the President of all authority to appoint or remove those members or otherwise supervise or control their exercise of that power, or whether, as the court of appeals held, the Act is constitutional because Congress can restrict the President's removal authority in any way it "deems best for the public interest."
2. Whether the court of appeals erred in holding that, under the Appointments Clause, PCAOB members are "inferior officers" directed and supervised by the Securities and Exchange Commission ("SEC"), where the SEC lacks any authority to supervise those members personally, to remove the members for any policy-related reason or to influence the members' key investigative functions, merely because the SEC may review some of the members' work product.
3. If PCAOB members are inferior officers, whether the Act's provision for their appointment by the SEC violates the Appointments Clause either because the SEC is not a "Department" under *Freytag v. Commissioner*, 501 U.S. 868 (1991), or because the five commissioners, acting collectively, are not the "Head" of the SEC.

Summary:
The Sarbanes-Oxley Act, passed in response to high-profile accounting scandals, created the Public Company Accounting Oversight Board, which oversees and regulates firms that audit public companies. The Board is designed to be free from political influence, and thus the Board's members are appointed and removable only for cause by a majority vote of the SEC, itself an independent agency, rather than by the President. Petitioners allege that the Appointments Clause requires that the President appoint Board members, and that the President's lack of meaningful control over Board members who exercise significant executive authority violates separation-of-powers principles. The D.C. Circuit, over a strongly-worded dissent by Judge Kavanaugh, rejected that challenge, holding that Board members are "inferior officers" who may be appointed by department heads and that the separation of powers principle "embraces independent agencies like the Commission and their exercise of broad authority over their subordinates."
Decision Below: 537 F.3d 667 (D.C. Cir. 2008)
Petitioner's Counsel of Record:
Michael A. Carvin, Jones Day
Respondent's Counsel of Record:
Elena Kagan, Solicitor General, US DOJ (for Respondent United States)

Jeffrey A. Lamken, Baker Botts LLP (for Respondents Public Company Accounting Oversight Board et al.)

Property Rights

Alvarez v. Smith **(08-351)**

Question Presented:

In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in United States v. $8,850, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

Summary:

Pursuant to Illinois's Drug Asset Forfeiture Procedure Act (DAFPA), police may seize vehicles and cash related to certain suspected drug offenses and hold the property until a court decides, at a statutorily prescribed hearing, whether forfeiture is warranted. The state may wait up to 187 days before filing formal forfeiture proceedings, and the hearing itself may be further delayed for good cause. Respondents claim that they are entitled to a more timely opportunity to contest the seizure of their property, and the Seventh Circuit agreed. Applying the three-part *Mathews v. Eldridge* standard, the court held that DAFPA is unconstitutional on its face under the Due Process Clause because it fails to provide an "interim, adversarial hearing" before the required civil forfeiture hearing. The state now argues that the Seventh Circuit applied the wrong standard, and that as in the context of speedy trial rights, the court should ask only whether the delay before a hearing is so long that dismissal of the forfeiture proceeding is required.

Decision Below: 524 F.3d 834 (7th Cir. 2008)

Petitioner's Counsel of Record:

Paul A. Castiglione, Assistant State's Attorney

Respondent's Counsel of Record:

Thomas Peters

Stop the Beach Renourishment, Inc. v. FL Dept. of Environmental Protection **(08-1151)**

Questions Presented:

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Summary:

Following a period of especially severe hurricanes, the Florida legislature enacted a beach replenishment program that built publicly-owned sand dunes between privately-owned property and the ocean. Petitioners alleged an uncompensated "taking" of their littoral (beachfront) property because the program deprived them of their long-standing common law right to have their land touch the water. The First District Court of Appeal found that the program resulted in an uncompensated taking of littoral rights, but the Florida Supreme Court reversed, disagreeing with petitioners' account of the background state law. According to the Florida Supreme Court, petitioners had no preexisting right to have their land touch the ocean, but only rights of access and to views of the ocean, left uncompromised by the new sand dunes. Petitioners now argue that the Florida court effectuated a "judicial taking" by radically transforming settled law to deprive them of their state-law property rights. This case will offer the Court an opportunity to rule definitively for the first time on whether and under what circumstances a judicial decision can be a "taking" under the Fifth Amendment.

Decision Below: 998 So. 2d 1102 (Fla. 2008)

Petitioner's Counsel of Record:

D. Kent Safriet, Hopping Green & Sams PA

Respondent's Counsel of Record:

Scott D. Makar, Solicitor General, Office of the Attorney General (FL) (for Respondent Florida Department of Environmental Protection)
Hala A. Sandridge, Fowler White Boggs PA (for Respondents Walton County and City of Destir)

First Amendment

***Citizens United v. Federal Election Commission* (08-205) (from October Term 2008)**

Question Presented:

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?

Summary:

Pursuant to campaign-finance laws prohibiting corporate financing of certain ads in support of political candidates, the FEC sought to block video-on-demand broadcasts of "Hillary: The Movie," a film highly critical of Hillary Clinton. The film's producer, petitioner Citizens United, filed suit, arguing primarily that the film was not an "electioneering communication" covered by the Bipartisan Campaign Reform Act. The Court heard oral argument in the spring of 2008, but

did not resolve petitioner's specific challenge. Instead, the Court ordered rehearing and supplemental briefing on a new and much broader question presented: whether the Court should overrule *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), precedents sustaining the threshold bar on corporate- and union-financed electioneering activity against Free Speech Clause challenges.

Decision Below: No. 07-2240 (D.D.C. Jan. 15, 2008)

Appellant's Counsel of Record:

Theodore B. Olson, Gibson Dunn & Crutcher LLP

Appellee's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

***Salazar v. Buono* (08-472)**

Questions Presented:

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross as a memorial to fallen service members in a remote area within what is now a federal preserve. After the district court held that the presence of the cross on federal land violated the Establishment Clause and the court permanently enjoined the government from permitting the display of the cross, Congress enacted legislation directing the Department of the Interior to transfer an acre of land including the cross to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, and the court of appeals affirmed. The questions presented are:

1. Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

Summary:

Respondent Buono, a National Park Service employee, sued the government in 2001, alleging that the display of a Christian cross on the federal preserve where he had worked violated the Establishment Clause. The district court held that Buono had standing because he was "subjected to an unwelcome religious display" and ruled for Buono on the merits, issuing an injunction forbidding the government from continuing to display the cross on federal land. The Ninth Circuit affirmed, and the United States did not seek certiorari. Congress responded to the injunction first by prohibiting the use of federal funds to remove the cross, then by designating the cross a national memorial, and finally, in the legislation now at issue, by ordering the transfer to the VFW of the acre of land on which the cross sits. The district court enjoined the land transfer on the ground that it would perpetuate rather than cure the Establishment Clause violation, and the Ninth Circuit affirmed again.

The government now argues that Buono lacks standing because his objection to the cross is contingent on the government's refusal to allow other

religious displays in the same area, and, on the merits, that the land transfer is a good-faith response to the injunction that would cure any Establishment Clause violation. According to respondent, neither his standing nor the initial ruling that the Establishment Clause forbids government maintenance of the cross is properly before the Court; both issues were resolved conclusively in his favor in the first round of litigation, from which the government did not seek certiorari review. On the merits, respondent claims that the proposed land transfer would not end the government's impermissible endorsement of the cross.

Decision Below: 527 F.3d 758 (9th Cir. 2008)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Respondent's Counsel of Record:

Peter Eliasberg, ACLU Foundation of Southern California

***United States v. Stevens* (08-769)**

Question Presented:

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

Summary:

Respondent Stevens was convicted under 18 U.S.C. § 48 of selling "depictions of animal cruelty," including videos of illegal dogfights and pit bull attacks on other animals; Stevens contends that the videos were documentaries produced for legitimate educational and safety-training purposes. The Third Circuit, sitting en banc, vacated Stevens' conviction and held § 48 unconstitutional on its face as a content-based prohibition on protected speech. The court reasoned that depictions of animal cruelty do not fall under any existing category of unprotected speech, and held that it would not expand exceptions to the First Amendment without "express direction" from the Supreme Court. The government now asks the Court to take up that invitation, identifying a new exception to the First Amendment analogous to the existing exception for child pornography. The government also argues that even if animal-cruelty depictions are protected by the First Amendment, § 48 is narrowly drawn to advance a compelling governmental interest and thus permissible under strict-scrutiny review.

Decision Below: 533 F.3d 218 (3d Cir. 2008)

Petitioner's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Respondent's Counsel of Record:

Patricia A. Millett, Akin Gump Strauss Hauer & Feld LLP

Milavetz v. United States/United States v. Milavetz **(08-1119/08-1225)**

Questions Presented:

Milavetz v. U.S.: The Petitioners brought this civil action based upon Respondent's overbreadth and vagueness of subjectivity in whether attorneys are debt relief agencies, and if so the provisions of Section 526(a)(4) and Section 528(a)(2), (b)(4) are unconstitutional. The district court concluded that attorneys are not debt relief agencies and that the challenged sections were unconstitutional as applied to attorneys. P.A. 74a-88a. The Petitioners petitioned this Court for review because the Eighth Circuit's ruling confirming that Section 526(a)(4) is unconstitutional and reversing that attorneys are debt relief agencies. Section 526(a)(2), (b)(4) is constitutional is inconsistent with decisions of other courts. A decision by this Honorable Court is necessary to protect the freedom of speech and due process rights of the attorney petitioners and other attorneys throughout the United States. Further, and most important a decision will protect Petitioners' John Doe, Mary Roe and the rights of other members of the public to receive constitutionally protected speech from attorneys regarding their rights and responsibilities. Three questions are presented:

1. Whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(I2A).
2. Whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution.
3. Whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.

U.S. v. Milavetz: Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The questions presented are as follows:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.
2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

Summary:

The Bankruptcy Abuse and Consumer Protection Act requires certain advertising disclosures by “debt relief agencies” and prohibits such agencies from advising debtors to incur debt “in contemplation of” bankruptcy. Milavetz, a bankruptcy attorney, challenged those provisions under the First Amendment to the extent they apply to bankruptcy attorneys as “debt relief agencies.” The Eighth Circuit held that attorneys who provide bankruptcy advice are “debt relief agencies” subject to the Act’s restrictions, but that the prohibition on certain advice to debtors violates the First Amendment as applied to such attorneys because it may restrict good-faith legal advice on bankruptcy planning. At the same time, the court upheld the requirement that covered attorneys include in their advertisements language stating that “We are a debt relief agency. We help

people file for bankruptcy relief under the Bankruptcy Code," or words to that effect. The court rejected Milavetz's claim that the required language is misleading, reasoning that it does no more than disclose the factually-correct information that covered attorneys are within the category of "debt relief agencies." On cross petitions for certiorari, the Supreme Court has agreed to review both of the Eighth Circuit's First Amendment holdings, as well as its preliminary finding that the statutory term "debt relief agencies" is properly read to reach bankruptcy attorneys.

Decision Below: 541 F.3d 785 (8th Cir. 2008)

Petitioner's Counsel of Record:

Alan Scott Milavetz, Milavetz, Gallop & Milavetz

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Business Law

Intellectual Property

***Reed Elsevier, Inc. v. Muchnick* (08-103)**

Questions Presented:

Does 17 U.S.C. §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?

Summary:

After four years of negotiations, a class of freelance authors who claimed they were not properly compensated for the use of their articles and photographs on internet databases settled with their publishers for $18 million. Ten authors, constituting one group of respondents in this case, objected, but the district court overruled their objections and approved the settlement. On appeal, the Second Circuit vacated the settlement on jurisdictional grounds, holding that under 17 U.S.C. § 411(a) the district court did not have jurisdiction over claims regarding unregistered copyrights, and so could not approve a settlement that included compensation for unregistered works, which constituted the vast majority of the copyrights at issue.

Because neither of the parties to the case is defending the Second Circuit's jurisdictional holding, the Court has appointed *amicus* to support the judgment below. Justice Sotomayor has recused herself from the case, perhaps because she participated as a Second Circuit judge when that court denied rehearing en banc. As a result, only eight Justices will hear the case; were they to split 4-4, the lower court judgment would remain intact, but the Court would issue no opinion and the question presented would remain to be answered in another case.

Decision Below: 509 F.3d 116 (2d Cir. 2008)

Petitioner's Counsel of Record:

Charles S. Sims, Proskauer Rose LLP

Respondent's Counsel of Record:

Michael J. Boni (Pogrebin Respondents)

Charles D. Chalmers (Muchnick Respondents)

Deborah Jones Merritt (Amicus Curiae In Support of the Judgment Below)

Bilski v. Doll **(08-964)**

Questions Presented:

Whether the Federal Circuit erred by holding that a "process" must be tied to a particular machine or apparatus, or transform a particular article into a different state or thing ("machine-or-transformation" test), to be eligible for patenting under 35 U.S.C. § 101, despite this Court's precedent declining to limit the broad statutory grant of patent eligibility for "any" new and useful process beyond excluding patents for "laws of nature, physical phenomena, and abstract ideas." Whether the Federal Circuit's "machine-or-transformation" test for patent eligibility, which effectively forecloses meaningful patent protection to many business methods, contradicts the clear Congressional intent that patents protect "method[s] of doing or conducting business." 35 U.S.C. § 273.

Summary:

Petitioners developed a method of hedging consumption risk associated with commodities, using a complex mathematical formula and various methods for managing and negotiating transactions. They applied for a patent, which was denied. The Board of Patent Appeals and Interferences affirmed the patent examiner's decision, holding that the transformation of "nonphysical financial risks and legal liabilities" is not appropriate subject matter for a patent. The Federal Circuit, sitting en banc, held that petitioners were not eligible for a patent under the "machine or transformation" test, which requires that a process be tied to a particular machine or used to physically transform a particular article into a different state or thing. Petitioners now argue that the Federal Circuit's standard is too restrictive, and in particular, that it would exclude software and other cutting-edge technology from patent protection.

Decision Below: 545 F.3d 943 (Fed. Cir. 2008)

Petitioner's Counsel of Record:

J. Michael Jakes, Finnegan Henderson Farabow Garrett & Dunner LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Securities

Jones v. Harris Associates **(08-586)**

Question Presented:

Congress enacted the Investment Company Act of 1940 to mitigate the conflicts of interest inherent in the relationship between investment advisers and the mutual funds they create and manage. See *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 536 (1984). Section 36(b) of that Act imposes on investment advisers "a fiduciary duty with respect to the receipt of compensation for services" and authorizes fund shareholders to bring a claim for "breach of [that] fiduciary duty." 15 U.S.C. § 80a- 35(b). The Act further provides that, in such an action, "approval by the board of directors" of the fund is not conclusive, but "shall be given such

consideration by the court as is deemed appropriate under all the circumstances." Id. § 80a-35(b)(2). The question presented is:

Whether the court below erroneously held, in conflict with the decisions of three other circuits, that a shareholder's claim that the fund's investment advisor charged an excessive fee - more than twice the fee it charged to funds with which it was not affiliated - is not cognizable under §36(b), unless the shareholder can show that the adviser misled the fund's directors who approved the fee.

Summary:

Petitioners, shareholders in several mutual funds for which respondent Harris Associates is the investment advisor, sued respondent in federal district court, alleging violations of the Investment Company Act. Specifically, they alleged that Harris Associates, which controlled the funds in question, charged an "excessive" fee, substantially higher than what would be charged an independent client. The district court granted respondent's motion for summary judgment, and the Seventh Circuit affirmed, holding that fee claims are actionable under the Act only if an advisor misleads the fund directors who approve its compensation.

Decision Below: 527 F.3d 627 (7th Cir. 2008)

Petitioner's Counsel of Record:

David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC

Respondent's Counsel of Record:

John D. Donovan Jr., Ropes & Gray LLP

***Merck & Co. v. Reynolds* (08-905)**

Question Presented:

Did the Third Circuit err in holding, in accord with the Ninth Circuit but in contrast to nine other Courts of Appeals, that under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation?

Summary:

Respondents sued petitioner Merck for alleged misrepresentations regarding Merck's arthritis pain-reliever Vioxx. Respondents claim Merck minimized the risks of heart attacks and strokes associated with the drug, which were outlined in an FDA warning letter issued in 2001 and discussed in the letter's subsequent media coverage. When respondents filed suit in 2003, the district court dismissed their claims; under the Third Circuit's inquiry-notice test, the court held, the limitations period began to run when the "storm warnings" of the FDA letter and associated press coverage put the respondents on notice of possible wrongdoing, and by 2003, the limitations period had lapsed. The Third Circuit reversed, holding that the statute of limitations did not begin to run until Merck acted with scienter (intent or knowledge of wrongdoing), so the publication of concerns regarding Vioxx did not constitute sufficient "storm warnings" to trigger the limitations period.

Decision Below: 543 F.3d 150 (3d Cir. 2008)

Petitioner's Counsel of Record:

Evan R. Chesler, Cravath, Swaine & Moore LLP

Respondent's Counsel of Record:

Max W. Berger, Bernstein Litowitz Berger & Grossman LLP

Free Enterprise Fund v. Public Company Accounting Oversight Board **(08-861) (see Constitutional Law: Government Powers)**

Antitrust

American Needle, Inc. v. NFL **(08-661)**

Questions Presented:

The Seventh Circuit affirmed the district court's grant of summary judgment, holding that the National Football League and its member teams constitute a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Antitrust Act. The antitrust claims arose from the teams' activities in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks ("Team Products"). In 2000, the teams entered into an agreement among themselves and with Reebok International, a Team Products licensee, pursuant to which the teams agreed (1) not to compete with each other in the licensing of Team Products and (2) not to permit any licenses to be granted to Reebok's competitors for a period of ten years, thus creating in Reebok a monopoly in the markets for Team Products. Petitioner American Needle, Inc., a former licensee, challenged the restrictive agreements as violative of the Sherman Act. The NFL claimed that the teams' agreements were exempt from the Sherman Act because the teams and the League constitute a single entity for purposes of the Act's plurality requirement. The district court granted summary judgment in favor of the NFL on the single entity issue and the Seventh Circuit affirmed, holding that the NFL is a single entity simply because they collectively produce NFL football games. In holding that the NFL and its member teams are exempt from rule of reason claims under the Sherman Act, the Seventh Circuit's decision directly conflicts with the Supreme Court's decision in Radovitch v. NFL, 352 U.S. 445 (1957), as well as the holdings of the First, Second, Third, Sixth, Eighth, Ninth, and D.C. Circuits. Two questions are presented:

1. Are the NFL and its member teams a single entity that is exempt from rule of reason claims under Section 1 of the Sherman Act simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?
2. Is the agreement of the NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of ten years, subject to a rule of reason claim under Section 1 of the Sherman Act, where the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in the licensing and sale of Team Products?

Summary: (see Questions Presented above)
Decision Below: 538 F.3d 736 (7th Cir. 2008)
Petitioner's Counsel of Record:
Glen D. Nager, Jones Day
Respondent's Counsel of Record:
Greg H. Levy, Covington & Burling LLP

Bankruptcy

United Student Aid Funds, Inc. v. Espinosa **(08-1134)**
Questions Presented:
1. Student loans are statutorily non-dischargeable in bankruptcy unless repayment would cause the debtor an "undue hardship." Debtor failed to prove undue hardship in an adversary proceeding as required by the Bankruptcy Rules, and instead, merely declared a discharge in his Chapter 13 plan. Are the orders confirming the plan and discharging debtor void?
2. Bankruptcy Rules permit discharge of a student loan only through an adversary proceeding, commenced by filing a complaint and serving it and a summons on an appropriate agent of the creditor. Instead, debtor merely included a declaration of discharge in his Chapter 13 plan and mailed it to creditor's post office box. Does such procedure meet the rigorous demands of due process and entitle the resulting orders to respect under principles of res judicata?
Summary:
This case involves the requirements for discharging student-loan debt in bankruptcy, a subject that may be of special interest given current economic conditions. Respondent Espinosa filed for Chapter 13 bankruptcy, listing as debt $13,250 in student loans held by United Student Aid Funds (USA Funds). Espinosa's bankruptcy proposal provided for repayment of the principal amount of the loan in installments, followed by a discharge of the loan's interest. When USA Funds received notice of the plan by mail, it filed a proof of claim of $17,832.15. The court confirmed Espinosa's bankruptcy plan, and the Chapter 13 trustee informed USA Funds that the loan would be repaid according to Espinosa's plan unless it objected within 30 days. USA Funds failed to timely object; Espinosa completed the plan and the bankruptcy court discharged his loan interest.

Three years later, USA Funds intercepted Espinosa's income tax refunds to recoup the unpaid portion of the loan. In the subsequent litigation, USA Funds argued that the order confirming Espinosa's bankruptcy plan was void because Espinosa had not first commenced an adversary proceeding to prove that repayment would pose an "undue burden," as required by the bankruptcy statute and regulations. The Ninth Circuit ruled in favor of Espinosa, holding that a debtor may obtain discharge of student loans by including them in a Chapter 13 plan so long as the creditor is provided notice and an opportunity to object.
Decision Below: 553 F.3d 1193 (9th Cir. 2008)
Petitioner's Counsel of Record:
Charles W. Wirken, Gust Rosenfeld PC

Respondent's Counsel of Record:

Michael J. Meehan, Munger Chadwick PLC

***Schwab v. Reilly* (08-538)**

Questions Presented:

The Third Circuit affirmed the United States District Court for the Middle District of Pennsylvania, which held that when the values on a debtor's list of assets and on her claim of exemptions are equal, a Chapter 7 Trustee must object to a debtor's claim of exempt property within 30 days in order to retain his statutory authority to later sell property for the benefit of creditors. Because of the wide and contradictory array of judicial decisions construing this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 180 (1992), three questions are presented:

1. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value?

2. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?

[The Court limited its grant of certiorari to the first two questions presented.]

Summary:

Respondent Reilly filed for bankruptcy in April 2005 and subsequently filed an exemption for her business equipment, which she claimed had a value of $10,718. Petitioner Schwab, the bankruptcy trustee charged with liquidating Reilly's assets to satisfy her creditors, did not object within the 30 days allowed by law. But in August 2005, Schwab filed a motion seeking to sell Reilly's business equipment. He claimed that no objection to Reilly's earlier filing had been necessary, as he did not object to Reilly retaining the $10,718 she claimed. But because the equipment was, according to Schwab, actually worth $17,200, it should be liquidated, with Reilly retaining the claimed $10,718 and the remainder distributed to creditors. The bankruptcy court disagreed, holding Reilly's business equipment fully exempt, and the district court and Third Circuit affirmed. According to the courts, Reilly had intended to exempt the full value of the equipment and simply underestimated that value, without objection by the trustee. This case will require the Supreme Court to interpret its 1992 decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638, relied on by the court below, which held that a trustee loses the right to challenge the value of an exempted asset unless he objects within 30 days.

Decision Below: 534 F.3d 173 (3d Cir. 2008)

Petitioner's Counsel of Record:

Craig Goldblatt, Wilmer Cutler Pickering Hale and Dorr LLP

Respondent's Counsel of Record:

G. Eric Brunstad Jr., Dechert LLP

Milavetz v. United States/United States v. Milavetz **(08-1119/08-1225) (see Constitutional Law: First Amendment)**

Labor and Employment

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region **(08-604)**

Questions Presented:

The Railway Labor Act ("RLA"), 45 U.S.C. §§151 et seq., sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board ("the Board"). The statute provides that the Board's judgment "shall be conclusive ... except ...for": (1)"failure ... to comply" with the Act, (2) "failure . . . to conform or confine" its order "to matters within . . . the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153 First (q). This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a "conference" between the parties. 45 U.S.C. §152 Second. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule." The questions presented are:

1. Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process.
2. Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

Summary:

Following an internal investigation, petitioner Union Pacific charged five employees with disciplinary violations. Respondent, the employees' representative, began arbitration proceedings before the National Railroad Adjustment Board, but failed to include evidence that the cases had been submitted to a conference between the parties. The Board denied the employees' claims for lack of jurisdiction, holding that conducting the conference was a prerequisite to arbitration under the Railway Labor Act. The Seventh Circuit set aside that decision as a violation of the Due Process Clause, on the ground that Board precedent had not made clear to the employees the necessity for such a conference. Petitioner now argues that the Seventh Circuit exceeded the scope of federal court authority to review Board arbitration awards under the Railway Labor Act; according to petitioner, the Act identifies a closed set of circumstances under which an arbitral award may be set aside, which does not include review for a due process violation.

Decision Below: 537 F.3d 789 (7th Cir. 2008)

Petitioner's Counsel of Record:

Maureen E. Mahoney, Latham & Watkins LLP

Respondent's Counsel of Record:

Edgar N. James, James & Hoffman PC

Granite Rock Co. v. International Brotherhood of Teamsters **(08-1214)**

Questions Presented:

1. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?
2. Does Section 30l(a) of the Labor-Management Relations Act, which generally preempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?

Summary:

After a round of intense negotiations, petitioner Granite Rock reached a proposed collective bargaining agreement with Teamsters Local 287, which would become binding if ratified by the employees. The proposed contract contained a no-strike provision and a provision for arbitrating "all disputes arising under" the agreement. The bargaining unit of employees voted to accept the agreement, but the International Brotherhood of Teamsters ("IBT") told Local 287 it could not honor the terms of the contract unless Granite Rock agreed to include a provision holding all national and international unions harmless for strike misconduct. Local 287 then announced that ratification had not occurred, and, at IBT's direction, undertook a company-wide strike. Granite Rock sued both Local 287 and IBT. The district court dismissed the claims against IBT, holding that §301(a) of the Labor-Management Relations Act gives federal courts jurisdiction only over claims among labor contract signatories, and that IBT was not a party to this contract. When Local 287, the remaining defendant, moved for arbitration, the district court ruled that it would be inappropriate to order arbitration without first determining whether a contract existed. After a jury found that an agreement had indeed been ratified, the district court ordered arbitration of the remaining claims.

In the decision below, the Ninth Circuit reversed the district court holding that it had jurisdiction to decide whether a contract existed. The question of contract formation, the court held, fell within the broad "arising under" arbitration provision, and should have been decided by an arbitrator, not the court. The Ninth Circuit affirmed dismissal of the claim against IBT, reasoning that no cause of action existed under § 301(a) because IBT was not a party to the contract, in that it had no express rights or duties under the agreement.

Decision Below: 546 F.3d 1169 (9th Cir. 2008)

Petitioner's Counsel of Record:

Garry George Mathiason, Littler Mendelson

Respondent's Counsel of Record:

Duane B. Beeson, Beeson, Tayer & Bodine (for Respondent Teamsters Local 287)

Peter David Nussbaum, Altshuler Berzon LLP (for Respondents International Brotherhood of Teamsters, et al.)

Conkright v. Frommert **(08-810)**

Questions Presented:

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.
2. Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

Summary:

Respondents are current and former Xerox Corporation employees who received lump-sum retirement payments and were later rehired. In calculating benefits due the employees, Xerox's retirement plan takes into account their entire service to Xerox, including the periods preceding their initial lump-sum payments; under a no-duplication provision designed to prevent double-counting, the employees' total pension benefits are offset by the value of the interim payments. After a dispute arose over application of this non-duplication provision, the ERISA Plan Administrator construed the provision to require that the employees' benefits be offset by the present-day economic value of the initial lump-sum payments, rather than their nominal value when paid, as sought by the employees. The district court disagreed, holding that the plan was ambiguous and thus should be construed in the employees' favor, and reasoning that it was not obliged to defer to a plan administrator's "mere opinion" offered outside the context of administrative claims for benefits. The Second Circuit affirmed, holding that the district court had discretion to adopt any reasonable interpretation of an ERISA plan's terms.

Decision Below: 535 F.3d 111 (2d Cir. 2008)

Petitioner's Counsel of Record:

Robert D. Wick, Covington & Burling LLP

Respondent's Counsel of Record:

Robert H. Jaffe, Robert H. Jaffe & Associates PA (for 33 Respondents)
Brendan S. Maher, Stris & Maher LLP (for 62 Respondents)

Arbitration

Stolt-Nielsen S.A. v. AnimalFeeds International Corp. **(08-1198)**

Question Presented:

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act 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 the 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 one presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

Summary:

Petitioners and respondent were parties to international shipping contracts that called for settlement of disputes through arbitration, to be conducted in accordance with the Arbitration Act. In 2003, respondent filed suit against petitioners and other carriers alleging a price-fixing conspiracy, and sought to arbitrate its claim on behalf of a class of buyers of maritime transportation services. Petitioners opposed, arguing that they had never consented to class arbitration. In accordance with *Bazzle*, the parties entered into a supplemental agreement to have a panel of arbitrators review the underlying arbitration clause on the question of class arbitration; the panel agreed that the while the clause was silent on class arbitration, existing law permitted such arbitration even in the absence of express approval. The district court vacated, holding that the arbitrators had failed to apply clear principles of maritime law precluding class arbitration absent specific consent. In the decision now under review, the Second Circuit reversed, holding that there had been no arbitrator error that "r[o]se to the level of manifest disregard of the law," as required to justify vacatur of the arbitral award. The Second Circuit also rejected petitioners' argument that the Federal Arbitration Act prohibits class arbitration not explicitly provided for by an arbitration agreement.

Decision Below: 548 F.3d 85 (2d Cir. 2008)

Petitioner's Counsel of Record:

Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Respondent's Counsel of Record:

Bernard Persky, Labaton Sucharow LLP

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region **(08-604) (see Business Law: Labor & Employment)**

Granite Rock Co. v. International Brotherhood of Teamsters **(08-1214) (see Business Law: Labor & Employment)**

Consumer Protection

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA **(08-1200)**

Question Presented:

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.

Summary:

Congress enacted the Fair Debt Collection Practices Act ("FDCPA") to combat abuse in debt collection activity. Under the FDCPA, debt collectors must send consumers a written "validation notice" that includes an explanation of how to dispute the debt. Debt collectors can avoid liability under this provision by showing that any violation was an unintentional "bona fide error," occurring despite the maintenance of procedures reasonably calculated to avoid such errors.

Respondents, a law firm and lawyer, were retained by the holder of petitioner Jerman's mortgage and served her with a foreclosure notice. The accompanying FDCPA validation notice inaccurately stated that the debt would be presumed valid unless contested "in writing"; the FDCPA does not require a written objection. Petitioner, who had in fact repaid her mortgage in full, sued respondents, claiming that they violated the FDCPA by misrepresenting the process for disputing her alleged debt. The district court held that the "in writing" provision of the validation notice rendered it unlawful under the FDCPA, but found that respondents qualified for the "bona fide error" defense, reasoning that the defense applies to legal as well as to factual or clerical errors. The Sixth Circuit affirmed, holding that Congress did not intend to limit the exception's reach to clerical, rather than legal, errors.

Decision Below: 538 F.3d 469 (6th Cir. 2008)

Petitioner's Counsel of Record:

Amy Howe, Howe & Russell PC

Respondent's Counsel of Record:

George S. Coakley

False Claims Act

Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson **(08-304)**

Question Presented:

Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative ... report ... audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730 (e)(4)(A).

Summary:

The False Claims Act establishes civil penalties for false or fraudulent claims to the United States for payment, and authorizes private parties ("qui tam" plaintiffs) to pursue such claims. To prevent private plaintiffs from exploiting the investigative work of others, Congress included in the Act a public disclosure bar, prohibiting a qui tam action based on certain types of public information where the plaintiff is not the original source of that information. Under the Act, the public disclosure bar includes a "congressional, administrative, or [GAO] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A).

Karen Wilson filed a qui tam action against petitioner Graham County Soil & Water, alleging various violations of the False Claims Act connected to flood and erosion cleanup costs. Prior to Wilson's filing, information related to her allegations was detailed in an audit submitted to Graham County, as well as a May 1996 report prepared by the North Carolina Department of Environment and

Natural Resources, both of which were public records. The district court concluded that a state audit or investigation constitutes public disclosure under § 3730(e)(4)(A), so that Wilson could not base her False Claims Act action on information in those documents. The Fourth Circuit reversed, acknowledging a circuit split on the issue and holding that § 3730(e)(4)(A) covers only federal, rather than state, audits and reports, relying on the grammatical structure of the provision. That result makes sense, the court reasoned, because federal reports are more likely to come to the attention of federal investigators, rendering private qui tam actions unnecessary.

Decision Below: 528 F.3d 292 (4th Cir. 2008)

Petitioner's Counsel of Record:

Christopher G. Browning, Jr., North Carolina Department of Justice

Respondent's Counsel of Record:

Mark T. Hurt

Civil RICO

***Hemi Group LLC v. City of New York* (08-969)**

Question Presented:

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its "business or property" by alleging non commercial injury resulting from nonpayment of taxes by non litigant third parties.

Summary:

Respondent City of New York filed suit against petitioners, a group of online cigarette vendors, for violating the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that they systematically defrauded New York City of tax revenues by not properly disclosing internet sales of cigarettes to New York residents. The Second Circuit allowed the civil RICO claims to proceed, over a dissent by Judge Winter arguing that the City lacked standing under RICO. Petitioners argue that the injury identified by respondent – that petitioners' alleged actions make it more difficult to collect taxes from non-litigant third parties – does not constitute an injury to "business or property," as required by RICO; instead, they are non-commercial losses that may implicate the sovereign power to tax, but not a commercial property right.

Decision Below: 541 F.3d 425 (2d Cir. 2008)

Petitioner's Counsel of Record:

Randolph H. Barnhouse, Luebben Johnson & Barnhouse LLP

Respondent's Counsel of Record:

Leonard J. Koerner, Corporation Counsel for the City of New York, NYC Law Department

Elizabeth Susan Natrella, Assistant Corporation Counsel, NYC Law Department

Federal Practice and Procedure

***Mohawk Industries, Inc. v. Carpenter* (08-678)**

Question Presented:

Whether a party has an immediate appeal under the collateral order doctrine, as set forth in *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), of a district court's order finding waiver of the attorney-client privilege and compelling production of privileged materials.

Summary:

Petitioner Mohawk Industries fired respondent Carpenter, a former shift supervisor, following an investigation of potential immigration law violations supervised by Mohawk's counsel. Carpenter sued, claiming Mohawk fired him to prevent him from testifying in a pending class action lawsuit against the company. Carpenter sought discovery of materials related to Mohawk's internal investigation and decision to terminate him, which Mohawk claimed were protected by attorney-client privilege. The district court found for Carpenter, holding that Mohawk waived the privilege and "placed the actions … in issue" when it referred to the investigation in a brief filed in the class action suit. Mohawk appealed to the Eleventh Circuit, which held that it did not have jurisdiction to review the district court's order under the collateral order doctrine as applied in *Cohen v. Beneficial Industrial Loan Corp*., because such orders regarding privilege are not "effectively unreviewable on appeal" after the final judgment has been entered.

Decision Below: 541 F.3d 1048 (11th Cir. 2008)

Petitioner's Counsel of Record:

Randall L. Allen, Alston & Bird LLP

Respondent's Counsel of Record:

Jonathan Craig Smith, Koskoff Koskoff & Bieder PC

***Shady Grove Orthopedic Assoc. v. Allstate Insurance Co.* (08-1008)**

Questions Presented:

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?
2. Can state legislatures dictate procedure in the federal courts?
3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

Summary:

New York law requires insurers to pay certain benefits within 30 days of submission of a properly documented claim, and to pay interest penalties on overdue benefits. Petitioners allege that respondent Allstate routinely fails both to pay benefits within the 30-day time period and to pay the resulting interest charges. Petitioners filed suit against Allstate on behalf of themselves and a proposed class of Allstate insureds who had been denied the mandated interest payments. Respondent moved to dismiss the claim, arguing that the state-law prohibition on class actions under New York Civil Practice Law and Rules supersedes Rule 23 of the Federal Rules of Civil Procedure, the federal rule governing class actions. The district court granted the motion and the Second Circuit affirmed, holding that New York's bar on class actions is substantive law that must be applied by federal courts sitting in diversity jurisdiction.

Decision Below: 549 F.3d 137 (2d Cir. 2008)
Petitioner's Counsel of Record:
Scott L. Nelson, Public Citizen Litigation
Respondent's Counsel of Record:
Christopher Landau, Kirkland & Ellis LLP

Hertz Corp. v. Friend **(08-1107)**
Question Presented:
Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters - i.e., its nerve center.
Summary:
Respondents sued petitioner Hertz in state court in California, seeking damages for alleged violations of the state's wage and hour laws. Hertz removed the action to federal district court, but the district court remanded, holding that it lacked diversity jurisdiction because Hertz was a citizen of California. Though Hertz is incorporated in Delaware and operates its headquarters in New Jersey, the district court held that because a plurality of Hertz's business activity occurs in California, Hertz is not the kind of litigant intended to be protected by diversity jurisdiction. The Ninth Circuit affirmed. Hertz now contends that the lower courts erred in not considering its headquarters its principal place of business, and that the Ninth Circuit incorrectly implied a company can have more than one principal place of business.
Decision Below: 297 Fed. Appx. 690 (Fed. Cir. 2008)
Petitioner's Counsel of Record:
Frank B. Shuster, Constangy, Brooks & Smith LLP
Respondent's Counsel of Record:
Robert J. Stein III, Adorno Yoss Alvarado & Smith

Criminal Law

Fifth Amendment

Maryland v. Shatzer **(08-680)**
Question Presented:
Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?
Summary:
In August 2003, the police attempted to interview respondent Shatzer, serving a prison sentence on an unrelated crime, about whether he had committed sex offenses against his three-year old son. Shatzer invoked his *Miranda* rights and refused to give a statement without an attorney present. After nearly three years had elapsed, the police re-opened their investigation of Shatzer for the sexual

abuse of his son. Shatzer, who was still in prison, was interviewed in March 2006 by a new detective who was unaware that Shatzer had requested an attorney during the 2003 interrogation. This time, Shatzer signed a *Miranda* waiver form and agreed to talk without an attorney present, and then made several inculpatory statements. Before trial, Shatzer moved to suppress those statements, claiming that the 2006 interrogation violated *Edwards v. Arizona*, 451 U.S. 427 (1981), which prohibits police re-initiation of interrogation in the absence of an attorney once a defendant has invoked his *Miranda* right to counsel. The Maryland Court of Appeals, Maryland's highest court, agreed with Shatzer that *Edwards* governed the 2006 interrogation (and ordered the trial court to apply *Edwards* on remand). The "passage of time alone," the court concluded, is insufficient to render *Edwards* inapplicable, and the fact that Shatzer had been returned to the general prison population between interrogations did not constitute a "break in custody" that would override *Edwards*' protections.

Decision Below: 954 A.2d 1118 (Maryland Ct. App. 2007)

Petitioner's Counsel of Record:

Brian Scott Kleinbord, Assistant Attorney General

Respondent's Counsel of Record:

Celia Anderson Davis, Assistant Public Defender, Office of Public Defender, Appellate Division

***Florida v. Powell* (08-1175)**

Questions Presented:

1. Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation conflicts with *Miranda v. Arizona* and decisions of federal and state appellate courts.

2. And if so, does the failure to provide express advice of the right to the presence of counsel during questioning vitiate Miranda warnings which advise of both (A) the right to talk to a lawyer "before questioning" and (B) the "right to use" the right to consult a lawyer "at any time" during questioning?

Summary:

Respondent Powell was charged with possession of a firearm by a felon. Before agreeing to talk to the police, Powell was given *Miranda* warnings, which read, in part: "You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." Defense counsel objected to these warnings at trial on the ground that they suggest a defendant has the right to have an attorney present *before*, but not *during*, questioning. The trial court overruled the defense's objection and the jury found Powell guilty. The Florida Second District Court of Appeal reversed, finding the *Miranda* warnings inadequate because they did not properly convey to Powell the right to consult with an attorney during the entire interrogation process, and the Supreme Court of Florida affirmed.

Decision Below: 998 So. 2d 531 (Fla. 2008)

Petitioner's Counsel of Record:

Robert J. Krauss, Chief Assistant Attorney General, Tampa Criminal Appeals

Respondent's Counsel of Record:

Cynthia Dodge, Assistant Public Defender

Sixth Amendment

***Briscoe v. Virginia* (07-11191)**

Question Presented:

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

Summary:

Petitioners were tried on cocaine-distribution charges. At trial, they objected to the admission of forensic reports showing that the substances seized from them contained cocaine, arguing that under the Confrontation Clause, the state could not introduce the reports without also calling the forensic analyst who had prepared them as a government witness subject to cross-examination by the defense. The Supreme Court of Virginia agreed that the reports were "testimonial" in nature and thus subject to the Confrontation Clause, a ruling the Supreme Court confirmed in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 5257 (2009). But the Virginia court went on to affirm the convictions, holding that the Confrontation Clause was not violated because defense counsel could have called the analyst as a defense witness, and that imposing that obligation on the defense does not improperly shifts the burden of proof to the defendant. Now the Supreme Court will have an early opportunity to clarify the scope of its holding last Term in *Melendez-Diaz*, deciding whether the state may satisfy its Confrontation Clause obligations under that decision by allowing the defense to call laboratory analysts as defense witnesses.

Decision Below: 657 S.E. 2d 113 (Va. 2008)

Petitioner's Counsel of Record:

Richard D. Friedman, University of Michigan Law School

Respondent's Counsel of Record:

Stephen R. McCullough, State Solicitor General

***Padilla v. Kentucky* (08-651)**

Questions Presented:

Petitioner, who has lived in this country for nearly 40 years and served in the United States Army, is a legal permanent resident of this country, not a citizen. In 2001 Petitioner was indicted for trafficking in marijuana - an offense designated as an "aggravated felony" under the Immigration and Naturalization Act (INA). Prior to entering a plea of guilty to that offense, Petitioner was incorrectly advised by his counsel that the plea would not affect his immigration status. Unfortunately, because the offense was an aggravated felony, Petitioner's

deportation is mandatory. Upon discovery of this fact, Petitioner sought post conviction relief in Kentucky's state courts arguing that his attorney had improperly advised him. The Supreme Court of Kentucky denied post conviction relief holding the Petitioner was not entitled to accurate advice from his attorney on immigration consequences because he had no Sixth Amendment right to counsel in that proceeding. Petitioner now seeks certiorari to review the following questions:

1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and

2. Assuming immigration consequences are "collateral", whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.

Summary:

Criminal convictions carry with them many disabilities, called "collateral consequences," that take effect under state and federal statutes, wholly apart from the penalty authorized for the crime itself. The question posed here is whether counsel's failure to advise a client about the effect a conviction will have upon the defendant's immigration status, a collateral consequence of conviction, can form the basis for an ineffective assistance of counsel claim that would justify vacating a guilty plea. Supreme Court review will resolve a difficult issue regarding the limits of a criminal defense counsel's obligation to be familiar with and advise a client of the collateral consequences his guilty plea will trigger. That issue arises frequently in cases involving non-citizens where the guilty plea may be for a deportable offense.

Decision Below: 253 S.W.3d 482 (Ky. 2008)

Petitioner's Counsel of Record:

Stephen B. Kinnaird, Paul, Hastings, Janofsky & Walker

Respondent's Counsel of Record:

Wm. Robert Long Jr., Office of the Attorney General

Wood v. Allen **(08-9156) (see Criminal Law: Habeas and AEDPA Review)**

Eighth Amendment

Graham v. Florida **(08-7412)**

Question Presented:

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

Summary:

Petitioner Graham was convicted of armed burglary and attempted armed robbery at age 16, and was sentenced to three years' probation. When he was 17, Graham violated his probation by committing additional robberies. The state trial judge sentenced Graham to life in prison without the possibility of parole for his

original conviction and probation violation, and rejected Graham's pre-appeal motion arguing that sentencing a juvenile to life in prison without parole for his first offense violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Florida First District Court of Appeal affirmed Graham's sentence, holding that it did not violate the Eighth Amendment because it was not "grossly disproportionate." Graham relies on *Roper v. Simmons*, 543 U.S. 551 (2005), holding unconstitutional the imposition of the death penalty for crimes committed as a juvenile, and argues that the same reasoning – primarily, that juveniles have diminished moral culpability – should extend as well to sentences of life without parole for non-homicide crimes.

Decision Below: 982 So. 2d 43 (Fla. 1st DCA 2008)

Petitioner's Counsel of Record:

Brian S. Gowdy, Mills Creed & Gowdy P.A.

Respondent's Counsel of Record:

Scott D. Makar, Solicitor General, Office of the Attorney General (FL)

***Sullivan v. Florida* (08-7621)**

Questions Presented:

Joe Sullivan is serving a sentence of life imprisonment without the possibility of parole for a non-homicide offense committed when he was thirteen years old. Nationwide, only one other thirteen-year-old child has received a life-without-parole sentence for a non-homicide. The questions presented are:

1. Does imposition of a life-without-parole sentence on a thirteen-year-old for a non-homicide violate the prohibition on cruel and unusual punishments under the Eighth and Fourteenth Amendments, where the freakishly rare imposition of such a sentence reflects a national consensus on the reduced criminal culpability of children?

2. Given the extreme rarity of a life imprisonment without parole sentence imposed on a 13-year-old child for a non-homicide and the unavailability of substantive review in any other federal court, should this Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

Summary:

Petitioner Sullivan was convicted of sexual battery at age 13 and was sentenced to life in prison without parole. After Sullivan lost his state court appeals, the Supreme Court first recognized constitutional limits on juvenile sentences in *Roper v. Simmons*, 543 U.S. 551 (2005), holding that the death penalty may not be imposed for crimes committed as a juvenile. Sullivan filed for post-conviction relief, arguing that in light of *Roper v. Simmons*, the imposition of life imprisonment without parole on a juvenile convicted of a non-homicide crime violates the Eighth Amendment. The trial court dismissed the motion, holding it did not raise a valid constitutional claim, and the Florida First District Court of Appeal summarily affirmed without opinion. *Sullivan* raises a procedural issue not present in its companion case, *Graham*: Because Sullivan did not seek post-conviction relief until nearly 20 years after his sentence; the state has argued that his petition is untimely and should be denied on that basis alone.

Decision Below: 987 So. 2d 83 (Fla. 1st DCA 2008) (table)
Petitioner's Counsel of Record:
Bryan A. Stevenson, Equal Justice Initiative
Respondent's Counsel of Record:
Scott D. Makar, Solicitor General, Office of the Attorney General (FL)

Habeas and AEDPA Review

***McDaniel v. Brown* (08-559)**
Questions Presented:
1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?
2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?
Summary:
Respondent Brown was convicted of raping a nine-year old girl after a state DNA expert testified at his trial that there was a "99.999967 percent" chance that he had committed the crime. On federal habeas, Brown moved to expand the record to include an expert report showing that the prosecution's DNA testimony was false, and claimed that the rest of the evidence at trial was insufficient to convict him. The district court granted the motion and ruled for Brown, and the Ninth Circuit affirmed. Though the precise grounds for that holding are now contested by the parties, the Ninth Circuit rested in part on its determination that without the expert's testimony, contradicted by the evidence in the expanded record, no reasonable jury could have voted to convict. Petitioner now argues that the Ninth Circuit misapplied *Jackson v. Virginia*'s standard for sufficiency of the evidence to support a conviction, which requires evaluation of all of the trial evidence and prohibits consideration of evidence that was not presented to the jury.
Decision Below: 525 F.3d 787 (9th Cir. 2008)
Petitioner's Counsel of Record:
Robert E. Wieland Jr., Nevada Office of the Attorney General
Respondent's Counsel of Record:
Paul G. Turner, Assistant Federal Public Defender

***Smith v. Spisak* (08-724)**
Questions Presented:
1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?
2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered

prejudice from several allegedly deficient statements [e.g. commenting on the brutality of the crimes, addressing the victims' families, and noting that Spisak had lived a life devoid of "good deeds"] made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

Summary:

Spisak presents questions regarding the scope of habeas review under AEDPA. Respondent Spisak was convicted of murdering three people and injuring a fourth, and was sentenced to death. On habeas review the Sixth Circuit vacated the death penalty on two independent grounds: that the penalty-phase jury instructions violated *Mills* by failing to clarify that the jury need not be unanimous as to the presence of any given mitigating factor; and that defense counsel was constitutionally ineffective during the penalty phase under *Strickland.* The state claims that this ruling violated AEDPA, which limits habeas relief to cases in which a state court ruling is "contrary to" "clearly established" Supreme Court precedent; because the Sixth Circuit went beyond *Mills* to reach a question not directly presented in that case, the state argues, it exceeded its authority under AEDPA. The state also claims that the Sixth Circuit improperly "indulged a presumption of prejudice" in endorsing Spisak's ineffective assistance claim, without giving the deference mandated by AEDPA to the state-court ruling rejecting that claim. This is the second time the Court has granted review in this case; the Court has already vacated and remanded the case for reconsideration in light of its decisions in *Schriro v. Landrigan*, 550 U.S. 465 (2007) and *Carey v. Musladin*, 549 U.S. 70 (2006), both of which applied AEDPA's limits on habeas review to reverse lower-court decisions granting relief.

Decision Below: 512 F.3d 852 (6th Cir. 2008)

Petitioner's Counsel of Record:

Benjamin C. Mizer, Solicitor General, Office of the Attorney General

Respondent's Counsel of Record:

Michael J. Benza

***Beard v. Kindler* (08-992)**

Question Presented:

After murdering a witness against him and receiving a sentence of death, Respondent Kindler broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss respondent's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court ... had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate."

Is a state procedural rule automatically "inadequate" under the adequate-state grounds doctrine - and therefore unenforceable on federal habeas corpus review - because the state rule is discretionary rather than mandatory?

Summary:

The "adequate state grounds" doctrine prevents a federal court from reaching the merits of a habeas petition if a state court has ruled that the defendant procedurally defaulted his claims under "an independent and adequate state procedural rule." Respondent Kindler was sentenced to death for murder. Under the state's "fugitive forfeiture rule," which gives the courts discretion over whether to hear a fugitive's appeal, the Pennsylvania courts held that Kindler had waived his right to appellate review by escaping, and dismissed his appeal without reaching the merits. On habeas review, the district court granted relief, and the Third Circuit upheld the habeas court's authority to reach the merits of those claims (though disagreeing in part with the district court on the merits). The court held that Pennsylvania's fugitive forfeiture rule was not an adequate state ground barring habeas review because it is discretionary and thus by definition not "firmly established" and "consistently and regularly applied," as required by Supreme Court precedent defining adequate state grounds.

Decision Below: 542 F.3d 70 (3d Cir. 2008)

Petitioner's Counsel of Record:

Ronald Eisenberg, Deputy District Attorney

Respondent's Counsel of Record:

Matthew C. Lawry, Defender Association of Philadelphia

Wood v. Allen **(08-9156)**

Questions Presented:

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?
2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

Summary:

Petitioner Wood was sentenced to death for capital murder. Wood claimed that he was represented by an attorney with no criminal experience who failed to present evidence of his impaired mental functioning and lower-than-70 IQ at the penalty phase of his trial. While Wood's case was on appeal to the Alabama Court of Criminal Appeals, the U.S. Supreme Court held in *Atkins v. Virginia*, [cite] that the Eighth Amendment prohibits execution of the mentally retarded. Wood's case was then remanded to the state trial court for an evidentiary hearing on the question of his mental retardation, and to determine whether his counsel was ineffective. The state court rejected Wood's *Atkins* claim, holding that he is not sufficiently limited in his adaptive functioning to be considered mentally retarded, and decided that Wood's counsel was not ineffective. Wood filed a federal habeas

petition, and the district court granted relief on Wood's ineffective assistance claim, rejecting the state court's conclusion and holding that Wood's counsel was ineffective for failing to introduce potentially mitigating evidence of Wood's low IQ. The Eleventh Circuit reversed, restricting its review under AEDPA to "examining whether there is evidence to support the state court's findings," and upheld the state court holding that Wood's counsel consciously and reasonably decided not to introduce mental impairment evidence as part of his trial strategy.

Decision Below: 542 F.3d 1281 (11th Cir. 2008)

Petitioner's Counsel of Record:

Kerry Alan Scanlon, Kaye Scholer LLP

Respondent's Counsel of Record:

Corey L. Maze, Solicitor General, Office of the Attorney General (AL)

Prosecutorial Immunity

***Pottawattamie County v. McGhee* (08-1065)**

Questions Presented:

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

Summary:

This case concerns the scope of prosecutorial immunity, and whether the same absolute immunity that protects prosecutors when they act as trial "advocates for the state" also applies to alleged pre-trial coercion of false testimony. Respondents McGhee and Harrington were convicted of murder in 1978. The Iowa Supreme Court vacated Harrington's conviction in 2003 after it learned that the prosecution failed to disclose exculpatory evidence. (McGhee pleaded guilty to second-degree murder in exchange for a sentence of time served.) Respondents sued, alleging that prosecutors had knowingly coerced false witness statements during the criminal investigation and then introduced those statements at trial. The district court held that allegations of such misconduct are sufficient to state a due process claim, and the Eighth Circuit agreed, holding that a prosecutor's procurement of false testimony violates a defendant's substantive due process rights, and that prosecutors are not immune from suit where they are accused of both procuring false evidence and using that evidence at trial. Petitioners argue that the Eighth Circuit violated an established principle that grants prosecutors absolute immunity for the use of false testimony at trial.

Decision Below: 547 F.3d 922 (8th Cir. 2008)

Petitioner's Counsel of Record:

Jeffrey W. Sarles, Mayer Brown LLP

Respondent's Counsel of Record:

Stephen D. Davis, Canel Davis & King (for Respondent McGhee)

J. Douglas McCalla, The Spence Law Firm LLC (for Respondent Harrington)

Mail and Wire Fraud – Deprivation of Honest Services

***Black v. United States* (08-876)**

Questions Presented:

This Court held in *McNally v. United States*, 483 U.S. 350 (1987), a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expands the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services." Twenty years later, the courts of appeals are hopelessly divided on the application of Section 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that Section 1346 may be applied in a purely private setting irrespective of whether the defendant's conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights.

1. Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

Summary:

Petitioners were convicted of mail fraud based on an instruction that, according to petitioners, allowed the jury to convict on either of two findings: that petitioners (1) stole money belonging to the company for which they worked, or (2) deprived the company of their "honest services" under 18 U.S.C. § 1346. Petitioners argue that the jury was improperly allowed to convict under the second, honest-services theory even if their employer suffered no economic injury. The Seventh Circuit affirmed the convictions, holding that a defendant can be convicted of honest-services fraud under 18 U.S.C. § 1346 even if the private gain sought is not at the expense of the party to whom honest services are owed. The court also held that petitioners forfeited their objection to the jury instructions when they objected to the government's request for a special verdict, because such a verdict would have separated the jury's holdings on each question and possibly rendered moot petitioner's objection to the second.

Decision Below: 530 F.3d 596 (7th Cir. 2008)

Petitioner's Counsel of Record:

Miguel A. Estrada, Gibson, Dunn & Crutcher LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

***Weyhrauch v. United States* (08-1196)**

Question Presented:

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

Summary:

Petitioner Weyhrauch represented Juneau in the Alaska House of Representatives. After deciding not to run for re-election, he contacted oil company VECO about the possibility that his law office might represent the company in the future. When Weyrauch subsequently sought early adjournment of a legislative session considering an oil-tax bill opposed by VECO, the federal government charged him with devising "a scheme or artifice to defraud and deprive the State of Alaska of its intangible right to honest services." Weyhrauch sought to exclude evidence regarding his alleged concealment of a conflict of interest on the ground that Alaska law does not require legislators to disclose employment negotiations. The prosecution argued that even if no state law is violated, a state official commits honest-services fraud whenever he acts contrary to federally-defined standards of honesty. The Ninth Circuit agreed with the government, holding that the mail fraud statute "establishes a uniform standard for 'honest services' that governs every public official and… the government does not have to prove an independent violation of state law to sustain an honest services fraud conviction."

Decision Below: 548 F.3d 1237 (9th Cir. 2008)

Petitioner's Counsel of Record:

Donald B. Ayer, Jones Day

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Speedy Trial Act

***Bloate v. United States* (08-728)**

Question Presented:

The Speedy Trial Act, 18 U.S.C. § 3161 et seq., requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" (emphasis added). The question presented here is:

Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1). As the Eighth Circuit explicitly acknowledged below, this question has divided the courts of appeals. The Fourth and Sixth Circuits have answered it in the negative; the Eighth Circuit and seven other circuits have answered it in the affirmative.

Summary:

Petitioner Bloate was indicted for possession of a firearm by a felon and possession of crack cocaine, triggering the 70-day maximum pretrial period under the Speedy Trial Act (STA). Bloate moved for and was granted an extension of the deadline for filing pretrial motions. After nearly six months passed without trial, Bloate filed a motion to dismiss under the STA. The district court denied his motion, holding that the 28 days allocated for preparation of pretrial motions, among other time periods, was properly excludable from the 70-day period. The Eighth Circuit, recognizing a circuit split on the issue of whether pretrial motion preparation is excludable under the STA, joined the majority of circuits in holding that if the court specifically grants time for that purpose, it is excludable under the STA's exception for "delay resulting from other proceedings concerning the defendant." The court reasoned that a contrary holding might put judges in a position where they would be required to refuse a defendant's request for extra time so as not to risk having an indictment dismissed.

Decision Below: 534 F.3d 893 (8th Cir. 2008)

Petitioner's Counsel of Record:

Mark T. Stancil, Robbins, Russell, Englert, Orseck & Untereiner LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Sentencing

***Johnson v. United States* (08-6925)**

Questions Presented:

1. Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, inter alia, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

2. Whether this court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" - a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another. Further, whether this court should resolve a circuit split on whether the physical force required is a de minimis touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.

Summary:

Petitioner Johnson pleaded guilty to possession of ammunition by a convicted felon. Under the Armed Career Criminal Act ("ACCA"), he was subject to an enhanced penalty based on a district court determination that he had three prior convictions for violent felonies. Petitioner appealed that determination with respect to an "unwanted touching" conviction that was elevated to felony battery under state law only because of a prior conviction. According to Johnson, to qualify as a "violent felony" under the ACCA, a battery offense must involve

bodily injury or the threat of such injury; because Florida's battery statute is broad enough to include the slightest intentional touching against another's will, a Florida battery conviction is not enough by itself to show a "violent felony" for ACCA purposes. Johnson argues that the federal courts, in construing ACCA, should give effect to *State v. Hearns*, a Florida Supreme Court decision holding that physical force or violence is not a necessary element of a simple battery conviction under state law. The district court overruled Johnson's objections, holding that "one cannot physically touch…without the use of force," and the Eleventh Circuit affirmed, holding that the Florida Supreme Court's ruling regarding simple battery is not binding on federal courts.

Decision Below: 528 F.3d 1318 (11th Cir. 2008)

Petitioner's Counsel of Record:

Lisa Call, Assistant Federal Public Defender

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ

Other Public Law Cases

Original Jurisdiction

South Carolina v. North Carolina (138, Org.)

Questions Presented: Exceptions to the First Interim Report of the Special Master:

In an equitable apportionment action between two States brought under this Court's original jurisdiction, intervention by a non-state entity is proper only when the putative intervenor demonstrates (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). The State of South Carolina excepts to the following conclusions of the Special Master:

1. That intervention is proper regardless of whether the party States adequately represent the movant's interests, whenever the movant is the "instrumentality" authorized to engage in conduct alleged to harm the plaintiff State, has an "independent property interest" at issue in the action, or otherwise has a "direct stake" in the outcome of the action. See First Interim Report at 10-21.
2. That the City of Charlotte, North Carolina, the Catawba River Water Supply Project, and Duke Energy Carolinas, LLC should be permitted to intervene in this original action. See First Interim Report at 21-32.

Summary:

South Carolina filed suit against North Carolina, seeking an equitable apportionment of the Catawba River. It alleged that North Carolina, the upstream state, has regularly taken more than its "fair share" of the river's waters – for example, by unilaterally permitting large transfers of water from the river basin during the river's increasingly frequent low-flow periods. The Special Master recommended permitting three non-state entities that use the river's waters to intervene in the lawsuit. South Carolina objects, arguing that the Supreme Court's

original jurisdiction is not to be used to resolve private disputes, and that the respective states adequately represent the interests of their citizens, including those of the parties seeking to intervene in this matter.

Plaintiff's Counsel of Record:

Robert D. Cook, Assistant Deputy Attorney General
David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC

Defendant's Counsel of Record:

Roy A. Cooper III, Office of the Attorney General
Christopher G. Browning Jr., North Carolina Department of Justice

Immigration

Kucana v. Holder (08-911)

Question Presented:

What is the scope of the jurisdictional stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) and whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals?

Summary:

Under 1996's Illegal Immigration Reform and Immigrant Responsibility Act, federal courts are without jurisdiction to review decisions or actions committed by the Act to the discretion of the Attorney General or the Board of Immigration Appeals ("BIA"), as the Attorney General's designee. The issue in this case is whether a BIA denial of a motion to reopen an asylum application is "discretionary" under the statute and thus beyond federal court review. Kucana, a citizen of Albania, entered the United States in 1995 on a business visa and then applied for asylum, claiming he was beaten and persecuted in Albania because of his political activities. Kucana missed his asylum hearing when he overslept, and was ordered deported in absentia. He filed a petition to reopen based on new evidence of political conditions in Albania; the petition was denied, as was his appeal to the BIA. Kucana then appealed to the Seventh Circuit, which held that 8 U.S.C. § 1252(a)(2)(B)(ii) deprived it of jurisdiction to review the Board's denial because, according to regulation, the decision whether to reopen is left to BIA discretion. Although the United States supported that position before the Seventh Circuit, it has since reconsidered and now agrees with Kucana that the decision below is incorrect, given that it is a regulation and not the statute itself that grants the BIA the relevant discretion. Accordingly, the Supreme Court has appointed *amicus* to defend the Seventh Circuit holding before the Court.

Decision Below: 533 F.3d 534 (7th Cir. 2008)

Petitioner's Counsel of Record:

Rick M. Schoenfield, DiVicenzo Schoenfield Swartzman

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ
Amanda C. Leiter, Columbus School of Law (Amicus Curiae in Support of the Judgment Below)

Attorneys' Fees

Perdue v. Kenny A. **(08-970)**

Question Presented:

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?

Summary:

Respondent attorneys filed a class action suit on behalf of 3,000 abused and neglected foster children in 2002. After referral to mediation, they agreed on a sweeping settlement more than three years later. Respondents then filed a claim for an award of attorney's fees; the judge reduced their claimed lodestar fee because it included "excessive hours," but enhanced the resulting $6 million lodestar upward by $4.5 million (for a total of more than $10 million) for the "superb quality" of the representation as well as the exceptionally "sweeping relief" the attorneys achieved for the foster children. The state claimed that the enhancement was improper, because the lodestar – the reasonable number of hours worked on the case multiplied by reasonable hourly fees that reflect the skill and experience of the lawyers – already incorporates a judgment as to the results obtained and the quality of the representation. The Eleventh Circuit upheld the award, holding that it was bound by circuit precedent approving such enhancements. Judge Carnes concurred separately, agreeing that circuit precedent controlled the case but arguing that the precedent was incorrect and inconsistent with Supreme Court case law.

Decision Below: 532 F.3d 1209 (11th Cir. 2008)

Petitioner's Counsel of Record:

Mark H. Cohen, Troutman Sanders LLP

Respondent's Counsel of Record:

Marcia Robinson Lowry, Children's Rights

Public Utilities

NRG Power Marketing, LLC v. Maine Public Utilities Commission **(08-674)**

Question Presented:

Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e(a), requires that rates for the transmission and sale of electricity in interstate commerce be "just and reasonable." Under the Mobile-Sierra doctrine—named for this Court's decisions in United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956)—the Federal Energy Regulatory Commission ("FERC") must "presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law," and that "presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No.1, 128 S. Ct. 2733, 2737 (2008). In the decision below, the court of appeals held that, "when a rate challenge is

brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply." The question presented is:

Whether Mobile-Sierra's public-interest standard applies when a contract rate is challenged by an entity that was not a party to the contract.

Summary:

New England sought to change the method by which electric companies are granted utility contracts, entering into an agreement that included an annual auction to choose suppliers and "transition" payments to existing providers to compensate them for continuing to make their capacity available. The Federal Regulatory Energy Commission (FERC) reviewed and approved the agreement under a "just and reasonable" standard, and also approved a provision which specified that future legal action would be governed by the *Mobile-Sierra* doctrine (presumption of reasonableness unless contrary to the public interest). The FERC rejected respondents' claim that *Mobile-Sierra* could not apply to future challenges by third parties. The D.C. Circuit disagreed, holding that because the purpose of *Mobile-Sierra* is to "ensure contract stability as between the contracting parties," that doctrine cannot bind third parties. Petitioners claim that the FERC has long applied *Mobile-Sierra* to third-party challenges, so the provision in the agreement requiring that standard is not improper.

Decision Below: 520 F.3d 464 (D.C. Cir. 2008)

Petitioner's Counsel of Record:

John N. Estes III, Skadden, Arps, Slate, Meagher & Flom LLP

Respondent's Counsel of Record:

Elena Kagan, Solicitor General, US DOJ (for Respondent Federal Energy Regulatory Commission)

John Story Wright (For Respondent Blumenthal, Attorney General for the State of Connecticut)

Petroleum Franchises

***Mac's Shell Service, Inc. v. Shell Oil Products Co./ Shell Oil Products Co. v. Mac's Shell Service* (08-240/08-372)**

Questions Presented:

Mac's Shell Service v. Shell Oil: The First Circuit held that in order to receive the protections of the Petroleum Marketing Practices Act ("PMPA" or "Act"), 15 U.S.C. § 2801 et seq., a franchisee faced with an unlawful lease must either sign the lease and forego any potential claim that the lease violates the Act or refuse to sign the lease and then challenge the lease following receipt of a notice of nonrenewal. The Ninth Circuit rejected an interpretation of the PMPA that would require the franchisee to discontinue its business in order to preserve its rights under the Act. A single question is thus presented: Whether the PMPA encompasses a claim for "constructive" nonrenewal of the franchise relationship where:

(i) the petitioner-franchisees filed suit prior to receiving new lease agreements that violated the Act;

(ii) the lease agreements were presented on a take-it-or-leave-it basis;

(iii) respondent-franchisor stated it would terminate the franchises unless petitioners signed the lease agreements; and
(iv) the franchisees signed the lease agreements, under protest, and pursued their legal claims against the franchisor.
Shell Oil v. Mac's Shell Service: The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, regulates the circumstances in which an oil refiner or distributor can "terminate" a service station franchise. In this case, the First Circuit, in conflict with the decisions of other courts of appeals, allowed service station operators to sue for "constructive termination" even though they continued to operate their stations (indeed, many were still operating their stations at the time of trial, almost five years after they claim to have been "constructively terminated"). The question presented is:

Whether a service station operator that continues to operate its franchise-using the same trademark, selling the same fuel, and occupying the same premises-can bring an action claiming that it was "constructively terminated" in violation of the Act.

Summary:

The Petroleum Marketing Practices Act (PMPA) forbids petroleum refiners and distributors from terminating gas station franchise agreements before they expire, and from "fail[ing] to renew" franchises unless they satisfy one of PMPA's listed exceptions. Mac's Shell Service and other franchisees and operators of Shell-branded stations sued Shell Oil and Motiva Enterprises (an entity to which Shell transferred its franchise relationships) for discontinuing a rent subsidy that Shell had allegedly told the franchisees would continue to exist. According to Mac's and the other franchisees, the discontinuation of the rent subsidy constituted a "constructive termination" of their franchises in violation of the PMPA, and the failure to include the subsidy in their new franchise agreements – allegedly signed "under protest" – constituted "constructive non-renewal." The First Circuit upheld a jury verdict on the constructive termination claim, reasoning that the franchisor had breached the lease component of the franchise agreements, an area protected under the PMPA, by eliminating the subsidy. But the court ruled against the franchisees on their constructive non-renewal claim because the franchisees had signed and were now operating under the agreements complained of, and the PMPA's relaxed standards for preliminary injunctions suggest that Congress intended franchisees to refrain from ratifying objectionable contract terms.

Decision Below: 524 F.3d 33 (1st Cir. 2008)

Petitioner's Counsel of Record (08-240):

John F. Farraher Jr., Greenberg Traurig

Respondent's Counsel of Record (08-240):

Jeffrey A. Lamken, Baker Botts

International Law

Abbott v. Abbott (08-645)

Question Presented:

The Hague Convention on International Child Abduction requires a country to return a child who has been "wrongfully removed" from his country of habitual residence. Hague Convention art. 12. A "wrongful removal" is one that occurs "in breach of rights of custody." Id. art. 3. The question presented is:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on International Child Abduction.

Summary:

Petitioner Timothy Abbott, a British citizen, and respondent Jacquelyn Abbott, a U.S. citizen, were married in 1992 and had a son in 1995. The family moved to Chile in 2002, and shortly thereafter the Abbotts divorced and proceeded to litigate custody in the Chilean family courts. Jacquelyn Abbott was awarded custody and Timothy Abbott was granted visitation rights, and the court entered a ne exeat order forbidding either parent from removing the child from the country without the other's consent. In 2005, however, Jacquelyn Abbott took their son to Texas without his father's consent. Timothy Abbott filed suit in federal court, seeking to have his son returned to Chile pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, which provides a return remedy when a "right of custody" is violated by a child's removal from his home country. Jacquelyn Abbott conceded that she had violated the Chilean court's order as well as Chilean statutory law, but argued that the ne exeat order did not give Timothy Abbott a "right of custody" that could be enforced under the Convention. The district court agreed, holding that breach of a ne exeat order does not infringe a "right of custody" under the Convention, and the Fifth Circuit affirmed.

Decision Below: 542 F.3d 1081 (5th Cir. 2008)

Petitioner's Counsel of Record:

Amy Howe, Howe & Russell PC

Respondent's Counsel of Record:

Stephen B. Kinnaird, Paul, Hastings, Janofsky & Walker LLP