GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2010 PREVIEW

September 20, 2010

A LOOK AHEAD AT OCTOBER TERM 2010

This report previews the Supreme Court's docket for October Term 2010. 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

By the time it recessed for the summer on June 28, 2010, the Court had 39 cases on its docket for the upcoming October Term. The highest proportion – fifteen cases – implicate the interests of businesses and employers. In ten cases, the Court will address criminal law issues, including questions arising under the Sixth and Eighth Amendments and the Antiterrorism and Effective Death Penalty Act, or "AEDPA," which governs federal court habeas review. The Court also has granted review in civil cases that present constitutional claims under the Free Speech, Establishment, and Equal Protection Clauses, as well as the right to informational privacy. Issues regarding state sovereign immunity and the scope of § 1983 liability for state and local constitutional violations also are on the Court's docket.

If the Court's caseload conforms to recent history, then the 39 cases the Court already has before it represent roughly half the cases it will hear in October Term 2010.[1] The Court has granted cases coming from every federal circuit except the Tenth and D.C. Circuits,[2] with the highest number – a total of sixteen – coming from the Ninth. The Court also will review two decisions of state high courts, one original jurisdiction case, and one case on appeal from a three-judge district court. While the Supreme Court is not an "error correction" court, it reverses (or vacates) in a large majority of the cases it chooses to hear; last Term, the Court reversed in 71 percent of the cases it reviewed.

The biggest story affecting the Court's procedure for the upcoming Term is the arrival of new Associate Justice Elena Kagan. Justice Kagan, who served as United States Solicitor General until her nomination to the Court, has recused herself in 21 cases[3] in which the Solicitor General's office participated during her tenure.

---

[1] Last Term, the Court decided 73 cases after full briefing and argument. The Court also decided 11 cases summarily – an unusually high number – and issued a total of 87 merits decisions. All statistical data in this report related to prior Supreme Court Terms can be found at http://www.scotusblog.com/wp-content/uploads/2010/07/Summary-Memo-070710.pdf.

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

[3] The cases in which Justice Kagan has recused herself are: *Abbott v. United States* and *Gould v. United States* (consolidated), *National Aeronautics and Space Administration v. Nelson*, *Michigan v. Bryant*, *Los Angeles County v. Humphries*, *Bruesewitz v. Wyeth*, *Harrington v. Richter*, *Belleque* (formerly *Premo*) *v. Moore*, and *Kasten v. Saint-Gobain Performance Plastics* (October sitting); *United States v. Tohono O'odham Nation*, *Sossamon v. Texas*, *Staub v. Proctor Hospital*, *Williamson v. Mazda Motor of America, Costco Wholesale v. Omega*, *Mayo Foundation v. United States*, and *Flores-Villar v. United States* (November sitting); and *Virginia Office for*

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Term Highlights

Constitutional Law

After deciding several significant First Amendment cases in October Term 2009, the Court will take up the First Amendment again this Term in two noteworthy free speech cases. *Snyder v. Phelps* (09-751) tests the limits imposed by the Free Speech Clause not on direct government regulation of speech, but on the imposition of civil liability through common-law tort suits. After his son's military funeral was targeted for an anti-gay protest by controversial pastor Fred Phelps, petitioner Albert Snyder successfully sued Phelps for torts including intentional infliction of emotional distress. The Fourth Circuit reversed, holding that the First Amendment protected Phelps' speech – which, though "repugnant," was on a matter of public concern – and prohibited Snyder's tort recovery. Petitioner Snyder argues that Phelps' speech (including signs reading "God Hates Fags" and "You're Going to Hell") consisted of harmful epithets, not public debate, and that in any event, even speech on a matter of public concern is not entirely immune from liability when it is targeted at a private person with no connection to the public issue. Phelps (represented before the Court by his daughter, Margie Phelps), insists that his protest was intended to advance debate on important public issues, and that punishing him for the content of that speech – even if it is deemed offensive – violates fundamental First Amendment principles. In deciding this case, the Court likely will clarify the scope of an important First Amendment precedent, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), which barred an intentional infliction of emotional distress suit by public figure Reverend Jerry Falwell arising from a magazine parody.

Schwarzenegger v. Entertainment Merchants Association (08-1448), another high-profile free speech case, involves a California law that prohibits the sale or rental of violent video games to minors. The Ninth Circuit invalidated the law under the First Amendment, rejecting the State's argument that *Ginsberg v. State of New York*, 390 U.S. 629 (1968), which sustained restrictions on the sale of sexual materials to minors, should be extended to non-sexual but violent speech. The grant of certiorari in this case surprised some observers. The lower courts have been unanimous in invalidating laws like California's, and the Supreme Court just last Term, in an 8-1 ruling in *United States v. Stevens*, 130 S. Ct. 1577 (2010), declined a similar invitation to carve out a new First Amendment exception, this one for depictions of animal cruelty. The Court's decision to grant review in this case just after it issued its decision in *Stevens* may indicate that at least some Justices believe that the sale of violent material to minors raises a distinct First Amendment question.

In consolidated cases from Arizona, *Arizona Christian School Tuition Organization v. Winn* (09-987) and *Garriott v. Winn* (09-991), the Court will address an Establishment Clause challenge to a state tax credit for donations to private organizations that award scholarships to private schools, including (and predominantly) religious schools. The Court already has approved neutral voucher programs that include religious schools. *See Zelman v. Simmons-*

Protection and Advocacy v. Stewart (formerly *Reinhard*), *Henderson v. Shinseki*, *Pepper v. United States*, *Thompson v. North American Stainless*, and *Chamber of Commerce v. Whiting* (formerly *Candelaria*) (December sitting).

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Harris, 536 U.S. 639 (2002). The question here is whether that precedent controls, or whether, as the Ninth Circuit held below, distinct Establishment Clause concerns are raised by the unusual design of the Arizona program, which directs benefits not to parents for use at whatever schools they choose, but instead to taxpayers, allowing the religious preferences of those who claim the tax credit to determine which scholarships are available. The Court, however, may never reach that merits question; also before it is a challenge to the standing of Arizona taxpayers to bring their Establishment Clause claim. The Roberts Court already has narrowed taxpayer standing under the Establishment Clause, *see Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), and it may take the opportunity to do so again here, with the support of the United States appearing as amicus and arguing against Article III standing.

Business Law

The Court's wide-ranging business docket includes four cases questioning the preemptive effect of federal law. Especially high-profile is *Chamber of Commerce v. Whiting* (formerly *Candelaria*) (09-115), in which businesses and civil rights groups challenge an Arizona statute imposing state sanctions on the employment of undocumented workers and failure to use the federal "E-Verify" registry system, on the ground that it is preempted by federal immigration law. In addition to having substantial significance in its own right, the Court's decision in this case may shed light on the ultimate fate of Arizona's more recent and controversial immigration statute, known as SB 1070, which requires local law-enforcement officials to stop and detain those they suspect are in the country unlawfully; the Department of Justice has sued to enjoin SB 1070, making preemption arguments similar to those it raised in this case as amicus at the certiorari stage.

Another preemption case of substantial importance to business is *AT&T Mobility v. Concepcion* (09-893), which involves the preemptive effect of the Federal Arbitration Act. For years, the Ninth Circuit has relied on California state unconscionability doctrine to invalidate certain consumer and employment arbitration agreements; in this case, it invalidated a consumer arbitration agreement because it barred class-wide arbitration and, according to the court, was part of a contract of adhesion, in a context in which recoveries would be small and difficult to obtain absent class-wide litigation. Supported by a wide array of business interests appearing as amici, petitioner argues that this use of state law to frustrate the enforcement of arbitration agreements conflicts with the Federal Arbitration Act and its pro-arbitration policy. Though this case turns specifically on the availability of class-wide arbitration – an issue the Court took up last Term in *Stolt-Nielsen S.A. v. AnimalFeeds International*, 130 S. Ct. 1758 (2010) – the Court's decision is likely to have broad significance for the availability of state common-law defenses to enforcement of consumer and employment arbitration agreements more generally.[4]

After deciding only one employment case in October Term 2009, the Court this Term already is slated to take up three significant employment cases. Two involve the scope of statutory protection against employer retaliation: In *Kasten v. Saint-Gobain Performance*

---

[4] The other two preemption cases currently before the Court are *Williamson v. Mazda Motor of America* (08-1314) and *Bruesewitz v Wyeth* (09-152). Both are summarized in the next section of this report.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Plastics Corp. (09-834) the Court will consider whether an employee complaint must be written, rather than oral, before the employee is protected against retaliation under the Fair Labor Standards Act; and in *Thompson v. North American Stainless* (09-291), whether Title VII's prohibition on retaliation reaches "third-party" retaliation against, for instance, a spouse or family member of an employee who has complained about discrimination. Commentators have observed that retaliation claims have fared relatively well before the Roberts Court, *see*, *e.g.*, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Crawford v. Nashville*, 129 S. Ct. 846 (2009), and one question raised by this pair of cases is whether that trend will continue. In its third employment case, *Staub v. Proctor Hospital* (09-400), the Court will address an issue that has been dividing the lower courts for some time: What happens when an employment decision is made by a manager without discriminatory motive, but influenced by input from a subordinate or subordinates who are impermissibly biased? What circumstances – and, in particular, what degree of influence by the biased subordinate – will give rise to employer liability?

Criminal Law

Much of this Term's criminal law docket implicates the relationship between federal courts and state criminal justice systems, and the authority of federal courts to address state and local constitutional violations. That sometimes contentious issue is raised especially starkly in *Schwarzenegger v. Plata* (09-1233), in which California challenges a "prisoner release order" issued by a three-judge district court convened under the Prison Litigation Reform Act. Finding that long-standing prison overcrowding was the "primary cause" of California's failure to provide its prisoners with constitutionally adequate medical care, the court ordered that California's prison population be capped at 137.5% of design capacity within two years, which would require an estimated prisoner reduction of 46,000. Respondents emphasize the lower court's finding – made after decades of unsuccessful court-ordered efforts – that no other relief could cure an ongoing Eighth Amendment violation in California's prisons. The State disputes the lower court's findings and analysis and invokes federalism principles more generally, characterizing the prisoner release order as the "most sweeping intrusion into a state's management of its correctional facilities in history."

Similar questions about the respective roles of federal courts and state criminal justice systems are raised under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which governs federal court habeas review of state criminal convictions. The Court's docket now includes five AEDPA cases,[5] several of which raise recurring and important questions of habeas procedure under that statute. In *Harrington v. Richter* (09-587), for instance, the Court took the unusual step of directing the parties to brief an additional question with substantial ramifications for habeas petitioners: whether and to what extent federal courts must defer under AEDPA to state-court dismissals of petitioners' claims when those dismissals are summary and offer no grounds of decision. In *Walker v. Martin* (09-996), the Court will decide what kinds of state procedural rules may be relied on by the States to bar federal habeas review of petitioners' claims, and in *Cullen v. Pinholster* (09-1088), the circumstances under which federal habeas

[5] Four of the five AEDPA cases come from the Ninth Circuit, and all are cases in which the habeas petitioner prevailed below and the Court granted certiorari at the State's behest.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

courts may conduct evidentiary hearings in order to decide petitioners' constitutional claims. Taken together, the Court's decisions in these cases could significantly recalibrate the role of federal habeas courts in addressing constitutional claims arising from state criminal convictions.

Federal court authority to address local constitutional violations is also at issue in *Connick v. Thompson* (09-571) and *Los Angeles County v. Humphries* (09-350), both of which involve the scope of municipal liability under § 1983, the federal statute that allows suits in federal court against state and local officials for violations of federal constitutional rights. *Connick v. Thompson* arises from an acknowledged *Brady* violation, in which a prosecutor deliberately withheld exculpatory evidence while the respondent was on death row. Thompson sued the district attorney's office (led by the father of musician Harry Connick, Jr.) for failure to train its prosecutors on their *Brady* obligations, and the question now before the Court is whether such "failure to train" liability under § 1983 may be predicated on a "single incident" rather than a pattern of constitutional violations that would have put the office on notice of the need for training. *Humphries*, which began when Los Angeles County incorrectly listed respondents on its index of child abusers and gave them no way of removing their names, raises a similar question: whether a § 1983 claimant, in order to prevail in a declaratory judgment action (and thus recover attorneys' fees), must show that a constitutional violation results from a municipal "policy or custom," as would be required in a § 1983 damages action under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). And in a final case regarding the scope of § 1983, the Court will decide in *Skinner v. Switzer* (09-9000) whether claims for access to DNA testing to prove innocence may be heard at all in a civil action under § 1983, or whether such claims are cognizable only on habeas review.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

SECTION II: CASE SUMMARIES

Overview

Constitutional Law

- Free Speech:
  Snyder v. Phelps
  Schwarzenegger v. Entertainment Merchants Association
- Establishment Clause:
  Arizona Christian School Tuition Organization v. Winn; Garriott v. Winn
- Informational Privacy:
  National Aeronautics and Space Administration v. Nelson
- Gender Discrimination:
  Flores-Villar v. United States

Business Law

- Employment:
  Staub v. Proctor Hospital
  Thompson v. North American Stainless
  Kasten v. Saint-Gobain Performance Plastics Corp.
- Preemption:
  Chamber of Commerce v. Whiting (formerly *Candelaria*)
  Williamson v. Mazda Motor of America, Inc.
  Bruesewitz v. Wyeth, Inc.
  AT&T Mobility v. Concepcion
- Securities:
  Matrixx Initiatives, Inc. v. Siracusano
  Janus Capital Group, Inc. v. First Derivative Traders
- Copyright:
  Costco Wholesale Corp. v. Omega
- Tax:
  Mayo Foundation for Medical Education and Research v. United States
  CSX Transportation, Inc. v. Alabama Department of Revenue
- Bankruptcy:
  Ransom v. MBNA America Bank
- Truth in Lending Act:
  Chase Bank USA v. McCoy
- ERISA:
  Amara v. CIGNA Corp.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

<u>Criminal Law</u>

- Eighth Amendment – Cruel and Unusual Punishment:
  Schwarzenegger v. Plata
- Sixth Amendment – Confrontation Clause:
  Michigan v. Bryant
- Habeas Corpus & AEDPA Review:
  Harrington v. Richter
  Skinner v. Switzer
  Cullen v. Pinholster
  Wall v. Kholi
  Walker v. Martin
- Sentencing:
  Abbott v. United States; Gould v. United States
  Pepper v. United States
- Right to Counsel:
  Belleque (formerly *Premo*) *v. Moore*

<u>Other Public Law</u>

- Government Liability and Immunities:
  Los Angeles County v. Humphries
  Virginia Office of Protection and Advocacy v. Stewart (formerly *Reinhard*)
  Connick v. Thompson
  Sossamon v. Texas
- Federal Practice and Procedure:
  Ortiz v. Jordan
  Henderson v. Shinseki
  United States v. Tohono O'odham Nation
- Freedom of Information Act:
  Milner v. Department of the Navy

<u>Original Jurisdiction</u>

- State Compacts:
  Montana v. Wyoming and North Dakota

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Constitutional Law

Free Speech

Snyder v. Phelps (09-751)

Questions Presented:

The Fourth Circuit reversed a jury determination in favor of Albert Snyder ("Snyder") for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper (collectively, "Phelps"). Snyder's claim arose out of Phelps' intentional acts at Snyder's son's funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) *Hustler Magazine, Inc. v. Falwell* does not apply to private versus private individuals; (b) Snyder was a "captive" audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence;* and (e) Phelps disrupted Snyder's mourning process. The Fourth Circuit's decision gives no credence to Snyder's personal stake in honoring and mourning his son and ignores Snyder's right to bury his son with dignity and respect. Three questions are presented:

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?[6]

[*] Because Snyder sought punitive damages, he was required to prove his case by clear and convincing evidence. Furthermore, Snyder was required to prove actual malice. Snyder carried his burden on both issues.

Summary:

Respondents, including Pastor Fred Phelps and other members of the Westboro Baptist Church, staged a protest near petitioner Albert Snyder's funeral service for his son, a Marine killed in Iraq. According to the protestors, who carried signs with legends like "Semper Fi Fags," "Thank God for Dead Troops," and "You're Going to Hell," their protest was intended to condemn homosexuality and its tolerance by the United States military. In federal district court, a jury ruled for Snyder on three Maryland tort claims, including intentional infliction of emotional distress, and Snyder ultimately was awarded $5 million in compensatory and punitive damages.

The Fourth Circuit reversed on First Amendment grounds, ruling that respondents' speech, notwithstanding its "distasteful and repugnant nature," is fully protected by the Free Speech Clause. Regardless of the public or private nature of the

[6] Unless otherwise noted, 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.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

speech's *target*, the court reasoned, the *type* of speech at issue – speech on a matter of public concern that does not assert "actual facts" that are provably false but instead consists of "rhetorical hyperbole" – may not be the basis of tort suit alleging emotional distress. If states and localities want to protect the sanctity of funerals, then they may do so through reasonable and content-neutral time, place and manner restrictions on speech near cemeteries and other memorial sites.

The parties now dispute whether respondents' speech is properly characterized as relating to a matter of "public concern," and whether it should be given the same First Amendment protection as speech targeted at "public figures" under *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Petitioner also argues that the Fourth Circuit ruling "vitiates the tort of intentional infliction of emotional distress": the requirement that actionable statements be "provably false" conflates intentional infliction of emotional distress with the very different tort of defamation, and the same "outrageousness" that is a necessary element of the intentional infliction becomes a First Amendment defense under the Fourth Circuit's "rhetorical hyperbole" reasoning. Whether petitioner was a "captive audience" deserving of privacy protection is also contested; respondents argue that military funerals are public, and that no privacy interest was invaded by the protest, which could not be seen or heard from the funeral itself.

Decision Below:

580 F.3d 206 (4th Cir. 2009)

Petitioner's Counsel of Record:

Sean E. Summers, Barley Snyder LLC

Respondents' Counsel of Record:

Margie J. Phelps

Schwarzenegger v. Entertainment Merchants Association (08-1448)

Questions Presented:

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment permit any limits on offensive content in violent video games sold to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Summary:

A 2005 California law prohibits the sale of certain violent video games to minors. The statute defines the covered "violent video games" in terms similar to those used to identify obscenity, as games that are patently offensive to prevailing community standards on what is suitable for minors, appeal to a minor's deviant or morbid interest, and lack serious literary, artistic, political or scientific value. Respondents, an association of video game companies, sued in federal district court, arguing that the law violates the First Amendment on its face; the district court enjoined the law's enforcement, and the Ninth Circuit affirmed.

The threshold dispute in the case is over the proper standard of review. In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court, relying on the special relationship between the state and minors, held that sexually explicit material could be regulated as "obscenity" as to minors even if it would not qualify as unprotected obscenity as to adults. The State argues that at least some depictions of violence should also be treated as obscenity for minors under *Ginsberg*, so that restrictions on sales to minors would be permissible under *Ginsberg*'s deferential standard of review. The Ninth Circuit, like other courts to consider the question, rejected that position, concluding that non-sexual material may not be treated as a form of obscenity under *Ginsberg*. In the alternative, the State claims that even under the strict scrutiny standard that generally governs content-based speech restrictions, it should prevail; the Ninth Circuit set the bar too high when it required the State to show a direct "causal link between minors playing violent video games and actual psychological or neurological harm" rather than crediting "reasonable inferences based on substantial evidence" of harms to children. The Ninth Circuit also held that the sales restriction is not the least restrictive means of preventing harm to children, and respondents agree, arguing that the State has not shown that minors are inadequately protected by the industry-wide voluntary rating system, which assigns age ratings and content descriptions to games.

Decision Below:

556 F.3d 950 (9th Cir. 2009)

Petitioner's Counsel of Record:

Zackery P. Morazzini, Deputy Attorney General, California

Respondent's Counsel of Record:

Paul M. Smith, Jenner & Block LLP

Establishment Clause

Arizona Christian School Tuition Organization v. Winn; Garriott v. Winn (09-987, 09-991)

Questions Presented:

[from cert petition 09-987]:

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

2. Is the Respondents' alleged injury – which is solely based on the theory that Arizona's tax credit reduces the state's revenue – too speculative to confer taxpayer standing,

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?
3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona's tax credit is private, not state, money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?
[from cert petition 09-991]:
Under Arizona Revised Statutes (A.R.S.) Section 43-1089, individuals who contribute money to school tuition organizations (STOs) that provide scholarships to students wishing to attend private schools are entitled to an income tax credit. Respondents alleged that Section 1089's neutral language and the Legislature's stated secular purpose for enacting were a pretense and that the tuition tax credit program had the primary effect of advancing religion because a majority of taxpayers who contributed to STOs chose to contribute to STOs that awarded scholarships to students attending religious schools. The question presented is the following:

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

Summary:

An Arizona law gives state taxpayers a dollar-for-dollar tax credit for donations made to "school tuition organizations" ("STOs"), organizations that award private school scholarships to children. Many Arizona STOs, including the three largest, are sectarian organizations that award scholarships only to specified religious schools. Respondents, state taxpayers, filed an as-applied challenge to the tax credit program under the Establishment Clause. Respondents acknowledge that the Court has sustained neutral voucher programs that allow parents to use state aid to send their children to religious as well as secular private schools, as in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). But Arizona's law is not such a neutral "parental choice" program, respondents argue; instead of facilitating true parental choice, the program allows the religious preferences of intermediary taxpayers to control the flow of aid, and because so many STOs will not sponsor scholarships to secular schools, it deprives parents – the program's alleged beneficiaries – of a "genuine choice" between religious and nonreligious private education. Petitioners, on the other hand, argue that *Zelman* is controlling; what matters is that state aid reaches religious schools only as the result of private, rather than state, decision-making, and not whether those private decision-makers are taxpayers or parents.

The Ninth Circuit agreed with respondents, holding that their allegations, if accepted as true, are sufficient to make out a claim of an Establishment Clause violation. The Supreme Court now has before it not only a dispute over the scope of *Zelman*, but also a threshold question of taxpayer standing. Petitioners argue that respondents cannot establish taxpayer standing because under Arizona's tax credit program, funds go directly from private parties to STOs without any formal disbursement or appropriation of state funds. The Ninth Circuit rejected that claim, holding that a taxpayer's "financial interest" in a challenged program is sufficient to confer standing whether or not funds actually

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

travel through the state treasury, and relying in part on cases in which the Supreme Court has adjudicated challenges to similar programs.

Decision Below:

562 F.3d 1002 (9th Cir. 2009)

Petitioner's Counsel of Record:

Paula S. Bickett, Chief Counsel of Civil Appeals, Office of the Arizona Attorney General

Respondent's Counsel of Record:

Paul Bender, Arizona State University College of Law

Informational Privacy

National Aeronautics and Space Administration v. Nelson (09-530)

Questions Presented:

1. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.
2. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.

Summary:

This case implicates a constitutional right to informational privacy that the Court discussed in two cases in the 1970s but never fully developed. Since 2004, employees of federal contractors have been subject to the same background investigations as those working directly for the federal government. Respondents, Caltech employees performing contract work for NASA at a federal facility, were asked to submit to a standard background investigation that would require disclosure of treatment for illegal drug use and ask designated references whether they had "any adverse information" that might bear on suitability for federal employment. Respondents refused, and the Ninth Circuit ultimately enjoined the investigations on the ground that they would violate the employees' right to informational privacy. The government may inquire into illegal drug use, the court held, but has no legitimate interest in information regarding drug treatment; and the request for "any adverse information" is too open-ended to be narrowly tailored to evaluating the fitness of "low risk" employees. In its merits brief, the United States suggests that the Court can uphold the background investigations at issue here without resolving broad questions about a right to "informational privacy": Whatever the scope of such a right, the government argues, it would not extend to the facts of this case, which involve the government, acting as employer rather than regulator, collecting only for its own employment-related use information that has been disclosed already to third parties, and protecting that information against any further public disclosure.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Decision Below:
568 F.3d 1028 (9th Cir. 2009)
Petitioner's Counsel of Record:
Neal Kumar Katyal, Acting United States Solicitor General
Respondent's Counsel of Record:
Dan Stormer, Hadsell Stormer Keeny Richardson & Renick, LLP

Gender Discrimination

Flores-Villar v. United States (09-5801)
Question Presented:
Whether the Court's decision in *Nguyen v. INS*, 533 U.S. 53 (2001), permits gender discrimination that has no biological basis?
Summary:
In the United States, citizenship is conferred on anyone born within the country; in most other countries, by contrast, a child inherits the citizenship status of the mother, regardless of where the birth takes place. The result is that a child born overseas to a United States mother might be left without a nationality. In response, federal immigration law allows children born abroad to acquire "derivative citizenship" from American parents under certain circumstances. The requirements for derivative citizenship are less demanding for the children of American mothers than American fathers, purportedly because those children are more likely to be left stateless if born overseas.

In *Nguyen v. INS*, 533 U.S. 53 (2001), the Court upheld special requirements that apply only where the right to derivative citizenship arises from a father's United States citizenship – specifically, requirements that the father admit paternity and assume financial responsibility until the applicant becomes an adult. This case involves a different requirement, under which fathers – and only fathers – must live in the United States for five years before their children can qualify for derivative citizenship. Petitioner, who was denied citizenship because his father failed to meet the residency requirement, argues that unlike the rule sustained in *Nguyen*, which was rooted in biological differences making it more difficult to establish paternity than maternity, the residency requirement rests on gender stereotypes and is not sufficiently related to its alleged end because it benefits too many children who would not otherwise be stateless and ignores too many who are.

As a threshold matter, the government asserts that petitioner lacks standing to challenge the residency requirement because it was imposed directly on his father, not petitioner himself. On the merits, the government defends the Ninth Circuit's conclusion that even under the intermediate scrutiny that governs gender classifications, the residency requirement is "substantially related" to reducing child statelessness despite its imperfect fit.
Decision Below:
536 F.3d 990 (9th Cir. 2008)

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Petitioner's Counsel of Record:
Steven F. Hubachek, Federal Defenders of San Diego, Inc.
Respondent's Counsel of Record:
Neal Kumar Katyal, Acting United States Solicitor General

Business Law

Employment

Staub v. Proctor Hospital (09-400)
Question Presented:
In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?
Summary:
The Uniformed Services Employment and Reemployment Rights Act of 1994 protects members of the uniformed services from employment discrimination based on their military service. 38 U.S.C. § 4311(a). Petitioner, Vincent Staub, claimed respondent Proctor Hospital fired him from his civilian job as a technologist because of his membership in the U.S. Army Reserve. At trial, Staub presented evidence that the head of his department had derided his duties as a reservist and that his immediate supervisor resented having to accommodate his military obligations, deliberately created scheduling conflicts with his weekend reserve duty, and actively sought to get rid of him. The jury found for Staub, but the Seventh Circuit reversed. Respondent was entitled to judgment as a matter of law, the court held, because there was insufficient evidence that Staub's superiors, who had demonstrated anti-military bias, had exercised "singular influence" over the company official who made the termination decision and was herself "free of any military-based animus." At issue before the Supreme Court is the standard to determine an employer's liability for an employment decision made by a manager without discriminatory motive who acts based on information or advice from biased subordinates.
Decision Below:
560 F.3d 647 (7th Cir. 2009)
Petitioner's Counsel of Record:
Eric Schnapper, University of Washington School of Law
Respondent's Counsel of Record:
Roy G. Davis, Davis & Campbell, L.L.C.

Thompson v. North American Stainless (09-291)
Questions Presented:
Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

(1) Does Section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity?
(2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

Summary:

Title VII, which prohibits employment discrimination based on sex, also forbids retaliation against an applicant or employee "because he has opposed any practice" in violation of Title VII or "because he has made a charge, testified, assisted, or participated" in an investigation or proceeding under Title VII. 42 U.S.C. § 2000e(3)(a). At issue in this case is whether an employee who is closely associated with an individual who charged the employer with discrimination is likewise protected from retaliation. Respondent North American Stainless fired petitioner Eric Thompson shortly after receiving notice that Thompson's then-fiancée (now wife) and co-worker, Miriam Regalado, had filed a charge of sex discrimination with the EEOC. Petitioner sued, claiming that respondent fired him in retaliation for Regalado's discrimination charge.

The district court granted summary judgment for the employer, holding that the plain language of Title VII "does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity." The Sixth Circuit initially reversed, then granted rehearing en banc and affirmed the summary judgment against petitioner. "By application of the plain language of the statute," the court held, petitioner "is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, made a charge, testify, assist, or participate in an investigation." The United States, in a brief filed at the Supreme Court's invitation at the petition state, agreed with petitioner that the decision below was incorrect because the victim of third-party retaliation is a "person claiming to be aggrieved" by an unlawful employment practice, and thus has standing and a cause of action under Title VII, 42 U.S.C. § 2000e-5(f)(1).

Decision Below:

567 F.3d 804 (6th Cir. 2009)

Petitioner's Counsel of Record:

Eric Schnapper, University of Washington School of Law

Respondent's Counsel of Record:

Leigh Gross Latherow, Vanantwerp, Monge, Jones, Edwards & McCann, LLP

Kasten v. Saint-Gobain Performance Plastics Corp. (09-834)

Question Presented:

Is an oral complaint of a violation of the Fair Labor Standards Act protected conduct under the anti-retaliation provision, 29 U.S.C. § 215(a)(3)?

Summary:

Petitioner, an hourly production worker at respondent's manufacturing plant, made repeated verbal complaints to the plant's human resources department that the location of the plant's time clock deprived employees of compensation for time spent donning and doffing protective gear, in violation of the FLSA. Respondent fired petitioner,

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

purportedly for his repeated failure to use the time clock properly, and petitioner sued for retaliatory discharge. The district court granted summary judgment, holding that because the FLSA prohibits retaliation against an employee who has "*filed* any complaint," a complaint must be in writing to afford a worker protection from reprisal. The Seventh Circuit affirmed, holding that the "plain language" of the FLSA protects from retaliation employees who make "internal intra-company complaints" that are "not formally filed with any judicial or administrative body," but not "unwritten, purely verbal complaints" because "the verb 'to file' connotes the use of a writing."

Petitioner and the United States as amicus argue that the term "file" does not invariably signify submission of a written document and – particularly in the context of employment grievances – refers to the submission or communication of a complaint, either verbally or in writing. To the extent the term is ambiguous, they urge the Court to defer to the longstanding reasonable interpretation of the Department of Labor and the EEOC that the statute prohibits retaliation against employees who make oral complaints.

Decision Below:

585 F.3d 310 (7th Cir. 2009)

Petitioner's Counsel of Record:

James H. Kaster, Nichols Kaster PLLP

Respondent's Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Preemption

***Chamber of Commerce v. Whiting* (formerly *Candelaria*)** (09-115)

Questions Presented:

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).
2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary, 8 U.S.C. § 1324a note.
3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Summary:

This case involves a preemption challenge to Arizona's 2007 Legal Arizona Workers Act ("LAWA"), which establishes a state-law prohibition on the employment of unauthorized aliens with sanctions that include revocation of a company's Arizona charter, and requires Arizona employers to use the federally administered "E-Verify" national registry system. Petitioners, a coalition of business and civil rights groups, sued the State, arguing that LAWA is preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), which expressly preempts "any State or local law imposing civil or

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens," 8 U.S.C. § 1324a(h)(2), and by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which makes use of E-Verify voluntary.

The Ninth Circuit held that LAWA is not preempted. Because LAWA's sanction for employment of unauthorized aliens involves license revocation, the court reasoned, it falls within IRCA's "savings clause" for sanctions "through licensing and similar laws." Nor, the court held, is LAWA preempted by IIRIRA's mandate that the federal government "may not require" participation in E-Verify, *see* IIRIRA § 402, because that provision expressly limits only the federal government, and Congress could have but did not preclude state laws requiring use of E-Verify.

Petitioner, joined by the United States at the certiorari stage, argues that LAWA disrupts the balance struck by Congress with IRCA, which ensures that employers do not undermine immigration law while also preventing discrimination against ethnic and racial minorities and undue disruption to businesses. Specifically, petitioners argue that LAWA's sanctions are not true licensing provisions, and that IRCA's savings clause applies only to state sanctions that follow on a finding by a federal judge of a federal IRCA violation and not, as here, to sanctions for violations of state immigration provisions adjudicated in state court. Petitioners also contend that the text and structure of IIRIRA reflect a clear congressional judgment that given E-Verify's high risk of error and other costs, no business may be required – by any government – to participate in the program.

Decision Below:

544 F.3d 976 (9th Cir. 2009)

Petitioner's Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Respondent's Counsel of Record:

Mary R. O'Grady, Arizona Solicitor General

Williamson v. Mazda Motor of America, Inc. (08-1314)

Question Presented:

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

Summary:

This case raises questions about the scope of the Court's 5-4 decision in *Geier v. American Honda Company, Inc.*, 529 U.S. 861 (2000), which held that a state tort claim for failure to install an airbag was preempted by federal safety regulations allowing for the installation of either airbags or other passive restraints. Petitioners are survivors of Thanh Williamson, who died in an automobile accident while wearing a lap-only belt installed in the backseat of a 1993 Mazda Minivan. When the vehicle was manufactured

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

and sold, a National Highway Safety Administration regulation – Federal Motor Vehicle Safety Standard 208 – required automobiles to install either a lap or a lap/shoulder belt in rear seating positions. When petitioners sued Mazda under state tort law, claiming that the absence of a lap/shoulder belt in Williamson's seat rendered the vehicle defective, the California courts held that Standard 208 preempted their claim. According to the courts below, *Geier* establishes that whenever a federal safety standard leaves manufacturers with a choice of options for compliance, a tort suit challenging a manufacturer's choice is preempted.

Petitioners, supported by the United States as amicus, argue that the California courts construed *Geier* too broadly. *Geier*, they argue, applies only when federal safety standards are specifically intended to promote the installation of a variety or mixture of safety devices, so that a state-law duty to choose one or the other would frustrate the federal purpose. But while the federal standard at issue in *Geier* was designed to "phase in" a mixture of airbags and other passive restraints, Standard 208 did not reflect any preference for a mixture of responses; on the contrary, federal policy since before 1993 has been to encourage the installation of lap/shoulder belts. Accordingly, petitioners argue, there is no conflict between a state-law duty to install lap/shoulder belts and federal standards imposing only a minimum safety standard.

Decision Below:

84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008)

Petitioner's Counsel of Record:

Martin N. Buchanan, Niddrie, Fish & Buchanan LLP

Respondent's Counsel of Record:

Mark V. Berry, Bowman and Brooke LLP

Bruesewitz v. Wyeth, Inc. (09-152)

Question Presented:

Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 ["the Act"] expressly preempts certain design defect claims against vaccine manufacturers "if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1). A-104.

The Question Presented is: whether the Third Circuit erred in holding that, contrary to its plain text and the decision of this Court and others, Section 22(b)(1) preempts all vaccine design defect claims, whether the vaccine's side effects were unavoidable or not?*

[*] Whether section 22(b)(1) of the Act encompasses both negligent and strict liability design defect claims is not at issue in this petition. Both the *Ferrari* court and the court below found that it encompasses both claims. *See* A-35; *Am. Home Prods. Corp. v. Ferrari*, 668 S.E.2d 236, 242 (Ga. 2008).

Summary:

The National Childhood Vaccine Injury Act of 1986 provides for "no-fault" monetary awards to individuals found to be injured by vaccines that are covered by the Act. Claimants may bring product liability lawsuits if they first exhaust their rights under the Act. Those lawsuits, however, are subject to a preemption clause providing that "[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

related injury or death . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings." 42 U.S.C. § 300aa-22(b)(1).

Petitioners are the parents of a child who suffered permanent brain damage shortly after receiving a DTP vaccine manufactured by respondent Wyeth. Petitioners claim that the vaccine was defective because there were alternative designs that could have been used that had less dangerous side effects, and therefore the injuries sustained were not "unavoidable" for purposes of the preemption clause. The district court dismissed petitioners' suit on the basis that all design defect claims against FDA-approved vaccines are preempted by § 22(b)(1). The Third Circuit affirmed.

Chief Justice John Roberts recused himself from this case at the certiorari stage, and may do so on the merits. Because this is one of the cases in which Justice Kagan, too, has recused herself, a recusal by Justice Roberts would mean that the case would be decided by only seven Justices.

Decision Below:

561 F.3d 233 (3d Cir. 2009)

Petitioner's Counsel of Record:

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

Respondent's Counsel of Record:

Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, LLP

AT&T Mobility v. Concepcion (09-893)

Question Presented:

Whether the Federal Arbitration Act ("FAA") preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

Summary:

The Federal Arbitration Act ("FAA"), which "manifests a liberal federal policy favoring arbitration agreements," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002), provides that such agreements are valid and enforceable "as a matter of federal law," so that contrary state law is preempted, "save upon such grounds as exist at law or in equity for the revocation of any contract." The question here is the degree to which this "savings clause" permits reliance on state unconscionability doctrine to invalidate arbitration agreements.

This is the latest of a series of cases in which the Ninth Circuit has invalidated arbitration agreements under California's law of unconscionability, reasoning that the state law does not disfavor arbitration agreements specifically, in conflict with the FAA, but is instead a generally applicable ground for revocation of "any contract" within the meaning of the savings clause. Here, the Ninth Circuit deemed unconscionable a consumer arbitration agreement because it bars class-wide arbitration, relying on California's "*Discover Bank*" standard; under *Discover Bank*, a class-waiver provision is unconscionable when it is part of a consumer contract of adhesion, disputes will predictably involve small amounts of damages, and there is an allegation of a deliberate

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

effort to prevent consumer recoveries. The Ninth Circuit rejected petitioner's preemption claim, holding that *Discover Bank* is "simply a refinement" of generally applicable doctrine and that class-waiver provisions are subject to the same unconscionability analysis whether they appear in arbitration agreements or other contracts.

Petitioner argues that the *Discover Bank* standard is not a generally applicable contract doctrine, but rather a special legal rule applicable only to arbitration agreements and thus outside the savings clause: *Discover Bank* reaches only dispute-resolution contracts, not "any contract," as required by the savings clause; and it is only in the context of arbitration agreements that a class waiver is held unconscionable even when the individual party before the court can be made whole under the existing, bilateral agreement. Petitioners also cite the general purpose of the FAA – to enforce arbitration agreements according to their terms – and argue that this purpose would be frustrated if California could "convert arbitration into litigation" by insisting on class-wide dispute resolution and other litigation-like procedures.

Decision Below:

584 F.3d 849 (9th Cir. 2009)

Petitioner's Counsel of Record:

Kenneth S. Geller, Mayer Brown LLP

Respondent's Counsel of Record:

Deepak Gupta, Public Citizen Litigation Group

Securities

Matrixx Initiatives, Inc. v. Siracusano (09-1156)

Question Presented:

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

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

Summary:

This case arises from a claim by respondents, a group of investors, that petitioner violated the Securities Exchange Act by failing to disclose material information regarding its product Zicam Cold Remedy – specifically, that some users of the nasal spray and gel form of Zicam complained of a loss of smell. Petitioner argues that the number of

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

complaints was so small – somewhere between 12 and 23 out of millions of units sold – that it was not "statistically significant," and that absent such a link between Zicam and loss of smell, the complaints were not "material" information subject to disclosure under the Act. Any contrary ruling, petitioner argues, would flood the marketplace with irrelevant information and undermine the "filtering" function of the materiality requirement.

The district court agreed with petitioner, dismissing respondents' claim for failure to sufficiently plead the elements of materiality and scienter under the Act. Applying the statistical significance requirement formulated in *In re Carter-Wallace, Inc. Securities Litigation (Carter-Wallace II),* 220 F.3d 36 (2d Cir. 2000), the court concluded that the number of complaints was not statistically significant as necessary to show materiality, and that respondents had not plead facts showing that petitioner knew that there was a causal link between Zicam and loss of smell sufficient to affect future earnings. The Ninth Circuit agreed with respondents and reversed, rejecting *Carter-Wallace II*'s "statistical significance" standard for materiality. Relying on *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the court below reasoned that the "delicate assessment" of materiality should not be subject to a bright-line rule and should instead in most instances be left to the trier of fact. The Ninth Circuit also reversed as to scienter, holding that the inference that Matrixx intentionally withheld customer-complaint information "is at least as compelling as any plausible nonculpable explanation."

Decision Below:

585 F.3d 1167 (9th Cir. 2009)

Petitioner's Counsel of Record:

Jonathan D. Hacker, O'Melveny & Myers LLP

Respondent's Counsel of Record:

Joseph. D. Daley, Robbins Geller Rudman & Dowd LLP

Janus Capital Group, Inc. v. First Derivative Traders (09-525)

Questions Presented:

There is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Securities Exchange Act of 1934. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Thus, a service provider who provides assistance to a company that makes a public misstatement cannot be held liable in a private securities-fraud action. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta Inc.*, 128 S. Ct. 761 (2008). In the decision below, however, the Fourth Circuit held that an investment adviser who allegedly "*helped* draft the misleading prospectuses" of a different company, "by *participating* in the writing and dissemination of [those] prospectuses," can be held liable in a private action "even if the statement on its face is *not* directly attributed to the [adviser]." App., *infra,* 17a-18a, 24a (emphases added). The questions presented are:

1. Whether the Fourth Circuit erred in concluding - in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits - that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

2. Whether the Fourth Circuit erred in concluding - in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits - that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

Summary:

This case arises from allegedly misleading statements in the prospectuses of certain Janus Fund mutual funds. Respondent, the lead plaintiff in a putative class action, sued Janus Capital Management ("JCM"), the investment advisor to the Janus Funds, and petitioner Janus Capital Group Inc. ("JCG"), which owns JCM, under § 10(b) of the Securities Exchange Act of 1934, alleging that JCM effectively manages the Janus Funds and was, along with JCG, accountable for the misleading prospectuses. The Fourth Circuit allowed the case to proceed, ruling that respondent had pled sufficient facts showing that petitioners, "by participating in the writing and dissemination of the prospectuses, [themselves] made the misleading statements contained in the documents." The court also concluded that respondent satisfied the "materiality" element of § 10(b) under the "fraud-on-the-market" theory by showing that given JCM's role in managing the Janus Fund, the investing public would likely attribute the prospectus statements to JCM.

Petitioners argue that holding JCM liable for "helping" to write and disseminate the prospectuses is inconsistent with *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, *Inc.*, 552 U.S. 148 (2008), barring aiding-and-abetting liability in private actions under § 10(b). They also contend that it is not enough to show "materiality" under the "fraud-on-the-market" theory that the public would attribute misleading statements to the defendant; rather, the statements must be publicly and directly attributed to the defendant, a condition not met here. Respondent and the United States (amicus at the certiorari stage) argue that the Fourth Circuit properly took account of the close relationship between the Janus Funds and JCM, and that *Stoneridge*, which addresses efforts to hold liable true corporate "outsiders" like law and accounting firms, does not preclude investment advisor liability in the circumstances of this case. Nor, they argue, does *Stoneridge* support petitioner's "direct attribution" requirement. *Stoneridge* involved defendants with no role in preparation of the financial reports in question; where, as here, a defendant actually drafts and disseminates a misleading document, and its responsibility for the document is reasonably ascertainable by the public, the fact that there is no express attribution should not shield the defendant from liability.

Decision Below:

566 F.3d 111 (4th Cir. 2009)

Petitoner's Counsel of Record:

Mark Andrew Perry, Gibson Dunn & Crutcher LLP

Respondent's Counsel of Record:

Ira M. Press, Kirby McInerney LLP

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Copyright

Costco Wholesale Corp. v. Omega (08-1423)

Question Presented:

Under the Copyright Act's first-sale doctrine, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that good without the authority of the copyright holder. In *Quality King Distribs. Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 138 (1998), this Court posed the question presented as "whether the 'first sale' doctrine endorsed in § 109(a) is applicable to imported copies." In the decision below, the Ninth Circuit held that *Quality King* (which answered that question affirmatively) is limited to its facts, which involved goods manufactured in the United States, sold abroad and then re-imported. The question presented here is:

Whether the Ninth Circuit correctly held that the first-sale doctrine does not apply to imported goods manufactured abroad.

Summary:

Respondent Omega filed suit alleging that Costco's sale in the United States of its copyrighted watches that were manufactured abroad and sold to Costco by a foreign distributor constituted infringement under 17 U.S.C. §§ 106 and 602 because Costco had not obtained Omega's permission to sell the watches. Costco contended that there was no infringement because under the "first sale" rule, 17 U.S.C. § 109(a), the owner of any particular copy "lawfully made under this title" may resell that copy without the authority of the copyright holder. The Ninth Circuit found for Omega, holding that the "first sale" rule did not apply because the copies were made and sold abroad and therefore were not "lawfully made under this title."

Decision Below:

541 F.3d 982 (9th Cir. 2008)

Petitioner's Counsel of Record:

Roy T. Englert, Jr., Robbins Russell Englert Orseck Untereiner & Sauber LLP

Respondent's Counsel of Record:

Michael Kellogg, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC

Tax

Mayo Foundation for Medical Education and Research v. United States (09-837)

Question Presented:

Whether the Treasury Department can categorically exclude all medical residents and other full-time employees from the definition of "student" in 26 U.S.C. § 3121(b)(10), which exempts from Social Security taxes "service performed in the employ of a school, college, or university" by a "student who enrolled and regularly attending classes at such school, college, or university."

Summary:

The Federal Insurance Contribution Act ("FICA") exempts from Society Security taxes "service performed in the employ of a school, college, or university" by a "student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

§ 3121(b)(10). After a series of federal court decisions holding that medical residents may qualify for the student exception, the Treasury Department promulgated a regulation categorically excluding all employees working more than 40 hours per week – including residents – from the exception. In the decision below, the Eighth Circuit sustained the regulation under *Chevron*, finding, first, that the statute does not unambiguously resolve whether a full-time employee qualifies as a "student . . . enrolled and regularly attending classes," and, second, that Treasury's construction of the term to exclude full-time employees is reasonable and conforms to legislative history indicating that Congress intended to benefit part-time student workers. Petitioners argue that the Eight Circuit erred at both stages of the *Chevron* analysis: Residents unambiguously qualify as "students" under the plain terms of the statute and, even if they did not, no deference is owed Treasury's inconsistently-applied position, which unreasonably and arbitrarily distinguishes between classroom education and hands-on training for medical students.

Decision Below:

568 F.3d 675 (8th Cir. 2009)

Petitioner's Counsel of Record:

Theodore B. Olsen, Gibson, Dunn & Crutcher LLP

Respondent's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

CSX Transportation, Inc. v. Alabama Department of Revenue (09-520)

Question Presented:

Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as "another tax that discriminates against a rail carrier."

Summary:

The Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), prohibits states from imposing a "tax that discriminates against a rail carrier providing transportation." 49 U.S.C. § 11501(b)(4). In *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), the Court held that a state may impose a generally applicable state property tax against rail carriers under the 4-R Act even if some non-railroad exemptions are granted. Below, the Eleventh Circuit ruled that *ACF Industries* governs general sales and use taxes as well as property taxes and upheld a sales and use tax imposed against petitioner, a railroad carrier, but not against motor carriers and water carriers. Petitioner argues that the state tax scheme "discriminates" against rail carriers within the meaning of the 4-R Act by exempting competitors – motor and water carriers – from the tax, and that the Eleventh Circuit has erred in extending *ACF Industries* beyond state property taxes to other forms of state taxation.

Decision Below:

Unpublished (11th Cir. 2009)

Petitioner's Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Respondent's Counsel of Record:

Corey L. Maze, Alabama Solicitor General

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Bankruptcy

Ransom v. MBNA America Bank (09-907)

Question Presented:

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles.

Summary:

Chapter 13 of the Bankruptcy Code requires debtors to relinquish all of their disposable income to unsecured creditors. To calculate disposable income, the debtor applies a means test that utilizes "applicable monthly expense amounts specified under the National Standards and Local Standards," which are issued by the IRS. 11 U.S.C. 707(b)(2)(A)(ii)(I). The Standards account for expenses associated with vehicles under "Ownership Costs" (covering loan and lease payments) and "Operating Costs." The question in this case is whether a debtor may deduct from his income ownership costs for a vehicle on which he is not making loan or lease payments.

Petitioner, a Chapter 13 debtor, sought to deduct "Ownership Costs" for a car that he owned in full. Respondent MBNA America Bank, an unsecured creditor, objected, and the Bankruptcy Court and Ninth Circuit agreed with respondent that petitioner could not deduct ownership costs for a car on which he was not making payments. Respondent defends the judgment below, relying on plain language: Both the word "applicable" and the distinction drawn between "ownership" and "operating" costs, respondent argues, make clear that a debtor may deduct as ownership costs only payments actually being made on a vehicle. Petitioner argues that the term "applicable" refers only to the appropriate geographic Local Standard, and that the Ninth Circuit (departing from the holdings of other circuits) is improperly restricting the discretion of bankruptcy courts to calculate projected disposable income.

Decision Below:

577 F.3d 1026 (9th Cir. 2009)

Petitioner's Counsel of Record:

Daniel Lucid

Respondent's Counsel of Record:

Deanne E. Maynard, Morrison & Foerster LLP

Truth in Lending Act

Chase Bank USA v. McCoy (09-329)

Question Presented:

The Federal Reserve Board's Regulation Z, which implements the Truth in Lending Act, requires creditors to provide an initial disclosure statement, before any transaction on an open-end credit plan takes place, containing "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires that when a creditor later changes any term that it was required to disclose in the initial

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

disclosure statement, the creditor must "mail or deliver written notice" of that change in terms before the effective date of the change. 12 C.F.R. § 226.9(c).

Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card account. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate. The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

Summary:

Respondent filed a class action lawsuit against petitioner Chase Bank, claiming that Chase violated the disclosure provisions of the Federal Reserve Board Regulation Z when it failed to provide notice before increasing interest rates because of consumer defaults. Under Regulation Z, a bank must provide an initial disclosure statement including "each periodic rate" that may be used to compute interest, and must then disclose any change to those terms before the change is effective. In this case, Chase's initial disclosure provided that the rate charged may increase, up to a specified maximum, if the consumer fails to make timely payments. The question is whether subsequent enforcement of that provision, in the form of an increased rate, is a change that requires a separate notice.

Relying on the Board's Official Staff Commentary to Regulation Z, the Ninth Circuit held that a separate notice is required where, as here, the original disclosure provides for a discretionary increase within a range of rates and does not specify "the actual amount of the increase and whether it will occur." Since the Ninth Circuit issued its opinion, the Board has interpreted the relevant version of Regulation Z (since superseded) differently, as not requiring a change-in-terms notice under circumstances like those here. As a result, the Court will now consider not only the merits of the original decision but the degree of deference to be afforded the agency's interpretation.

Decision Below:

559 F.3d 963 (9th Cir. 2009)

Petitioner's Counsel of Record:

Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Respondent's Counsel of Record:

Deepak Gupta, Public Citizen Litigation Group

ERISA

Amara v. CIGNA Corp. (09-804)

Question Presented:

Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

Summary:

This case concerns the showing that must be made by ERISA plan beneficiaries before they can recover benefits for a violation of ERISA's notice provisions. When respondent CIGNA converted its traditional defined benefit plan to a cash balance plan, many participants experienced extended "wear away" periods in which they worked without accruing any additional benefits. A group of participants brought a class action lawsuit against CIGNA alleging, in part, that CIGNA had violated ERISA's notice provisions, including the requirement that participants be provided with a summary plan description ("SPD") and summary of any material modifications ("SMM") in a form that is clear, easily understood, and not misleading. The district court held that CIGNA's SPD and SMM were inadequate because they failed to disclose the possibility of "wear away" periods and included affirmative "material misrepresentations" suggesting benefit increases. The court rejected CIGNA's argument that, as a condition of recovery of benefits, each plan participant should be required to prove detrimental reliance on the SPD or SMM. Instead, the court ordered class-wide recovery based on its finding that the class as a whole had shown "likely harm," in that CIGNA's failure to provide adequate notice had deprived employees of the chance to protest the change to their benefit plans. The Second Circuit summarily affirmed in an unpublished decision, based "substantially [on] the reasons stated" by the district court.

Petitioner argues that the ruling below imposes a form of "strict liability" on ERISA plan administrators, in that they may be held liable for even a minor shortcoming in providing notice without proof that any participant ever relied on or even read the faulty SPD or SMM. The result, petitioner warns, will be "windfall" recoveries inconsistent with ERISA's objectives, needlessly long and complex SPDs designed to address every possible objection, and a counter-productive reluctance to make material modifications to ERISA plans. Resolution of this question may have much larger implications for the availability of class actions in the ERISA context: A requirement that plan participants must show individual reliance on an SPD or SMM in order to recover could be a significant obstacle to class certification.

Decision Below:

348 F. App'x 627 (2d Cir. 2009)

Petitioner's Counsel of Record:

Theodore B. Olson, Gibson, Dunn & Crutcher LLP

Respondent's Counsel of Record:

Stephen R. Bruce

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Criminal Law

Eighth Amendment – Cruel and Unusual Punishment

Schwarzenegger v. Plata (09-1233)

Questions Presented:

1. Whether the three-judge district court had jurisdiction to issue a "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626.
2. Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and… no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order."
3. Whether the three-judge court's "prisoner release order," which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA's nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.

Summary:

This case presents important questions about the authority of federal judges to remedy systemic state-prison constitutional violations through "prisoner release orders" under 1996's Prison Litigation Reform Act ("PLRA"). Under the PLRA, a "prisoner release order" – defined broadly as any order limiting the size of a prison population – may be issued only by a three-judge district court, convened only when previous orders for less intrusive relief have failed to remedy a violation after sufficient time for compliance. And that court may order prisoner release only if crowding is the "primary cause" of a constitutional violation that cannot be cured by any other means. 18 U.S.C. § 3626.

A three-judge court was convened under the PLRA in 2006, after district courts in two separate cases found ongoing Eighth Amendment violations in California's failure to provide adequate medical care to its prisoners. After trial, the PLRA court found that prison crowding was the "primary cause" of California's ongoing failure to provide constitutionally adequate care, and that "no other relief" short of a population cap would bring California into compliance with the Constitution. Accordingly, the court issued a prisoner release order mandating that California's prison population be capped at 137.5% of design capacity within two years, requiring an estimated prisoner reduction of 46,000 inmates.

Under 28 U.S.C. § 1253, California appealed the prisoner release order directly to the Supreme Court, describing the order as "the most sweeping intrusion into a state's management of its correctional facilities in history." According to the State, the three-judge PLRA court was improperly convened because the State was not given sufficient time to comply with prior remedial orders. On the merits, the state argues that the prisoner release order is not justified under the PLRA because the evidence and court's own analysis showed crowding to be a "contributing cause," rather than the "primary

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

cause," of inadequate health care and because the court was too quick to dismiss alternative methods of bringing California's prisons into constitutional compliance. Appellees argue, first, that the Court lacks jurisdiction to hear the State's claim that the three-judge court was improperly convened; though 28 U.S.C. § 1253 gives the Court jurisdiction over the court's final order, any challenge to the initial decision to convene the court was reviewable only by the Ninth Circuit in the first instance. Appellees also defend the order on the merits, emphasizing that it comes in response to decades of unsuccessful efforts to cure the ongoing Eighth Amendment violation in California's prisons and that it leaves the State with the discretion to take whatever steps it deems best to meet the 137.5% cap.

Decision Below:

2010 WL 99000 (E.D. Cal. 2010)

Appellant's Counsel of Record:

Carter G. Phillips, Sidley Austin LLP

Appellees' Counsel of Record:

Paul D. Clement, King and Spalding LLP
Donald Specter, Prison Law Office

Sixth Amendment – Confrontation Clause

Michigan v. Bryant (09-150)

Question Presented:

Should certiorari be granted to settle the conflict of authority as to whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

Summary:

This is another in a line of cases testing the boundaries of *Crawford v. Washington*, 541 U.S. 36 (2004), which held that "testimonial" witness statements may not be admitted at trial unless they are subject to cross-examination under the Sixth Amendment. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court considered a 911 call reporting an ongoing attack, and held that statements elicited for the purpose of responding to an "ongoing emergency" are nontestimonial and thus fall outside the *Crawford* rule. In this case, the Court will decide whether the "ongoing emergency" exception applies when the police question the victim of a shooting thirty minutes after the crime.

The Michigan Supreme Court answered in the negative, reasoning that *Davis*' "ongoing emergency" standard governs only when the police are attempting to prevent an ongoing crime, rather than investigating a past one, and the witness is describing events as they transpire, rather than events in the past. The state argues that there remained an "ongoing emergency" in this case even thirty minutes after the shooting, in that the victim required medical aid and the perpetrator was still at large. The Michigan court

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

rejected that position on the ground that it would render nontestimonial *any* statement made by an injured witness or before a suspect is apprehended – a broad result that the state court believed to be inconsistent with the *Crawford* line of cases and especially the portion of *Davis* holding that the "ongoing emergency" rule did not apply to certain statements made to the 911 operator after the attack had ceased.

Decision Below:

768 N.W.2d 65 (Mich. 2009)

Petitioner's Counsel of Record:

Lori Baughman Palmer, Assistant Prosecuting Attorney

Respondent's Counsel of Record:

Peter Jon Van Hoek, Assistant Defender

Habeas Corpus & AEDPA Review

Harrington v. Richter (09-587)

Questions Presented:

1. In granting habeas relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. section 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

2. [*Added by the Court*:] Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under Strickland v. Washington, 466 U.S. 668 (1984)?

Summary:

Respondent Joshua Richter was convicted of murder in California state court and sentenced to life without parole. On habeas, he argued, *inter alia*, that his trial counsel rendered constitutionally deficient assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), when he failed to consult with forensic experts and present expert testimony regarding a blood pool that was critical to his theory of the case. The California Supreme Court issued a one-sentence summary denial of Richter's state habeas petition.

A divided en banc panel of the Ninth Circuit granted habeas relief, ruling that Richter was prejudiced by his counsel's deficient investigation of the blood pool and failure to present expert testimony. In an opinion written by Judge Reinhardt, the court acknowledged that AEDPA limits habeas relief to cases in which a state-court adjudication on the merits is "contrary to" or "unreasonably appli[es]" "clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d). Because the California Supreme Court's denial of Richter's ineffective assistance claim constituted an unreasonable application of *Strickland* so that relief was warranted even under AEDPA's "strict[] unreasonableness standard," the Ninth Circuit concluded, there was no need to decide whether the California Supreme Court's "unreasoned" summary denial of Richter's claim actually was entitled to AEDPA deference.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

When it granted certiorari review, the Supreme Court instructed the parties to brief not only the merits of the ineffective assistance issue, but also the question reserved by the court below: whether AEDPA deference applies to a state court's summary disposition of a *Strickland* claim. Habeas petitioners have long argued that a summary denial of a *Strickland* claim cannot be reviewed under § 2254(d)'s deferential standard; without knowing even which components of the *Strickland* standard the state court has considered, a reviewing court cannot determine whether the state court's analysis "unreasonably" applies federal law. The State, by contrast, argues that nothing in the text of § 2254(d) requires a state court to explain its reasoning to the satisfaction of a federal court, and that denying AEDPA deference to summary dispositions of *Strickland* claims would impose significant burdens on state courts struggling with enormous case loads.

Decision Below:

578 F.3d 944 (9th Cir. 2009)

Petitioner's Counsel of Record:

Harry Joseph Columbo, Deputy Attorney General, California

Respondent's Counsel of Record:

Cliff Gardner, Law Offices of Cliff Gardner

Skinner v. Switzer (09-9000)

Question Presented:

For ten years, Henry W. Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. §1983 to vindicate his due process right to " 'fundamental fairness in [the] operation' " of Texas's scheme. *Dist. Att'ys Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (citation omitted). The district court dismissed Mr. Skinner's §1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The question presented is the same one the Court granted certiorari in *Osborne* to decide, but left unresolved:

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. §1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

Summary:

This case is a follow-up to last Term's *District Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009), finding no general due process right to post-conviction DNA testing to prove innocence. Petitioner Skinner was convicted of murder; after his conviction, he unsuccessfully invoked Texas state procedures to gain access to physical evidence for DNA testing. He then sued under §1983, arguing that the state's continued refusal to provide him with crime-scene evidence for testing violated his due process rights. The district court and Fifth Circuit ruled against him, holding that under *Heck v. Humphrey*, 512 U.S. 477 (1994), a claim for post-conviction DNA testing is cognizable only on habeas, and not by way of a §1983 suit.

On the merits of his due process claim, Skinner argues that *Osborne* leaves open the possibility of his as-applied challenge to the arbitrary manner in which the Texas process operated to deny him access to DNA testing. But the central issue in the case is

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

whether Skinner is entitled to bring his claim under §1983 at all, or whether DNA testing claims must be raised only in habeas proceedings. Under *Heck*, any prisoner claim that would, if successful, "necessarily imply the invalidity" of a conviction or sentence may not be the basis of a §1983 action, and must instead be pursued on habeas. The Court in *Osborne* declined to decide whether a §1983 claim for DNA testing is barred by the "*Heck* doctrine" (though Justice Alito, joined by Justice Kennedy, wrote separately to endorse that position), and the lower courts have divided on the question.

Decision Below:

363 F. App'x 302 (5th Cir. 2010)

Petitioner's Counsel of Record:

Robert C. Owen, University of Texas School of Law

Respondent's Counsel of Record:

Gregory S. Coleman, Yetter Coleman LLP

Cullen v. Pinholster (09-1088)

Questions Presented:

1. Whether a federal court may reject a state-court adjudication of a petitioner's claims as "unreasonable" under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28. U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

Summary:

Respondent Pinholster was sentenced to death in California. The California Supreme Court summarily denied his state habeas claim alleging that counsel had provided ineffective assistance during his trial's sentencing phase by failing to investigate and present mitigating evidence, including evidence of organic brain damage and a deprived and abusive childhood. On federal habeas review, the district court held an evidentiary hearing and subsequently granted habeas relief. In the decision below, a divided *en banc* panel of the Ninth Circuit, over a dissent by Judge Kozinski, affirmed the district court ruling.

This case involves the interplay between two provisions of AEDPA: 28 U.S.C. § 2254(d)(1), under which habeas relief may be granted only if the state court's adjudication of a claim was "unreasonable;" and § 2254(e)(2), under which a federal court, subject to limited exceptions, may not hold an evidentiary hearing if the applicant failed to develop the factual basis for his claim in state court. The Ninth Circuit held, first, that the district court properly granted a hearing, given respondent's diligence in pursuing an evidentiary hearing in the California courts. It follows, the Ninth Circuit concluded, that the court was not foreclosed from considering the evidence from that hearing in deciding respondent's claim. Congress relied on § 2254(e)(2) to limit the presentation of new evidence on federal habeas review, and so long as that provision is satisfied, nothing in § 2254(d)(1) prevents a court from evaluating "reasonableness" in

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

light of newly discovered facts. The State takes a different view, arguing that a federal court may never grant relief under § 2254(d)(1) on the basis of facts presented for the first time in a federal evidentiary hearing; according to the State, a state-court adjudication cannot be deemed "unreasonable" under § 2254(d)(1) for failing to take into account facts that were not then before the court. To ensure that federal habeas courts do not rely incorrectly on newly-adduced facts, the State urges that no § 2254(e)(2) hearing should be held unless and until a state decision is first judged "unreasonable" under § 2254(d)(1) – and that, in any event, the court here erred in granting a hearing because respondent had not adequately developed the basis for his claim in state proceedings. The parties also dispute the merits of the ineffective assistance claim, with the State both defending counsel's performance and arguing that any deficiency was not prejudicial in light of the aggravating circumstances of the crime.

Decision Below:

590 F.3d 651 (9th Cir. 2009)

Petitioner's Counsel of Record:

James William Bilderback II, Supervising Deputy Attorney General, California

Respondent's Counsel of Record:

Sean K. Kennedy, Federal Public Defender

Wall v. Kholi (09-868)

Question Presented:

Does a state court sentence-reduction motion consisting of a plea for leniency constitute "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one-year limitations period for a state prisoner to file a federal habeas corpus petition, an issue as to which there is 3-2 circuit split?

Summary:

AEDPA's one-year statute of limitations is tolled during the pendency of an "application for State post-conviction or other collateral review with respect to the pertinent judgment." 28 U.S.C. § 2244(d)(2). The question in this case is whether a sentence-reduction motion seeking leniency qualifies as an application for "post-conviction or other collateral review." The First Circuit answered in the affirmative, reasoning that petitioner's plea for leniency, filed after his conviction, "self-evidently" constitutes an application for "post-conviction . . . review of the pertinent judgment." The state disagrees, arguing that the phrase "post-conviction or *other* collateral review" (emphasis added) is limited to forms of collateral review, and that a plea for discretionary leniency, filed before the original sentencing judge and alleging no legal error in the judgment or sentence, is not a "collateral review" proceeding. Both parties contend that there are policy reasons to adopt their respective readings: Petitioner argues that unless sentence-reduction motions toll the AEDPA limitations period, federal habeas courts will be required to review state proceedings that are still on-going; and the State argues that allowing tolling in these circumstances will give prisoners an incentive to file frivolous sentence-reduction motions as a delaying tactic.

Decision Below:

582 F.3d 147 (1st Cir. 2009)

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Petitioner's Counsel of Record:
Aaron L. Weisman, Assistant Attorney General, Rhode Island
Respondent's Counsel of Record:
Judith H. Mizner, Federal Defender Office

Walker v. Martin (09-996)
Question Presented:
Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filling his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?
Summary:
A federal habeas court will not review a claim rejected by a state court if the state court's decision rests on an independent state-law ground that is "adequate" to support the judgment. Defining "adequacy" for purposes of this rule has been a recurring issue for the Court, which has held only that a state procedural default rule may be adequate – and thus preclude federal review – when it is "firmly established and regularly followed." Last Term, in *Beard v. Kindler*, 130 S. Ct. 612 (2009), the Court held that a state procedural rule is not necessarily "inadequate" because it is discretionary in application, but declined to provide "broad guidance on the adequate state ground doctrine." This case may provide the Court with an opportunity to more fully resolve the issue.

The California Supreme Court denied respondent Martin's state habeas petition under a state procedural rule requiring that petitions be filed without "substantial" delay. The federal district court then denied review of Martin's federal petition on the ground that the California ruling rested on independent and adequate state-law grounds. In the opinion below, the Ninth Circuit reversed, holding that California's "substantial delay" rule was too vague and inconsistently applied to qualify as an adequate state ground. Unlike other states, the court concluded, California has chosen to use an undefined "substantial delay" standard rather than a fixed statutory deadline, and because it has failed to clarify or to consistently apply that standard – the court cited conflicting California cases holding a one-year delay "substantial" but allowing a 14-month delay as insubstantial – it cannot be the ground for denying federal review. Petitioner defends the ruling below, arguing that the California courts have failed to explain their contradictory applications of the "substantial delay" rule, and that such unreasoned and arbitrary state-court judgments should not dictate whether federal review is available. The State takes the position that so long as petitioner has notice of a state procedural rule and a chance to comply, the rule should be deemed adequate, regardless of how the rule is applied (at least absent "extraordinary circumstances"). The flexibility of discretionary rules often benefits petitioners, the State argues, and federal second-guessing of those rules is wasteful, unreliable, and contrary to important principles of federalism.
Decision Below:
357 F. App'x 793 (9th Cir. 2009)

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Petitioner's Counsel of Record:
R. Todd Mitchell, Deputy Attorney General, California
Respondent's Counsel of Record:
Michael B. Bigelow

Sentencing

Abbott v. United* States** (09-479); ***Gould v. United States (09-7073)
Questions Presented:
[Number 09-479:]
Title 18 U.S.C. § 924(c)(1)(A) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or . . . in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is . . . provided . . . by any other provision of law." The questions presented are:
1. Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence?
2. If not, does it include another offense for possessing the same firearm in the same transaction?
[Number 09-7073:]
Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) applies to a count when another count already carries a greater mandatory minimum sentence?
Summary:
Section § 924(c)(1)(A) of Title 18 imposes a consecutive five-year mandatory minimum sentence when a drug-trafficking crime or crime of violence involves a firearm. Under the provision's "exceptions clause," the five-year minimum does not apply when "a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." Petitioner Kevin Abbott was convicted of drug trafficking and firearms offenses, and sentenced to both a fifteen-year mandatory minimum under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), and § 924(c)(1)(A)'s five-year minimum, for a total of 20 years. Abbott argues that he falls within § 924(c)(1)(A)'s exceptions clause because he was subject to a greater minimum sentence under the ACCA, which qualifies as "any other provision of law." The Third Circuit disagreed, adopting the government's position that the exceptions clause reaches only greater minimums imposed under § 924(c)(1)(A) itself ("a greater minimum sentence [] otherwise provided by this subsection"), and that the reference to "any other provision of law" is intended to capture only additional penalties for § 924(c)(1)(A) violations that might be codified by Congress in the future.
Decisions Below:
574 F.3d 203 (3d Cir. 2009); 329 F. App'x 569 (5th Cir. 2009)
Petitioners' Counsel of Record:
Mark T. Stancil, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

David L. Horan, Jones Day

Respondent's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

Pepper v. United States (09-6822)

Questions Presented:

There is a conflict among the United States Courts of Appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a).

Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*?

Whether as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation.

When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

Summary:

The question in this case is whether successful post-sentencing rehabilitation is a permissible ground for a downward sentencing variance when a defendant must be resentenced on remand after appeal. Petitioner Pepper presents a particularly compelling case: After serving an initial sentence, he married and became a primary support for his spouse and stepchild, was named "Associate of the Year" at his Sam's Club overnight supervisor job, and attended college full-time. The Eighth Circuit held, however, that while Pepper should be "commend[ed] . . . on the positive changes he has made in his life," evidence of post-sentencing rehabilitation is not a permissible factor to consider on resentencing in support of a downward variance, given that the evidence could not have been considered at the time of the initial sentencing. Petitioner argues that just as post-offense rehabilitation may support a downward variance under *Gall v. United States*, 552 U.S. 38, 46 (2007), post-sentencing rehabilitation is also grounds for a downward variance. Notably, the United States agrees with petitioner that the court below erred in excluding consideration of post-sentencing rehabilitation on resentencing, and the Court has appointed private counsel to defend the decision below.

Decision Below:

412 F.3d 995 (8th Cir. 2005)

Petitioner's Counsel of Record:

Alfredo Parrish, Parrish Gentry & Fisher LLP

Respondent's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

Adam G. Ciongoli, Willis Group Holding Limited (Amicus Curiae in Support of the Judgment Below)

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Right to Counsel

Belleque* (formerly *Premo*) v. *Moore (09-658)

Questions Presented:

1. This Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante* – a direct appellate review case – this Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession was not harmless.
    a. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Fulminante* standard apply, even though no record of a trial is available for review?
    b. Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1)?
2. In Moore's underlying criminal case, he confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the Ninth Circuit err by granting federal habeas relief on Moore's ineffective-assistance-of-counsel claim?

Summary:

To establish prejudice in an ineffective assistance of counsel claim under *Strickland*, a claimant who pleads guilty, rather than being convicted after a trail, must show a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This question in this case is the standard for evaluating that prejudice on federal habeas review when counsel's deficiency is the failure to challenge an unlawfully obtained confession. Respondent Moore pled guilty to felony murder after his counsel failed to challenge what is now a concededly unlawful police interrogation leading to a confession. The state courts rejected his ineffective assistance claim on the ground that counsel's deficient performance had not prejudiced Moore, who had made similar confessions to others who could testify against him. The Ninth Circuit granted relief, relying on *Arizona v. Fulminante*, 499 U.S. 279 (1991), for the proposition that introduction of an involuntary confession is not harmless error even when a defendant has made other voluntary confessions, and ruling that the state courts' failure to follow *Fulminante* was unreasonable under AEDPA. The state argues that *Fulminante*, which involved review of the full record of a jury trial, cannot be applied in the context of convictions obtained by guilty plea, when there is no record of what other evidence the prosecution might have produced and the impact of a confession on a jury is not at issue. In the alternative, the state claims that even if *Fulminante* does apply to guilty-plea convictions, that is not a matter of "clearly established federal law," so that the state courts' contrary conclusion cannot be grounds for relief under AEDPA.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Decision Below:
574 F.3d 1092 (9th Cir. 2009)
Petitioner's Counsel of Record:
Mary Hazel Williams, Deputy Attorney General,Oregon
Respondent's Counsel of Record:
Steven T. Wax, Federal Public Defender

Other Public Law Cases

Government Liability and Immunities

Los Angeles County v. Humphries (09-350)
Questions Presented:
1. Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from *Monell's* requirement as determined by the Ninth Circuit?
2. May a plaintiff be a prevailing party under 42 U.S.C. § 1988 for purposes of a fee award against a local public entity based upon a claim for declaratory relief where the plaintiff has not demonstrated that any constitutional violation was the result of a policy, custom or practice attributable to the public entity under *Monell*?
3. May a plaintiff be a prevailing party on a claim for declaratory relief for purposes of a fee award under 42 U.S.C. § 1988 where there is neither a formal order nor judgment granting declaratory relief, nor any other order altering the legal relationship between the parties in a way that directly benefits the plaintiff?

Summary:
The Ninth Circuit held that the State of California and County of Los Angeles violated respondents' procedural due process rights by listing them incorrectly on a state-run index of child abusers with no means of removing their names, and remanded for consideration of whether the County was liable for damages under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because it had acted pursuant to a municipal "policy or custom." While that question was pending, the Ninth Circuit awarded interim appellate attorneys' fees to the respondents under 42 U.S.C. § 1988, with 10 percent to be paid by the County and 90 percent by the State, based on its determination that respondents had prevailed on their claim for declaratory relief. The central question in this case is whether respondents can be said to have "prevailed" on their declaratory relief claim against the County, so as to entitle them to attorneys' fees, without the finding of "policy or custom" that would be required to hold the County liable for damages under *Monell*.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Petitioner County argues that *Monell*'s "custom or policy" requirement is intended not only to protect municipalities against the financial burdens of damages awards, but also to advance "core principles of federalism" by cabining federal authority to intervene in local governance through § 1983 more generally. Respondents contend that *Monell*'s "custom or policy" limit, which ensures a causal link between a municipality and a violation, is unnecessary with respect to claims for prospective relief from ongoing violations, like this one; such claims are governed already by strict standards of causation that do not apply in the damages context. Emphasizing that the Court has never before applied the *Monell* standard to a claim for prospective relief to remedy an ongoing constitutional violation, respondents urge the Court not to restrict the availability of judicial redress in such cases.

Decision Below:

54 F.3d 1170 (9th Cir. 2009)

Petitioner's Counsel of Record:

Timothy T. Coates, Greines, Martin, Stein & Richland LLP

Respondent's Counsel of Record:

Andrew J. Pincus, Mayer Brown LLP

***Virginia Office for Protection and Advocacy v. Stewart* (formerly *Reinhard*)** (09-529)

Question Presented:

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

Summary:

Petitioner Virginia Office for Protection and Advocacy ("VOPA"), an independent state agency, brought an action in federal court against three Virginia officials in their official capacities, seeking prospective declaratory and injunctive relief for an alleged failure to comply with federal law. Before the district court, the defendant state officials moved to dismiss VOPA's complaint on the ground that Virginia's sovereign immunity barred the suit from being heard in federal court. The district court denied the motion to dismiss, relying on *Ex parte Young*, 209 U.S. 123 (1908), which allows federal courts to entertain claims brought against state officials for prospective relief from an ongoing violation of federal law. The Fourth Circuit reversed, holding that "federal court adjudication of an 'intramural contest' between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff."

Petitioner and the United States as amicus argue that a plaintiff's identity as a state agency is irrelevant for purposes of *Ex parte Young*, given that the Supreme Court has previously ruled that courts "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002). Petitioner also argues that the Fourth Circuit improperly relied on language from the Court's plurality opinion in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), in which only Chief Justice Rehnquist and Justice Kennedy called for a case-

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

by-case approach to application of *Ex parte Young* based on the presence of "special sovereignty interests." Finally, the parties dispute whether state courts serve as adequate forums for entertaining claims brought by state agencies against state officials.

Decision Below:

568 F.3d 110 (4th Cir. 2009)

Petitioner's Counsel of Record:

Seth M. Galanter, Morrison & Foerster LLP

Respondent's Counsel of Record:

E. Duncan Getchell Jr., Virginia Solicitor General

Connick v. Thompson (09-571)

Question Presented:

Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. See *City of Canton v. Harris*, 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but in rare cases one violation may suffice. *Bryan County*, 520 U.S., at 409. The Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. See *Canton*, 489 U.S., at 390 n.10.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

Summary:

This case involves the scope of failure-to-train liability under §1983. After a prosecutor deliberately withheld exculpatory blood-type evidence at his trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), respondent Thompson sued the district attorney's office under §1983, alleging, *inter alia*, that the office was liable because it had failed to train its prosecutors on their *Brady* obligations. The Fifth Circuit affirmed a $14 million damages award, finding that the district attorney had been "deliberately indifferent" to the need to provide *Brady* training and that a "pattern" of *Brady* violations was not necessary to show failure-to-train liability. Petitioner argues that a single *Brady* violation cannot be the predicate for vicarious municipal liability under a failure-to-train theory. Acknowledging that the Court endorsed the concept of "single-incident" municipal liability in *City of Canton v. Harris*, 489 U.S. 378 (1989), for failure to train police officers in the use of deadly force, petitioner argues that the *Canton* "hypothesis" is the exception, not the rule, and that it has no application to prosecutors who, unlike the police, are legal professionals who can be presumed to understand their obligations under rules like *Brady*.

Decision Below:

553 F.3d 836 (5th Cir. 2008)

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Petitioner's Counsel of Record:
S. Kyle Duncan, Appellate Chief, Louisiana Department of Justice
Respondent's Counsel of Record:
J. Gordon Cooney, Jr., Morgan, Lewis & Bockius LLP

Sossamon v. Texas (08-1438)
Question Presented:
Whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. (2000).
Summary:
The question in this case is whether a state that accepts federal funds waives its sovereign immunity against damages actions under RLIUPA, a Spending Clause statute that provides for "appropriate relief against a government." Petitioner, a prisoner in Texas, sued the state under RLIUPA, seeking monetary as well as declaratory and injunctive relief. The Fifth Circuit conceded that the statutory phrase "appropriate relief" has been read by the Court to include monetary damages in cases against non-state entities, but held that the phrase is too ambiguous to qualify as the "plain statement" necessary to overcome state sovereign immunity. Petitioner argues that under Court precedent, "appropriate relief" is a term of art, so that Texas was on clear notice as to its potential damages liability under RLIUPA when it accepted federal funds. Though prior Court cases construing "appropriate relief" have not involved state defendants, petitioner argues, they have involved Spending Clause legislation, which carries its own plain statement rule; if "appropriate relief" is sufficiently "unambiguous" to render governments liable for damages under the Spending Clause, then it satisfies the sovereign immunity plain statement rule, as well.
Decision Below:
560 F.3d 316 (5th Cir. 2009)
Petitioner's Counsel of Record:
Kevin K. Russell, Howe & Russell, P.C.
Respondent's Counsel of Record:
James C. Ho, Texas Solicitor General

<u>Federal Practice and Procedure</u>

Ortiz v. Jordan (09-737)
Question Presented:
May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?
Summary:
Petitioner Michelle Ortiz was raped by a prison guard and then, after she complained and sought protection, raped again the next night. Petitioner filed a 42 U.S.C. § 1983 lawsuit and respondents, two prison officials, sought summary judgment on qualified immunity grounds. When the judge denied their motion, respondents did not appeal the qualified

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

immunity determination, but instead opted to go to trial; when they lost at trial, they returned to the issue and appealed the original denial of qualified immunity. In the decision below, the Sixth Circuit ruled that the denial of qualified immunity was appealable after trial under 28 U.S.C. § 1291 – an exception, the court explained, to the general rule that appellate courts do not review denials of summary judgment after trial on the merits – and it reversed the district court's decision, effectively vacating the verdict due to qualified immunity.

Petitioner argues that the Sixth Circuit lacked jurisdiction to consider respondents' qualified immunity claim under 28 U.S.C. § 1291, which gives the federal courts of appeals jurisdiction over "final" orders of district courts. Because the summary judgment proceedings were superseded by a trial on the merits, the denial of summary judgment was not "final" under § 1291 – and that provision does not admit of an exception for qualified immunity or other "legal issues," as contemplated by some lower courts. Only by bringing an immediate collateral-order appeal or by renewing their claim after the verdict under Rule 50(b) could respondents seek appellate review of the denial of qualified immunity. Respondents contend that because the qualified immunity defense is legal, not factual, it is not mooted by facts adduced at trial, but instead – like preemption and statute of limitations defenses – merges into the appealable final judgment. So long as defendants preserve the issue by raising it at the summary judgment stage, they may appeal after trial; an immediate collateral-order appeal is permissible but not mandatory, and Rule 50(b) is designed for sufficiency of the evidence objections rather than legal claims.

Decision Below:

316 F. App'x 449 (6th Cir. 2009)

Petitioner's Counsel of Record:

David E. Mills, The Mills Law Office LLC

Respondent's Counsel of Record:

Benjamin C. Mizer, Ohio Solicitor General

Henderson v. Shinseki (09-1036)

Question Presented:

Section 7266(a) of Title 38, U.S.C., establishes a 120-day time limit for a veteran to seek judicial review of a final agency decision denying the veteran's claim for disability benefits. Before the decision below, the Federal Circuit in two en banc decisions held that Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling under this Court's decision in *Irwin v. Department of Veterans Affairs*, 488 U.S. 89 (1990). In the divided en banc decision below, however, the Federal Circuit held that this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), superseded *Irwin* and rendered Section 7266(a) jurisdictional and not subject to equitable tolling.

The question presented is whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Summary:

Petitioner, a veteran of the Korean War seeking veterans' benefits, appealed an adverse agency decision to the United States Court of Appeals for Veterans Claims (Veterans Court). Though his *pro se* appeal was filed 135 days after the prior decision, outside the 120-day period specified by 38 U.S.C. § 7266(a), petitioner asked the Veterans Court to excuse his late filing because it resulted from the same disability (mental illness) for which he sought benefits. A divided *en banc* Federal Circuit ruled against petitioner, overruling prior precedent and holding that under the Supreme Court's 2007 decision in *Bowles v. Russell*, 551 U.S. 205, the 120-day statutory period is not a statute of limitations subject to equitable tolling, but rather a jurisdictional limit that cannot be tolled. Petitioner argues that the text, structure and purpose of § 7266(a) make clear that it is a statute of limitations, not a jurisdictional limit, particularly in the light of the "pro-veteran" canon of construction that governs provisions for veterans' benefits. According to petitioner, *Bowles*, which involved court-to-court filings rather than review of agency decisions, is inapposite; more on point is *Bowen v. City of New York*, 476 U.S. 467 (1986), holding that the deadline for seeking review of agency denial of social security benefits is a statute of limitations subject to tolling, which the Court did not call into question in *Bowles*.

Decision Below:

589 F.3d 1201 (Fed. Cir. 2009)

Petitioner's Counsel of Record:

Lisa S. Blatt, Arnold & Porter

Respondent's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

United States of America v. Tohono O'odham Nation (09-846)

Question Presented:

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff . . . has . . . any suit or process against the United States" or its agents "pending in any other court." The question presented is: Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

Summary:

In *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993), the Court held that a suit in the Court of Federal Claims ("CFC") should be dismissed pursuant to 28 U.S.C. § 1500 if it is "based on substantially the same operative facts" as are the basis for an action in another court, "at least if there [is] some overlap in the relief requested." The Court reserved the question at issue in this case: whether two actions with the same operative facts but seeking different relief also run afoul of § 1500. Respondent Tohono O'odham Nation is a federally recognized Indian tribe that sued the United States in both federal district court and the CFC. While alleging in both complaints that the government had

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

mismanaged tribal assets, the respondent sought equitable relief in the district court and relief at law for money damages before the CFC. In the proceedings before the CFC, the government successfully moved to dismiss for lack of subject matter jurisdiction under § 1500. The Federal Circuit reversed, relying on *Keene* and its own precedent to reason that there is a clear distinction in the type of relief requested in each court; even if monetary relief is ultimately requested in both actions, there is no overlap as the claims for equitable relief are distinct from the claims for relief at law.

The United States argues that the relief sought by respondents in both courts overlaps, and, in the alternative, that § 1500 precludes CFC jurisdiction whenever a plaintiff has a suit pending in another court based on the same operative facts, even if the two suits seek entirely different relief. Respondent argues that it seeks different relief in each action, and that the position of the United States on § 1500 could force litigants to choose between relief available only in one court and that available only in another. *See Cashman v. United States*, 135 Ct. Cl. 647, 650 (1956) ("'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.'").

Decision Below:

559 F.3d 1284 (Fed. Cir. 2009)

Petitioner's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

Respondent's Counsel of Record:

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

Freedom of Information Act

Milner v. Department of the Navy (09-1163)

Question Presented:

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

Summary:

Petitioner Milner sought disclosure of Department of Navy maps identifying the location and blast range of explosives stored at a Navy ordnance depot on an island in Puget Sound. The Department refused Milner's request, arguing that disclosure would provide potential attackers with information that could threaten the security of the depot and surrounding community. The Ninth Circuit held that the documents were exempted from disclosure under the Freedom of Information Act ("FOIA") by FOIA Exemption 2, which covers materials that relate "solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

Many lower courts have extended Exemption 2 beyond what they have termed "Low 2" documents: those relating to "mundane" internal employment practices with no genuine public significance, like parking and lunch policies. Drawing on *Department of the Air Force v. Rose*, 425 U.S. 352, 369 (1976), in which the Court reserved the question

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

whether Exemption 2 might reach non-trivial information if disclosure would "risk circumvention of agency regulation," those courts have held that Exemption 2 also covers "High 2" documents: documents with some public import that are sensitive and would create a risk of "circumvention of law" if disclosed. Applying this "High 2" analysis, the Ninth Circuit below held that the maps sought by petitioner were covered by Exemption 2 because they were "predominantly internal" policies used to direct personnel in the performance of their duties, rather than to regulate the public, and because disclosure would risk circumvention of the law. Petitioner argues that FOIA Exemption 2, limited to trivial internal material with no public import, is inconsistent with the "High 2" category created by the lower courts – and that even if *Rose* allows for the withholding of some non-trivial information, the Ninth Circuit below construed that exception too broadly.

Decision Below:

575 F.3d 959 (9th Cir. 2009)

Petitioner's Counsel of Record:

David D. Mann, Gendler & Mann

Respondent's Counsel of Record:

Neal Kumar Katyal, Acting United States Solicitor General

Original Jurisdiction

State Compacts

Montana v. Wyoming and North Dakota (137 ORG)

Questions Presented:

[From the brief of the United States:] In this case Montana alleges that Wyoming has breached the Yellowstone River Compact (Compact) by consuming more water than is permitted under the Compact, in four specific respects. Wyoming has moved to dismiss the bill of complaint. The Special Master has recommended that Wyoming's motion to dismiss be denied and concluded that three of Montana's theories state a claim of Compact breach, to the extent that Montana can show that Wyoming's use of the practices alleged have left pre-1950 users in Montana without enough water and without any recourse under Montana law. The Special Master concluded, however, that Montana's fourth theory fails to state a claim. That theory alleges that certain users in Wyoming are diverting the same amount of water as they did before the Compact, but consuming more of those diversions through increased efficiencies, so that less water returns to the river and is available for use downstream in Montana. The questions presented by Montana's exception are as follows:

1. Whether the Special Master correctly concluded that Montana's increased-efficiency allegation does not state a claim for breach of the Compact.

2. Whether the Special Master correctly concluded that, to show that Wyoming has breached the Compact and caused Montana injury, Montana must show that its water users lack an intrastate remedy under Montana law.

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved

Summary:
See above.

Plaintiff's Counsel of Record:
John B. Draper, Montgomery & Andrews

Respondents' Counsel of Record:
Peter K. Michael, Senior Assistant Attorney General, Wyoming
Todd Adam Sattler, Assistant Attorney General, North Dakota

Copyright © 2010 by Supreme Court Institute, Georgetown University Law Center, Washington, DC, All Rights Reserved