

# October Term 2008

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## **Introduction**

As the Court approached the start of October Term 2007, it faced a severe docket crunch. The justices had agreed to decide only 26 cases, well below the number needed to fill the fall argument calendar. At the conclusion of the summer recess, the shortfall forced the Court to expedite briefing schedules in numerous cases granted to avoid canceling the January argument session outright. Over the course of the term, it never caught up. While the Court managed to fill its calendar for three of the final four argument sessions, in total the justices heard argument in only 70 cases, the lowest figure in more than 50 years.<sup>1</sup>

By contrast, the Court enters October Term 2008 having accepted a comparatively plentiful 43 cases for argument. Ordinarily, that total would be sufficient to fill the Court's argument calendar well into January or February. In a switch from past terms, however, the Court has scheduled three arguments (rather than two) on most days in the October and November sittings, and is expected to hear only one argument per day during the spring. By frontloading the calendar, Chief Justice John Roberts has said, the Court would have more time to finish opinions over the winter recess and thereby avoid its usual crunch at the end of the term.<sup>2</sup>

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<sup>1</sup> Three granted cases were dismissed before argument by mutual consent of the parties: No. 06-1346, *Ali v. Achim*; No. 07-110, *Arave v. Hoffman*; and No. 07-480, *Huber v. Wal-Mart*.

<sup>2</sup> Tony Mauro, *Next Term: A Fatter, Faster Calendar for Supreme Court*, *Legal Times*, July 3, 2008.

The cases for the term, of course, span an array of substantive areas.

### **Voting Rights**

For decades, federal law has forbidden nine states and nearly six dozen counties<sup>3</sup> with histories of racial voting discrimination from making any change to their election laws without first receiving the approval of either the U.S. Department of Justice or a panel of three federal judges in Washington. For many of the covered jurisdictions, most of which are located in the South, this “preclearance requirement,” contained in section 5 of the Voting Rights Act of 1965, has long served as a source of resentment. Indeed, opponents of the Act see the obligation as a modern-day scarlet letter—no longer primarily intended to ensure minority participation in the political process, but rather to prevent certain regions of the country from escaping their racist pasts.

Thus, after Congress in 2006 overwhelmingly extended the law for another 25 years, few were surprised that it came quickly under attack. Calling the requirement nothing more than a “badge of shame,” a municipal district in Travis County, Texas, sought a declaratory judgment that its continued application was unconstitutional. But last May a panel of three federal judges in Washington, D.C., disagreed.<sup>4</sup> Citing numerous examples of voting changes to which the DOJ had objected over the previous two decades, the panel found Congress had ample justification under the Fourteenth or Fifteenth Amendments to continue to impose the preclearance requirement. Shortly thereafter, attorneys for the district filed a notice of a direct appeal to the Supreme Court—the vehicle for review of such cases—setting up what, if the Court notes probable jurisdiction, will perhaps be the biggest case of the term.

The plaintiff, Northwest Austin Municipal District Number 1, was formed in the late 1980s to provide infrastructure and services to a planned subdivision of some 3,000 residents. Though situated inside the boundaries of both Austin and Travis Counties, the district,

<sup>3</sup> The states are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. For the complete list of counties, see [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm).

<sup>4</sup> Northwest Austin Mun. Utility Dist. No. One v. Mukasey, 2008 WL 2221034 (D.D.C. 2008) (hereinafter “NAMUDNO”).

under state law, remains independent of both. Elections for the district's five-person board of directors are held every two years. Formed more than a decade after the DOJ first required Texas jurisdictions to meet the preclearance requirements, the district claimed the most recent extension to be both costly and unfair. It noted that, because section 5 covers any "change in practices or procedures affecting voting," even the most minor alterations must first be submitted to Washington for approval. As one example, the district said it had to seek preclearance to relocate a polling place from a residential garage to a public school.

More important, given the progression in voting rights over the passage of time, the district argued that Congress lacked any present justification to continue imposing the preclearance requirements. It contended that by relying on what it characterized as an "ancient formula" in reauthorizing section 5 obligations, Congress created a regime that is both over- and under-inclusive. "The district and its voters are being punished for conditions that existed thirty years ago but have long since been remedied," the district's complaint states, "while jurisdictions where similar conditions exist today are spared because the conditions did not exist thirty years ago."

Both parties moved for summary judgment. In a 121-page opinion, the panel ruled for the DOJ. After quickly disposing of the district's claim that it was eligible to seek a "bailout" from the preclearance requirements,<sup>5</sup> the panel embarked on a lengthy analysis that ultimately affirmed Congress's power to extend section 5—whether under the "rational basis" test set forth in *South Carolina v. Katzenbach*<sup>6</sup> for legislation passed under the Fifteenth Amendment, or under the stricter "congruent and proportional" test established in *City of Boerne v. Flores*<sup>7</sup> for legislation passed under the Fourteenth Amendment.

Key to the panel's analysis was its conclusion, supported in a 15-page appendix, that numerous covered jurisdictions continue to

<sup>5</sup> The panel held that only states and counties—or entities that themselves conducted voter registration—could take advantage of the provision of the Voting Rights Act enabling political subdivisions to end their preclearance requirements.

<sup>6</sup> 383 U.S. 301 (1966).

<sup>7</sup> 521 U.S. 507 (1997).

resist racial equality in voting, and that the legislative record compiled by Congress in considering the 2006 extension was far more extensive than those the Supreme Court found adequate in two cases upholding Congress's legislative power under the Fourteenth Amendment—*Nevada Dept. of Human Resources v. Hibbs*,<sup>8</sup> involving the states' record of gender discrimination, and *Tennessee v. Lane*,<sup>9</sup> involving the ability of the disabled to access state courts.<sup>10</sup>

In the closing pages of its opinion, the panel characterized the district's burden in meeting the preclearance requirement as "trivial."

Throughout its two decades of existence, the District has filed only eight preclearance requests, and the cost of these submissions—\$223 per year—is modest, especially when compared to the District's average annual budget of \$548,338. As the Attorney General points out, moreover, the District has never received an objection letter or been targeted by a section 5 enforcement suit. Nor has the District identified a single voting change that it considered but chose not to pursue because of section 5. Finally, given that state law controls most features of the District's electoral system, it has limited autonomy to adopt voting changes in the first place. In light of this evidence—all uncontested by the District—we find it impossible to conclude that section 5 imposes any meaningful burden on the District, much less an unconstitutional one.<sup>11</sup>

The district's jurisdictional statement is due at the Court by September 8.

A second voting rights case, which the Court has already agreed to consider, involves minority influence districts. It presents the question whether a racial minority group constituting less than 50 percent of a proposed legislative district can state a "vote dilution" claim under section 2 of the Voting Rights Act. The case, *Bartlett v. Strickland*,<sup>12</sup> arises from a dispute over North Carolina's 2003 redistricting plan, which split the General Assembly's 18th District

<sup>8</sup> 538 U.S. 721 (2003).

<sup>9</sup> 541 U.S. 509 (2004).

<sup>10</sup> NAMUDNO, 2008 WL 2221034, at \*48.

<sup>11</sup> NAMUDNO, 2008 WL 2221034, at \*59.

<sup>12</sup> No. 07-689.

between parts of two counties to create a district whose minority voting population neared 40 percent. The Board of Commissioners of Pender County later sued the state, arguing the plan violated a provision in the state constitution that barred dividing counties between different legislative districts. State officials said the move was required under section 2 of the Voting Rights Act, but the state supreme court disagreed, holding that, under the U.S. Supreme Court's ruling in *Thornburg v. Gingles*,<sup>13</sup> the Voting Rights Act was not implicated since the district did not contain a majority black population.<sup>14</sup> The Court, which had expressly left open the question on five prior occasions, including its recent decision in *LULAC v. Perry*,<sup>15</sup> granted the state's petition for certiorari in March, and oral argument is scheduled for October 14.

### Post-September 11

From Abu Ghraib to Guantanamo Bay to "black sites" in Eastern Europe, U.S. military and intelligence personnel all but certainly engaged in gross maltreatment—some would say, torture—of detainees in their custody. While the allegations are seemingly less well-known, members of the Federal Bureau of Prisons—as well as top officials in the DOJ—similarly stand accused of committing (or at least condoning) abuse of Arab and Muslim detainees swept up in the months following the attacks of September 11. These latter accusations, implicating no less than former Attorney General John Ashcroft and FBI Director Robert Mueller, are the focus of the upcoming case *Ashcroft v. Iqbal*.<sup>16</sup>

The plaintiff in the case, Javaid Iqbal, was one of hundreds of Muslim immigrants arrested shortly after September 11 and held at the Metropolitan Detention Center in Brooklyn.<sup>17</sup> Initially arrested for using a false Social Security card, Iqbal was soon classified as a detainee of "high interest" to the FBI's ongoing investigation of September 11. Officials subsequently placed him in solitary confinement in the center's "Administrative Maximum Special Housing

<sup>13</sup> 478 U.S. 30 (1986).

<sup>14</sup> *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007).

<sup>15</sup> 548 U.S. 399 (2006).

<sup>16</sup> No. 07-1015.

<sup>17</sup> Iqbal originally filed the suit with a co-plaintiff, an Egyptian named Ehad Elmagh-raby, who subsequently settled his claim for \$300,000.

Unit." For the next six months, prison staffers allegedly subjected Iqbal to gross mistreatment. Among the more disturbing allegations, Iqbal claimed guards disabled his toilet, conducted daily body-cavity searches, left his cell light on 24 hours per day, repeatedly confiscated his Koran, blasted the air conditioning after leaving him in the rain, and subjected him to frequent and baseless beatings.

Iqbal, who lost 40 pounds while in custody, ultimately pled guilty to document fraud and was deported to his native Pakistan. In 2004 he filed a federal suit not only against the immediate perpetrators of the abuse but also against Ashcroft and Mueller. According to Iqbal's complaint, both officials personally approved a policy shortly after September 11 requiring all detainees arrested in connection with the FBI's ongoing investigation to be held under harsh conditions until investigators had cleared them of all wrongdoing, regardless of any suspected link to terrorism.<sup>18</sup> Iqbal alleged that, in the absence of individualized suspicion, he and other detainees were segregated from the general prison population unit solely on account of their race, religion, or national origin. In his *Bivens*<sup>19</sup> action, Iqbal sought damages on numerous constitutional grounds, including violations of the First and Fifth Amendments, and under the Religious Freedom Restoration Act and the federal statute allowing lawsuits claiming a conspiracy to interfere with civil rights.<sup>20</sup>

The following year, U.S. District Judge John Gleeson denied most of the defendants' motions to dismiss. While noting that mere assertions that high-ranking executive branch members crafted unconstitutional policies would not have been sufficient to state valid claims, Gleeson found that outside evidence lent credence to Iqbal's accusations.<sup>21</sup> In particular, he cited a 2003 report from the Justice Department's inspector general suggesting Ashcroft's and Mueller's personal involvement in crafting the "until cleared" policy.<sup>22</sup> In mid-2007, over strenuous objections from the government, a panel of the U.S. Court of Appeals for the Second Circuit affirmed.

<sup>18</sup> The complaint describes Ashcroft as a "principal architect" of the policy and alleges Mueller was "instrumental" in its adoption and implementation.

<sup>19</sup> Named after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>20</sup> 42 U.S.C. § 1985.

<sup>21</sup> Judge Gleeson also rejected the administration's contention that "special factors" surrounding the post-September 11 environment precluded relief under *Bivens*.

<sup>22</sup> The report is available at <http://www.usdoj.gov/oig/special/index.htm>.

Writing for the panel, Judge Jon O. Newman first rejected Ashcroft and Mueller's claims of qualified immunity. Newman wrote that any "reasonably competent" officer would have known the alleged policies and conduct violated the Constitution.<sup>23</sup> Newman likewise rejected the government's claim that Iqbal failed to satisfactorily allege Ashcroft's and Mueller's personal involvement. Reasoning that officials in their position would have been likely to take part in crafting policies concerning individuals arrested in connection with the FBI's investigation, the panel found Iqbal's complaint satisfied the "plausibility standard" necessary to proceed to discovery.<sup>24</sup>

The Supreme Court granted the government's petition for certiorari in June, and the case will be argued in December or January.<sup>25</sup> As one of the final cases argued during the Bush presidency, it may occasion calls to hold high-ranking members of the administration accountable for a range of post-9/11 detention practices that have garnered condemnation from the international community. By the time the decision comes down, the new president will have been sworn in. And whoever the new occupant of the White House happens to be, and regardless of what his supporters may wish, any president entering office presumably would not favor a ruling that makes suing his cabinet officers less difficult. The case also may allow the justices to clarify the standard for pleading requirements under their 2007 decision in *Bell Atlantic v. Twombly*,<sup>26</sup> which the government's petition characterized as requiring plaintiffs to do more than "create a suspicion of actionable wrongdoing."

Depending on the date on which the petition for certiorari is filed, the Court during the upcoming term may also agree to consider the president's authority to indefinitely detain a legal alien dubbed an "enemy combatant" inside the United States. In July, a fractured en banc panel of the Fourth Circuit held that the Authorization for Use of Military Force, passed in the wake of 9/11, gave the president authority to militarily detain any individual the government believes to be an enemy combatant, regardless of the location of capture or

<sup>23</sup> *Iqbal v. Hasty*, 490 F.3d 143, 174 (2d Cir. 2007).

<sup>24</sup> *Id.* at 175–176.

<sup>25</sup> It is possible, though probably unlikely, that the case will be scheduled for argument the day after the next president is sworn into office.

<sup>26</sup> 127 S. Ct. 195.

possession of U.S. citizenship.<sup>27</sup> Lawyers for the detainee, Ali Saleh Kahlan Al-Marri, a Qatari citizen studying at Bradley University and living with his family in Peoria, Illinois, at the time of his arrest, quickly indicated they planned to ask the justices to review the determination. If the petitioner does not seek an extension, the petition for certiorari would be due October 13, meaning the case could be heard and decided during the upcoming term. Meanwhile, a separate majority of the en banc court held that even assuming the president possessed authority to detain Al-Marri, Al-Marri had not received sufficient opportunity to challenge his enemy combatant designation. But in a statement<sup>28</sup> released after the decision, the DOJ indicated that it would not seek the Court's review of that holding.

### First Amendment and Related Issues

*Pleasant Grove City, Utah v. Summum*<sup>29</sup> arises out of a request by a little-known religious organization to erect a monument depicting the "Seven Aphorisms of Summum" in the city's Pioneer Park. Founded in 1975, the Summum believe, among other things, that the Old Testament's Ten Commandments are not a complete expression of nature's laws without inclusion of the seven principles on which their faith is based—the "Seven Aphorisms." Although Pioneer Park already houses multiple monuments donated by outside groups—including one depicting the Ten Commandments—the city denied the group's application. The city found that the proposed monument did not meet basic selection criteria; namely, that it neither related directly to the history of Pleasant Grove nor was donated by a group with long-standing ties to the community. The Summum promptly filed suit, claiming a violation of the organization's First Amendment right to free speech, and sought injunctive relief allowing immediate construction of the proposed monument. The district court rejected their claim.<sup>30</sup>

On review, the Tenth Circuit reversed the district court with instructions to grant the preliminary injunction.<sup>31</sup> The court first

<sup>27</sup> *Al-Marri v. Pucciarelli*, 2008 WL 2736787 (4th Cir. 2008).

<sup>28</sup> Available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/doj-statement-july-15.doc>.

<sup>29</sup> No. 07-665.

<sup>30</sup> *Summum v. Pleasant Grove City*, 2006 WL 1794770 (D. Utah 2006).

<sup>31</sup> *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007).



found that the speech at issue was private, not governmental. It thus rejected the city's argument that, after donation, the monument became government property and any associated speech was governmental in nature. Next, the court determined that the park was a traditional public forum, requiring any city restrictions on freedom of private expression to satisfy "strict scrutiny." Finding that the city would not likely survive such a standard of review, the Tenth Circuit ruled that when a government entity accepts and displays a monument donated by a private party, it must—absent a compelling interest—accept and display additional monuments from competing groups. The Tenth Circuit rejected Pleasant Grove's request for rehearing en banc by an equally divided six-to-six vote.

As it comes to the Supreme Court, the case presents two questions. First, is a monument donated to a municipality—and thereafter owned, controlled, and displayed by the municipality—considered government or private speech? Second, is a municipal park that displays monuments proposed by private parties a public forum? As framed by the petitioner, the decision really can be reduced to whether the First Amendment compels public parks to allow the construction of any and all monuments if they have previously accepted any privately donated monuments.<sup>32</sup> Argument has been scheduled for November 12.

Ever since the Court's 1978 decision in *FCC v. Pacifica Foundation*,<sup>33</sup> which upheld civil sanctions against the daytime radio broadcast of the late comedian George Carlin's monologue "Filthy Words," broadcasters have understood Federal Communications Commission policy to bar the use of repeated obscenities but otherwise to exempt the use of single or "fleeting" expletives. But the FCC changed that policy in 2004 in the wake of public and congressional displeasure over celebrities' use of expletives at various award shows.<sup>34</sup> The FCC levied no fines against the broadcasters carrying

<sup>32</sup> Petition for Writ of Certiorari at 3, *Pleasant Grove City, Utah v. Sumnum* (No. 07-665).

<sup>33</sup> 438 U.S. 726.

<sup>34</sup> In January 2003, U2 lead singer Bono declared his receipt of a Golden Globe Award to be "really, really fucking brilliant." The same year, Nicole Richie of Fox's television show *The Simple Life*, said during the Billboard Music Awards, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

the shows, but a host of networks brought suit against the commission for failing to provide a sufficient basis for the shift. A divided panel of the U.S. Court of Appeals for the Second Circuit agreed with the plaintiffs, dubbing the change “arbitrary and capricious” and hence invalid under the Administrative Procedure Act.<sup>35</sup> By remanding the case for further agency explanation, the panel did not reach the plaintiffs’ First Amendment challenge to the new policy. In a long section expressly labeled as dicta, however, the panel “questioned whether the FCC’s indecency test can survive First Amendment scrutiny.”<sup>36</sup>

In its petition for certiorari, the FCC argued that the ruling forced it to choose between two per se rules: “allowing one free use of any expletive . . . or else adopting a (likely unconstitutional) across-the-board prohibition against expletives.”<sup>37</sup> Acknowledging that the justices infrequently review rulings remanding cases to agencies, the FCC nonetheless argued that because it had already presented its best explanation for the new policy, it was “clear that the Commission is unlikely to be able to say anything on remand that the court would find satisfactory to justify that policy.”<sup>38</sup> The case, *FCC v. Fox*,<sup>39</sup> will be argued November 4, election day.

Meanwhile, in July, the Third Circuit struck down the FCC’s fine against the CBS network and its affiliates over Janet Jackson’s infamous “wardrobe malfunction” during the halftime show of Super Bowl XXXVIII. In that ruling, the court likewise found arbitrary and capricious the FCC’s change of policy to permit punishment for fleeting exposure of obscene visual (non-verbal) images. In so ruling, the court suggested that the FCC might lack the authority under federal law to treat words and images differently. If the FCC wishes to apply its authority broadly, “to reach all varieties of indecent content,” the court said, this “requires that the FCC treat words and images interchangeably.”<sup>40</sup>

<sup>35</sup> *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

<sup>36</sup> *Id.* at 465.

<sup>37</sup> Pet. Br., *FCC v. Fox*, No. 07-582.

<sup>38</sup> *Id.* at 26.

<sup>39</sup> No. 07-582.

<sup>40</sup> *CBS v. FCC*, 2008 WL 2789307, at \*13, n.13 (3d Cir. July 21, 2008).

At the justices' opening conference in September, the Court will consider two other controversial First Amendment petitions. *Stanton, et al. v. Arizona Life Coalition, et al.*,<sup>41</sup> involves First Amendment free speech rights as applied to specialty license plate programs. Arizona Life Coalition, an anti-abortion group, applied in 2002 for a specialty plate displaying the organization's motto "Choose Life." Although the Arizona Department of Transportation certified the request as meeting statutory requirements, the state License Plate Commission denied the application. The commission did not provide a rationale for this decision, but earlier debate indicated concerns over whether the public would infer state endorsement of the pro-life message.

Arizona Life Coalition filed suit in district court, contending the commission violated its First Amendment right to free speech by arbitrarily denying the application. The district court granted summary judgment in favor of the government.<sup>42</sup> On appeal, the Ninth Circuit found that messaging conveyed through specialty plates, although possessing some aspects of governmental speech, represents primarily private speech.<sup>43</sup> Further, by establishing the specialty license plate program, Arizona created a "limited public forum" for all organizations meeting established statutory requirements. Because denial of the Arizona Life Coalition application was not grounded in those statutory requirements, the Ninth Circuit reversed the district court's decision, citing a violation of the coalition's constitutional rights to free speech.

The other pending petition, *Smith v. Al-Amin*,<sup>44</sup> asks whether the opening (but not reading) of a prison inmate's legal mail amounts to a free speech violation distinct from a Sixth Amendment access-to-courts claim. The prisoner, Jamil Al-Amin,<sup>45</sup> claimed that correctional facility personnel repeatedly opened his legal correspondence outside of his presence—specifically, mail from his wife, an attorney, that was clearly marked as attorney-client privileged. The district court ruled for Al-Amin and the Eleventh Circuit affirmed, reasoning

<sup>41</sup> No. 07-1366.

<sup>42</sup> *Arizona Life Coal., Inc. v. Stanton*, 2005 WL 2412811 (D. Ariz. 2005).

<sup>43</sup> *Arizona Life Coal., Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008).

<sup>44</sup> No. 07-1485.

<sup>45</sup> Before converting to Islam, Al-Amin was formerly known as H. Rap Brown and was a high-ranking member of both the Student Nonviolent Coordinating Committee and the Black Panther Party in the mid-1960s.

that by repeatedly and knowingly opening the prisoner's privileged mail, the correctional facility inhibited and chilled Al-Amin's mail communications with his attorney,<sup>46</sup> which, though not causing actual injury, violated Al-Amin's First Amendment right to free speech.

### Separation of Powers

In *Winter, Secretary of the Navy v. Natural Resources Defense Council*,<sup>47</sup> the Supreme Court has agreed to determine whether the National Environmental Policy Act compels the U.S. Navy to limit its use of mid-frequency active (MFA) high-powered sonar, despite presidential intervention on the basis of national security.

The respondents, a coalition of environmental organizations, claim that the Navy's use of MFA sonar during pre-deployment joint exercises is harmful to marine mammals. Citing that risk, the Natural Resources Defense Council filed suit in federal court seeking to compel the Navy to complete an environmental impact statement (EIS). The district court found a likelihood that the exercises were harmful to marine life and that the Navy had failed to comply with NEPA by failing to complete an EIS in advance of the exercises. It enjoined the Navy's use of MFA sonar.<sup>48</sup> In the order, the district court severely restricted the Navy's use of the sonar when marine mammals were, or could be expected to be, within close proximity of the naval strike groups.

In short order, the chief of naval operations concluded that the injunction unacceptably risked training and readiness and thus the effectiveness and safety of naval units scheduled to deploy during a time of war. The president agreed, determined that use of MFA sonar during the exercises was "essential to National Security," and exempted the Navy from the governing provisions. Concurrently, the Council on Environmental Quality, applying a longstanding regulation, found "emergency circumstances" for permitting the Navy's compliance with NEPA without completion of the EIS. The actions of both the president and the CEQ would have allowed

<sup>46</sup> Al-Amin v. Smith, 511 F.3d 1317 (11th Cir. 2007).

<sup>47</sup> No. 07-1239.

<sup>48</sup> NRDC v. Winter, 2007 WL 2481037 (C.D. Cal. 2007).

the Navy to go ahead with the planned exercises off the coast of southern California.

In February 2008, a Ninth Circuit panel found that the CEQ lacked authority to provide a waiver of the EIS requirement and affirmed the preliminary injunction.<sup>49</sup> In so ruling, however, the court of appeals modified the order to allow the use of sonar during “critical points” of the exercise, albeit at lower levels when marine mammals are present.

At the administration’s urging, the Supreme Court has agreed to review whether the CEQ permissibly construed its own regulation in finding “emergency circumstances” and allowing the presidential waiver, and whether the injunction is inconsistent with established equitable principles limiting discretionary injunctive relief. At the solicitor general’s request, the Court moved the argument up to October 8 because of possible complications (including mootness) if heard later.

Among pending petitions, the justices will consider a major Appointments Clause challenge that threatens to scuttle years of rulings of the Patent and Trademark Office. The case, *Translogic Technology, Inc. v. Jonathan W. Dudas, Director, PTO*,<sup>50</sup> arises from legislation enacted in 2000 that delegated the power to appoint administrative patent judges to the director of the PTO. In this case, the petitioner—a party to recent litigation before the PTO’s Board of Patent Appeals and Interferences—claims that one member of the board was appointed in violation of Article II of the Constitution, which allows Congress to “by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>51</sup> The judge in question was appointed not by the head of the Department of Commerce, but by the PTO director.

## Business

Last term the Court considered four cases raising questions of federal preemption—and in all four it sided with Congress or federal

<sup>49</sup> NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008).

<sup>50</sup> No. 07-1303.

<sup>51</sup> Art. II, § 2, cl. 2.

regulatory agencies over conflicting state laws.<sup>52</sup> For the upcoming term, the justices already have granted certiorari in two cases featuring large corporations seeking shelter under federal law against more consumer-friendly state statutes. *Altria Group v. Good*,<sup>53</sup> the first such case that will be argued next term, deals with the application of the Federal Cigarette Labeling and Advertising Act (Labeling Act) to “light” and “low tar” cigarettes. Altria Group, the parent company of Philip Morris, was sued under the state of Maine’s Unfair Trade Practices Act. The plaintiffs alleged that Philip Morris violated the act by falsely claiming that light cigarettes were less harmful than regular cigarettes. On a motion for summary judgment, the defendants claimed the suit was explicitly preempted by the Labeling Act, which gives the Federal Trade Commission authority to regulate all cigarette labeling related to safety and health, and implicitly preempted by the FTC’s 60-year policy of not challenging the “light” designation of certain cigarettes.

The district court granted the tobacco companies summary judgment but was reversed by the First Circuit. Applying the Supreme Court’s decision in *Cipollone v. Liggett Group, Inc.*,<sup>54</sup> the panel found that because Maine’s law imposed a duty “not to deceive customers,” rather than a duty “based on smoking and health,” the suit was not preempted.<sup>55</sup> It also found that because “the FTC has never issued a formal rule specifically defining which cigarette advertising practices violate the [FTC] Act and which do not,” the Labeling Act did not expressly or impliedly preempt the Maine law.<sup>56</sup>

In a blow to Altria, the FTC has proposed nullifying the policy on which much of Altria’s preemption argument rests. On July 12 the commission began soliciting public comment on revoking its

<sup>52</sup> *Riegel v. Medtronic, Inc.*, 552 U.S.\_\_\_\_, 128 S. Ct. 999 (2008); *Preston v. Ferrer*, 552 U.S. \_\_\_\_ , 128 S. Ct. 978 (2008); *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. \_\_\_\_ , 128 S. Ct. 989 (2008); and *Chamber of Commerce v. Brown*, 553 U.S. \_\_\_\_ , 128 S. Ct. 2408 (2008). A fifth case regarding preemption, *Warner Lambert v. Kent*, 552 U.S. \_\_\_\_ , 128 S. Ct. 1168 (2008), was affirmed by an equally divided court (with Justice Kennedy recused). A sixth case, *Exxon Shipping Co. v. Baker*, 554 U.S. \_\_\_\_ , 128 S. Ct. 2605 (2008), presented a preemption claim that was neither central to the outcome nor the reason the court granted cert.

<sup>53</sup> No. 07-562.

<sup>54</sup> 505 U.S. 504 (1992).

<sup>55</sup> *Good v. Altria Group, Inc.*, 501 F.3d 29, 36 (1st Cir. 2007).

<sup>56</sup> *Id.* at 51.

general policy of not challenging cigarette descriptors like those at issue in the case. The decision followed the agency's filing of an amicus brief supporting the plaintiffs in which the commission argued that it "does not view respondents' lawsuit as undermining the FTC's policies in any way."<sup>57</sup>

The other preemption case before the Court, *Wyeth v. Levine*,<sup>58</sup> deals with Food and Drug Administration authority over the labeling of pharmaceuticals. The drug in question is called Phenergan, an anti-nausea drug produced and marketed by Wyeth. Phenergan, when in contact with arterial blood, can cause severe tissue damage; one method of injection, known as IV push, increases the likelihood of arterial exposure. Plaintiff Levine was injected with Phenergan using IV push to combat serious migraines. Due to arterial exposure, she developed gangrene and eventually was forced to have her arm amputated. In a suit filed in Vermont state court, the plaintiff argued that Wyeth's failure to ban IV push injection in its labeling of Phenergan constituted criminal negligence and also violated state failure-to-warn principles.

Wyeth argued the FDA's approval of its existing label—and rejection of a different label—barred all liability under state law. While conceding that Congress has not expressly preempted all state tort claims in the area, Wyeth claims that the FDA's rejection of a new label makes it impossible to simultaneously comply with both federal and state law. The Vermont Supreme Court rejected that argument, finding that the FDA's comment on rejection did not address the contested injection method and thus did not preempt more stringent labeling requirements under state law.<sup>59</sup> The case will be argued November 3.

For the third time in five years the Court will consider *Philip Morris USA v. Williams*,<sup>60</sup> a long-running dispute over a \$79.5 million punitive damages award an Oregon jury granted to the widow of a longtime smoker. In 2003, after the Oregon Supreme Court initially

<sup>57</sup> Brief for FTC as Amicus Curiae Supporting Respondents at 14, *Altria Group v. Good*, No. 07-562 (cert. granted Jan. 18, 2008). See also Lyle Denniston, A second blow to tobacco appeal, SCOTUSblog.com, <http://www.scotusblog.com/wp/a-second-blow-to-tobacco-appeal> (July 9, 2008, 6:03 p.m.).

<sup>58</sup> No. 06-1249.

<sup>59</sup> *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006).

<sup>60</sup> No. 07-1216.

upheld the award, the Court vacated the judgment and remanded the case in light of its intervening decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>61</sup> In 2007, after the Oregon Supreme Court reaffirmed the judgment, the justices heard argument and once again overturned the award, finding that jurors may have sought to punish the tobacco company for harms to smokers not named in the case. According to the 5–4 majority, while harm to nonparties can help establish the degree of reprehensibility of a defendant’s conduct, punitive damages cannot be used to directly inflict punishment for their alleged suffering.<sup>62</sup>

Earlier this year, the Oregon supreme court upheld the award once again—this time on the ground that Philip Morris had submitted a flawed jury instruction at the original trial that misstated state law. Having determined that the instruction in question was faulty, the Oregon court found that Philip Morris had procedurally defaulted its right to challenge the judgment. In its petition for certiorari, Philip Morris characterized the ruling as “nothing more than a pretext for the Oregon Supreme Court’s refusal to protect Philip Morris’s due process rights.” The U.S. Supreme Court agreed to review that issue but declined to revisit the constitutionality of the award itself, which was many times larger than the \$800,000 in compensatory damages the jury awarded.

Another major business case before the Court deals with the “predatory pricing” scheme known as “dumping”—when a manufacturer in one country exports a product to another country at a price either below the cost of the product or below what it charges domestically. *United States v. Eurodif*<sup>63</sup> concerns a specific step in the creation of uranium rods used in nuclear power plants. According to the United States, Eurodif, a French uranium processing company, took raw uranium imported from the United States, converted it into another product called low enriched uranium (LEU), and then “dumped” it on the U.S. market at illegally low prices. Pursuant to that determination, the Commerce Department levied a 20 percent tariff on those LEU products. The Court of International Trade nullified the tariff and the Federal Circuit affirmed, reasoning that the

<sup>61</sup> 540 U.S. 801 (2003).

<sup>62</sup> *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

<sup>63</sup> No. 07-1059, consolidated for argument with *USEC v. Eurodif*, No. 07-1078.



conversion of raw uranium into a more useful form “constitute[s] a provision of services, rather than a sale of goods.”<sup>64</sup>

In its petition for certiorari, the government argued that the Federal Circuit had not shown proper deference to the Commerce Department and had “opened a potentially gaping loophole in the Nation’s trade laws that will encourage domestic buyers and foreign producers to structure their transactions as contracts for ‘services’”<sup>65</sup> rather than for goods. The case will be argued on November 4, election day.

### **Criminal Law**

The leading Fourth Amendment case next term, *Herring v. United States*,<sup>66</sup> asks whether the exclusionary rule should apply to evidence obtained incident to a warrantless arrest conducted due to the negligence of another law enforcement agency. In July 2004, Bennie Dean Herring was at the Coffee County, Alabama, Sheriff’s Department to retrieve possessions from an impounded car. While Herring was at the station, Investigator Mark Anderson—who had a contentious history with the petitioner—arrived for work and, on a hunch, asked a records clerk to check a computer database to determine whether Herring had any outstanding warrants for his arrest. When no warrants were found in Coffee County, Anderson asked the clerk to check neighboring Dale County. Over the phone, a Dale County clerk said its database showed Herring had an outstanding warrant for failure to appear on a felony charge. As the Dale County clerk sought to retrieve a hard copy of the warrant, Anderson and another investigator left in pursuit of Herring, who by that point had driven away. After pulling him over and placing him under arrest, Anderson conducted a search and discovered methamphetamine on his person and an unloaded gun under the front seat.

Meanwhile, in searching for a hard copy of the warrant, the Dale County clerk discovered that Herring’s arrest warrant had been recalled five months earlier but mistakenly had not been deleted from the database. The clerk called Coffee County to report the error, but the mistake was discovered too late. Herring was charged

<sup>64</sup> *Eurodif S.A. v. United States*, 411 F.3d 1355, 1357 (Fed. Cir. 2005).

<sup>65</sup> Pet. Br. at 16, *United States v. Eurodif*, No. 07-1059.

<sup>66</sup> No. 07-513.

on counts of drug and weapons possession and was sentenced to 27 months in prison. On appeal, he contended the district court erred by denying his motion to suppress the evidence obtained during the search. The Eleventh Circuit affirmed.<sup>67</sup>

*Herring* represents a follow-up to *Arizona v. Evans*<sup>68</sup> in which an error by a court clerk, rather than a law enforcement officer, resulted in an arrest. Seven justices held that the evidence seized incident to the arrest nonetheless should be admitted because “the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees.”<sup>69</sup> In a footnote, however, three justices specifically declined to decide whether the same rationale would apply to mistakes made by law enforcement personnel.<sup>70</sup> *Herring* argues that negligent record keeping by law enforcement officers, especially in an era of police work reliant on computer databases, will be deterred by a strong reading of the exclusionary rule.<sup>71</sup> Oral argument is set for October 7.

The other granted Fourth Amendment cases are *Arizona v. Gant*,<sup>72</sup> which will address whether police officers must demonstrate a threat to their safety or a need to preserve evidence to justify a search under *New York v. Belton*<sup>73</sup>; *Arizona v. Johnson*,<sup>74</sup> regarding officers’ abilities to conduct pat-down searches of car passengers not suspected of any crime; and *Pearson v. Callahan*,<sup>75</sup> involving qualified immunity for officers conducting a warrantless search based on a drug dealer’s consent to an informant entering his home.<sup>76</sup> Finally, the pending petition in *Owens v. Kentucky*<sup>77</sup> asks whether the so-called “automatic companion” rule, under which police may frisk

<sup>67</sup> *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007).

<sup>68</sup> 514 U.S. 1 (1995).

<sup>69</sup> *Id.* at 14.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> Petition for Writ of Certiorari at 18, *Herring v. United States*, No. 07-513.

<sup>72</sup> No. 07-542.

<sup>73</sup> 453 U.S. 454 (1981).

<sup>74</sup> No. 07-1122.

<sup>75</sup> No. 07-751.

<sup>76</sup> In granting certiorari, the Court also asked the parties to address whether the decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled.

<sup>77</sup> No. 07-1411.

an individual following the arrest of his companion, violates the Fourth Amendment.

In the Sixth Amendment arena, in *Melendez-Diaz v. Massachusetts*<sup>78</sup> the Court will consider whether to extend *Crawford v. Washington*'s testimonial evidence rule to lab reports of forensic analysts prepared for use in criminal prosecutions. The petitioner, Luis Melendez-Diaz, challenged his 2002 cocaine trafficking conviction on the ground that he was denied the right to cross-examine the forensic lab technician who determined the substance found in his possession to be illegal narcotics. The Appeals Court of Massachusetts permitted prosecutors to introduce such reports without placing their authors on the stand. The case has implications for the national debate over wrongful convictions. In an amicus brief, the Innocence Project argues that at least half of the 218 nationwide exonerations based on DNA testing followed convictions based on faulty forensic evidence, such as reliance on unscientific methodology or flawed procedures, mistakes in reporting, or overstating the value of test results because of a scientist's bias toward the prosecution.<sup>79</sup> Oral argument is November 10.

Another Sixth Amendment case, *Oregon v. Ice*,<sup>80</sup> involving the right to a jury trial, will address whether the Court's holdings in *Apprendi* and *Blakely* apply to the state's consecutive sentencing statute. The defendant, Thomas Ice, was sentenced to 340 months' imprisonment, with three of the sentences running concurrently, on two counts of first-degree burglary and four counts of first-degree sexual abuse. Ice contended that the trial judge violated the Sixth Amendment in finding facts in setting the sentence. Oral argument has been scheduled for October 15.

Interesting criminal petitions on the horizon include *Lucero v. Texas*<sup>81</sup> and *Lee v. Louisiana*.<sup>82</sup> In *Lucero*, a capital case, a juror brought a Bible into the deliberation room and, after a straw vote over imposing the death penalty, the foreman read scripture to persuade hold-out jurors who favored a sentence of life in prison. The petitioner,

<sup>78</sup> No. 07-591.

<sup>79</sup> Brief of Amici Curiae National Association of Criminal Defense Lawyers, et al, in Support of Petitioner, No. 07-591, at 14.

<sup>80</sup> No. 07-901.

<sup>81</sup> No. 07-1429.

<sup>82</sup> No. 07-1523.

sentenced to death for three murders, contends that his Sixth Amendment rights were violated by this outside influence. The petition also questions whether the Texas Court of Criminal Appeals—which rejected Lucero’s Sixth Amendment claim and confirmed the capital sentence—erred by relying on jurors’ after-the-fact affidavits to determine that the introduction of the Bible to the jury room was a “harmless error.”

Lee asks the Court to overrule its 1972 decision in *Apodaca v. Oregon*<sup>83</sup> in which the Court held, in a splintered decision, that the Sixth Amendment’s unanimous jury requirement does not apply to the states. The petitioner, Derrick Todd Lee, was convicted of first-degree murder for one of several alleged serial killings that occurred in Baton Rouge. The state subsequently linked him to two other violent crimes on the basis of circumstantial evidence and DNA analysis that Lee later sought to suppress. The state amended the charge to second-degree murder—a non-capital crime that, under Louisiana law, requires only 10 of 12 jurors to convict. At present, Louisiana and Oregon are the only states in the country that allow a felony conviction by a less than unanimous jury. In his petition for certiorari, Lee contends that legal developments and academic studies have undercut the reasoning of the *Apodaca* plurality.

### Civil Rights Cases

In *Imbler v. Pachtman*, the Supreme Court unanimously held that prosecutors enjoy absolute immunity from suit under 42 U.S.C. § 1983 for activities “intimately associated with the judicial phase of the criminal process.”<sup>84</sup> At the same time, the justices declined to consider whether the same rule would apply when prosecutors act not as an advocate but as an “administrator” or “investigative officer.”<sup>85</sup> Now, more than three decades later, the Court will have the opportunity in *Van De Kamp v. Goldstein* to clarify how the line should be drawn.

The respondent, Thomas Lee Goldstein, was convicted in 1980 of killing his neighbor in a darkened alley near his home in Long Beach, California. The prosecution’s star witness was a heroin addict named

<sup>83</sup> 406 U.S. 404 (1972).

<sup>84</sup> 424 U.S. 409, 430 (1976).

<sup>85</sup> *Id.* at 430–431.

Edward Fink, who testified that Goldstein confessed to the crime while the two shared a holding cell. As in the past, authorities had promised Fink, a longtime informant, a lighter sentence in a separate case in exchange for his testimony. But that information was never relayed to the district attorneys prosecuting the case—or, as a result, to Goldstein’s own lawyer. In 2004, federal courts granted Goldstein’s habeas petition and ordered his release from prison on the ground that he was innocent. The former marine then filed a civil rights suit against not only the city of Long Beach and its police department, but also the heads of the office responsible for his prosecution. Specifically, Goldstein alleged that John Van De Kamp, the Los Angeles County district attorney at the time of his conviction, and Curt Livesay, his chief deputy, violated his rights under *Brady v. Maryland*<sup>86</sup> and *Giglio v. United States*<sup>87</sup> by failing to create a system that allowed line attorneys to share the identities of police informants with one another.

Finding the alleged conduct to be “administrative” rather than prosecutorial in nature, a district court denied the defendants’ motion to dismiss in March 2006. One year later, a Ninth Circuit panel unanimously affirmed. The court of appeals reasoned that the Supreme Court had never addressed whether prosecutors retained absolute immunity against claims regarding the “failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation.”<sup>88</sup> But the court drew analogies to opinions from the Second and Third Circuits, which denied prosecutorial immunity against allegations that municipalities failed to train line prosecutors on *Brady* issues<sup>89</sup> or prevent them from introducing testimony from perjurious eyewitnesses.<sup>90</sup> Ultimately, the panel concluded that Goldstein’s allegations concerned only how Van De Kamp and Livesay managed the District Attorney’s Office, and not whether or how they chose to prosecute particular cases.

<sup>86</sup> 373 U.S. 83 (1963) (holding the Due Process Clause requires prosecutors to disclose evidence favorable to the accused).

<sup>87</sup> 405 U.S. 150 (1972) (holding, under *Brady*, that prosecutors must disclose promises to witnesses of benefit or leniency).

<sup>88</sup> *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1174 (9th Cir. 2007).

<sup>89</sup> *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992).

<sup>90</sup> *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999).

In his petition for certiorari, Van De Kamp argued the Ninth Circuit's decision both narrows the circumstances under which prosecutors may receive absolute immunity and allows almost any claim barred against a line prosecutor to simply be restated against one or more supervisors for failure to provide adequate training and supervision.<sup>91</sup> On the merits, Van De Kamp further argued that, in contrast with investigative or personnel decisions, identifying and disclosing exculpatory information constitutes the type of core prosecutorial function for which district attorneys have long received immunity. And given that elected district attorneys technically oversee all prosecutions under their watch, Van De Kamp argued that the court of appeals' ruling will produce a "flood of lawsuits" from aggrieved defendants. The justices granted certiorari in April. Argument is scheduled for November 5.

In two other civil rights cases granted for the upcoming term, the Court will consider whether Title IX's implied right of action precludes the filing of a section 1983 suit against federally funded schools for allegedly unconstitutional sex discrimination; and whether the Supremacy Clause prohibits states from barring private damage suits against prison employees in state court. The first case, *Fitzgerald v. Barnstable School Committee*,<sup>92</sup> should resolve a circuit split over whether Title IX—the 1972 law requiring equal educational opportunities for male and female students—provides the exclusive remedy for claims of sex discrimination. The plaintiffs in the case, the parents of a female kindergarten student in Hyannis, Massachusetts, allege that an eight-year-old boy sexually harassed their daughter on the bus to school.<sup>93</sup> Unsatisfied with the school district's response, the parents filed suit claiming, in part, that school officials were more responsive to complaints of bullying from male students in general and gave their daughter's alleged harasser more favorable treatment in particular. Affirming the dismissal of the Equal Protection claim (which was brought under section 1983), the First Circuit reasoned that Title IX established a comprehensive remedial scheme that Congress intended to be the exclusive remedy for federally

<sup>91</sup> Petition for Writ of Certiorari at 9, *Van De Kamp v. Goldstein*, No. 07-854.

<sup>92</sup> No. 07-1125.

<sup>93</sup> According to the allegations, the older student, a third grader, made the victim lift up her skirt and pull down her underpants while on the bus.

funded schools that allegedly fail to address claims of sexual harassment.<sup>94</sup>

The other case, *Haywood v. Drown*,<sup>95</sup> involves a challenge to an unusual New York State statute stripping state courts of jurisdiction over all damages claims against correction officers. The statute requires such suits to be brought in a special claims court and only against the state itself. The petitioner, prisoner Keith Haywood, alleged that the law violates the Supremacy Clause by preventing state courts from hearing claims brought under section 1983. After acknowledging that the statute's constitutionality appeared "questionable" at first glance, the Court of Appeals of New York nevertheless concluded that the Supreme Court's decision in *Howlett v. Rose* permitted states to enact a "neutral state rule regarding the administration of the courts."<sup>96</sup> In other words, so long as New York barred its judges from hearing specific claims brought under state or federal law, "there is no Supremacy Clause violation because there is no discrimination against the federal claim in favor of similar state claims."<sup>97</sup>

Among civil rights petitions on the horizon, *Cerqueira v. American Airlines*<sup>98</sup> asks whether, and under what circumstances, airlines can be held liable for alleged racial discrimination in ostensibly refusing to transport passengers for safety reasons. The petitioner, a U.S. citizen of Portuguese descent, was removed from an American Airlines flight leaving Boston in late 2003 along with two Israeli passengers the crew mistakenly believed were speaking Arabic. Police cleared the men of suspicion, but a ticket agent told Cerqueira the airline made a corporate decision to deny him service. Finding American made the decision based on race, a jury awarded the petitioner \$400,000 in compensatory and punitive damages. The First Circuit reversed with instructions to enter judgment for the airline, ruling that no reasonable juror could find that the captain, who originally

<sup>94</sup> In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court held 5-4 that Title IX authorized damages claims against school boards found to have acted with deliberate indifference to claims of student-on-student sexual harassment.

<sup>95</sup> No. 07-10374.

<sup>96</sup> 496 U.S. 356, 372 (1990).

<sup>97</sup> *Haywood v. Drown*, 9 N.Y.3d 481, 488 (2007).

<sup>98</sup> No. 07-1495.

ordered the men off the flight, or the corporate manager, acted with discriminatory animus.<sup>99</sup>

### Employment Discrimination

In its 1974 decision in *Alexander v. Gardner-Denver Co.*,<sup>100</sup> the Supreme Court unanimously held that employees' right to litigate discrimination claims in federal court could not be foreclosed by a prior arbitration ruling under a nondiscrimination clause of a collective bargaining agreement. Seventeen years later, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>101</sup> the justices held that individuals *could* be required to arbitrate civil rights claims under employment contracts to which they themselves, as opposed to a union, had agreed. Although it subsequently recognized the tension between the two cases, the Court explicitly declined to determine whether a union can waive employees' rights to have statutory discrimination claims resolved in a judicial, rather than arbitral, forum.<sup>102</sup> That is the question now before the Court in *14 Penn Plaza, LCC v. Pyett*,<sup>103</sup> a case from the Second Circuit.

For years, the plaintiffs, members of Service Employees International Union, Local 32BJ, worked as night watchmen at the defendant's commercial office building near Madison Square Garden. In mid-2003, in response to "post-9/11 security concerns,"<sup>104</sup> the defendant instead hired a separate (unionized) contractor to provide trained security guards for the building. The plaintiffs, all over 50 years old, were reassigned to what they deemed less prestigious and more physically demanding jobs.

Under the collective bargaining agreement, binding arbitration served as the "sole and exclusive" remedy for all employment discrimination claims—including any arising under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The union, which had consented to the hiring of the new security guards, filed a grievance over the reassignment.

<sup>99</sup> *Cerqueira v. American Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008).

<sup>100</sup> 415 U.S. 36 (1974).

<sup>101</sup> 500 U.S. 20 (1991).

<sup>102</sup> See *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 76–77 (1998).

<sup>103</sup> No. 07-581.

<sup>104</sup> Pet. Br. at 8, *14 Penn Plaza LLC v. Pyett*, No. 07-581.



But prior to arbitration it withdrew the portion of the complaint alleging age discrimination. As the arbitration was pending on other claims, the plaintiffs filed a charge with the Equal Employment Opportunity Commission, and, after the agency issued right-to-sue letters, brought suit under the ADEA in federal court. Pursuant to the terms of the collective bargaining agreement, the employer sought to compel arbitration on the age discrimination claim. But a district judge denied the defendant's motion, and the Second Circuit affirmed.<sup>105</sup> Applying earlier circuit precedent, the panel found *Gardner-Denver* straightforwardly barred employers and unions from waiving workers' rights to resolve statutory discrimination claims in court. As such, it determined, any such waivers remain unenforceable, regardless of their clarity.

In its brief on the merits, the petitioner calls *Gardner-Denver* "not on point," maintaining the decision held only that arbitrators cannot issue binding decisions on statutory discrimination claims that the parties had not agreed to submit to arbitration in the first place.<sup>106</sup> Instead, the petitioner contends, the Federal Arbitration Act renders all promises to arbitrate enforceable so long as they are "clear and unmistakable."<sup>107</sup> The respondents counter that the underlying concerns of *Gardner-Denver* still apply—namely, the potential for conflict between unions' collective interests and workers' individual rights—and that, in any event, the language of the collective bargaining agreement does not grant employees themselves the right to arbitrate. Supporting the latter contention in an amicus brief, the local union notes that under the arbitration clause, "all Union claims are brought by the Union alone."<sup>108</sup> The Court has not yet scheduled argument, but the case almost certainly will be heard in December.

In another employment case, *Crawford v. Metropolitan Government of Nashville*,<sup>109</sup> the Court will consider whether Title VII's anti-retaliation provision protects workers from termination for cooperating in

<sup>105</sup> *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007).

<sup>106</sup> Pet. Br. at 15, 14 Penn Plaza LLC v. *Pyett* (No. 07-581).

<sup>107</sup> According to the petitioner, the collective bargaining agreement was crafted to meet the requirement of *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998), that any waiver of rights to adjudicate statutory discrimination claims be "clear and unmistakable." Merits Brief at 6.

<sup>108</sup> Brief of Amicus Curiae the Service Employees International Union in Support of Petitioner, No. 07-581, at 7.

<sup>109</sup> No. 06-1595.

an employer's internal sexual harassment investigation. The employee in the case, Vicky Crawford, a school district payroll coordinator for some 30 years, told investigators that a supervisor about whom other workers had complained had repeatedly engaged in inappropriate behavior, such as asking to see her breasts, grabbing his crotch in front of her, and in one instance forcefully pulling her head toward his groin. Officials declined to discipline the supervisor under investigation, but allegedly fired Crawford and other employees who testified against him. Crawford brought suit under Title VII's anti-retaliation provision, which bars employers from taking adverse action against employees who either oppose the types of discrimination prohibited by the statute<sup>110</sup> (the "opposition clause") or participate in any investigation arising thereunder (the "participation clause").

Upholding the district court's grant of summary judgment for the employer, the Sixth Circuit ruled, first, that the "opposition clause" only protects employees who themselves protest unlawful workplace discrimination—that is, by actively complaining to their employer or to the government, rather than answering questions during an investigation initiated by others—and, second, that the "participation clause" applies only to statements made in investigations that stem from the filing of a charge with the EEOC.<sup>111</sup> The U.S. solicitor general, by contrast, argues that the ruling creates an "inexplicable gap" in Title VII's anti-retaliation coverage<sup>112</sup> that would dissuade employees from cooperating in internal employer investigations. Argument has been scheduled for October 8.

Among pending employment petitions, *Ricci v. Destefano*<sup>113</sup> already has received wide attention. In December 2003, the New Haven, Connecticut, Fire Department administered tests—which included both written and oral portions—for promotions to captain and lieutenant. In total, 118 applicants took the exams—68 of whom were white, 27 black, and 23 Latino. But among those whose scores qualified them to be considered for promotion, 17 were white, 2 were

<sup>110</sup> Broadly speaking, Title VII bars employment discrimination on the basis of race, color, religion, sex, or national origin.

<sup>111</sup> *Crawford v. Metropolitan Gov't of Nashville*, 211 Fed. Appx. 373 (6th Cir. 2006).

<sup>112</sup> Brief of Amicus Curiae the Solicitor General, No. 06-1595, at 15.

<sup>113</sup> No. 07-1428.

Latino, and none was black. The city's corporation counsel warned that certifying the results could form the basis of a Title VII disparate impact claim and, after a series of contentious hearings, the city's civil service board failed to muster the majority required for certification.<sup>114</sup> The plaintiffs, who were no longer eligible for promotion as a result of the decision, brought suit under Title VII and the Equal Protection Clause, among other claims. In effect, they argue that the city's professed desire to comply with federal anti-discrimination law was simply a pretext to discriminate against white test-takers. The district court granted the city's motion for summary judgment on the federal claims, and the Second Circuit affirmed in a per curiam opinion adopting the reasoning of the judge below. The full court split 7–6 in denying rehearing en banc.

### **Conclusion**

The Court's docket for October Term 2008 as of the summer recess—before the “long conference” that heralds a spate of cert grants a week before the new term begins—presents a number of very interesting cases, although few of historic importance. The term may well be most interesting for what it teaches about the Court's future in the wake of the appointments of Chief Justice Roberts and Justice Samuel Alito.

<sup>114</sup>The board split 2–2 on whether to certify the results of each exam. Another member was recused because her brother was a candidate for promotions. *Ricci v. DeStefano*, 2006 WL 2828419, at \*7 n.5 (D. Conn. Sept. 28, 2006).

