

## **Davis v. Federal Election Commission (07-320)**

*Appealed from the U.S. District Court for the District of Columbia (Aug. 9, 2007)*

**Oral Argument: April 22, 2008**

This case presents a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 and is Congress' most recent attempt to regulate the "corrupting influence" of campaign contributions on politics in the United States. See *Davis v. Federal Election Commission*, 501 F. Supp. 2d 22, 25 (D.D.C. 2007). The specific provision of the BCRA at issue in this case is § 319, the so-called Millionaire's Amendment, which raises the contribution limits associated with opponents of wealthy candidates and adds certain disclosure requirements. Davis is challenging the Millionaire's Amendment on two separate grounds: the First Amendment and the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.

This is just the latest in the Supreme Court's review of congressional attempts to regulate election spending. Congress stepped up its regulation of federal election spending after the Watergate scandal, resulting in the complex regulatory system that exists today. See Samuel Issacharoff, *THE LAW OF DEMOCRACY* 326 (2007). Courts dealing with campaign finance restrictions are forced to deal with the frequently competing interests of free speech and association and the government's interest in regulating the way federal elections are conducted. As Congress continues to pass regulations in this arena, the outcome will undoubtedly influence the type and number of people that run for office. The *Washington Post* notes, for instance, that a decision in this case is likely to affect the 2008 congressional campaigns. See Robert Barnes, *Supreme Court to Review 'Millionaires' Amendment*, *Wash. Post*, sec. A, 5 (Jan. 12, 2008).

### **Facts**

The appellant, Jack Davis, was the Democratic Party's unsuccessful nomi-

nee for New York's 26th congressional district seat in the 2004 election, in which he challenged incumbent Rep. Thomas Reynolds. Davis funded his campaign primarily with personal funds, thereby triggering § 319 of the BCRA—the so-called Millionaire's Amendment. In 2006, because of Davis' alleged failure to report his personal expenditures during his 2004 campaign, the Federal Election Commission (FEC) commenced an investigation into possible violations of § 319.

In 2006, Davis challenged Reynolds once again. In anticipation of plans to spend more than a million dollars, Davis filed suit in the U.S. District Court for the District of Columbia prior to the start of his general election campaign. The suit alleged that application of disclosure requirements and limits on contributions, as required by § 319, violated his First and Fifth Amendment rights. Specifically, he requested that the court stop the FEC from enforcing the section and declare it unconstitutional. Davis also moved to expedite the hearing of the case under BCRA § 403, which directs the district court to "expedite to the greatest possible extent the disposition of the action and appeal," asking the court to hear the case before the start of the 2006 general election campaign. The FEC opposed the request and the court denied the motion. The parties filed cross-motions for summary judgment, and on Aug. 9, 2007, the district court granted the FEC's motion. Because the BCRA mandates that the district court hearing be conducted by a three-judge panel, under 28 U.S.C. § 1253, Davis was able to appeal the district court's denial of summary judgment to the U.S. Supreme Court.

### **History of Campaign Finance Regulation**

The Federal Election Campaign Act of 1971 (FECA) provides the foundation for modern campaign finance law. The act, as amended, created the Federal Election Commission and placed legal limits on the amount and function of money in politics. The central provision of the act included limits on contributions to candidates for federal office, limits on candidates' expenditures and a disclosure requirement. In 1976,

shortly after the act went into effect, it was challenged in the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Supreme Court applied the First Amendment to restrictions on campaign finances, holding that spending money to influence elections is protected under the First Amendment. In a very lengthy decision, the Court upheld the campaign contribution limits, reasoning that the government had a compelling interest to combat the appearance of quid pro quo corruption. However, the Court struck down limits on independent expenditures by individuals and groups, reasoning that these types of restrictions on expenditures placed a more severe burden on protected speech and did not effectuate a compelling interest. Condensed to its essentials, after *Buckley*, individuals and groups were free to spend so-called soft money on issue advertisements as long as they didn't specifically advocate the election of a candidate for federal office.

In response to the rise of soft-money politics in the decades after *Buckley*, Congress passed BCRA—commonly referred to as the McCain-Feingold Act—which generally prohibited the use of soft money by political parties and forbade corporations and labor unions from using expenditures to engage in "electioneering communications," which is a broad category of communications broadcasted close to election day. The first major challenge to BCRA came in 2003 in *McConnell v. FEC*, 540 U.S. 93, 189 (2003), in which the Supreme Court largely sustained the act. But then, in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), the Court crafted an exception to the prohibition on electioneering communications by corporations and unions by holding that communications are not electioneering communications if they can reasonably be interpreted as something other than an appeal to vote for or against a candidate for federal office.

### **The Millionaire's Amendment**

Section 319 of BCRA attempts to correct what Congress believed was an inequity created when the Supreme Court, in *Buckley*, eliminated the caps FECA put on the amount of personal money

a candidate can spend but retained the limits placed on campaign contributions. See *Davis v. Federal Election Commission*, 501 F. Supp. 2d 22, 25 (D.D.C. 2007). The amendment sought to loosen the contribution limits for a candidate who faces a wealthy opponent and to allow a political party to spend more on behalf of such a candidate.

The Millionaire's Amendment mandates that, when a candidate personally spends more than \$350,000 on a campaign, the candidate's opponent can (1) "receive contributions at three times the limit for each donor that would otherwise be in place," (2) "receive contributions from individuals who have reached what would otherwise be their statutory limit for aggregate campaign donations," and (3) "coordinate with their political party on additional party expenditures that would otherwise be limited." In addition, the amendment changed the reporting requirements for the candidates. Under the amendment, within 15 days of announcing an intention to run for office, each candidate must file a Statement of Candidacy with the FEC, declaring the amount of personal funds over \$350,000 that the candidate intends to spend. In addition to many other notification requirements, a candidate who spends more than \$350,000 in personal funds must notify the FEC within 24 hours of doing so.

### Legal Arguments

Davis argues that § 319 unconstitutionally burdens self-financed candidates' political speech. By targeting a class of wealthy candidates, Davis contends, Congress "diminishes the exercise of [the right to free speech] in a direct and substantial manner." He also argues that this treatment favors incumbents and violates his right to equal protection under the law as provided by the Fifth Amendment. According to Davis, to the extent Congress relied on an equality rationale here, that rationale is not compelling, and no sufficiently compelling reason exists to allow Congress to infringe upon his First Amendment rights.

After discussing standing, the Federal Election Commission responds that the Millionaire's Amendment does not place a substantial burden on political speech. If anything, the FEC asserts, the amendment promotes political speech

by increasing the volume and range of political speech while not simultaneously reducing a candidate's ability to spend his or her own personal funds. Nothing prevents Congress from seeking equalization, the FEC explains, but Congress is also motivated by an anti-corruption rationale, namely the appearance that the wealthy control congressional seats.

### Conclusion

This case is the next chapter in the Supreme Court's jurisprudence involving campaign financing. Beginning in 1976 with *Buckley v. Valeo*, the Court has taken an active role in establishing the line between the First Amendment and the government's interest in regulating federal elections. The Millionaire's Amendment provides the Court with another opportunity to draw that line and balance election regulation with individual liberty interests. Although the Supreme Court is considering a small section of the BCRA, the fate of § 319 may have a major influence on the types of candidates who run for federal office and the impact that such candidates have on American politics. The outcome of this case will help to inform Congress about the interests that permit it to regulate campaign financing. **TFL**

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*Prepared by Eric Finkelstein and Michael Zuckerman. Edited by Timothy Birnbaum.*

### **Kennedy v. Louisiana (07-343)**

*Appealed from the Supreme Court of Louisiana (May 22, 2007)*

**Oral Argument: April 16, 2008**

Patrick Kennedy is the first defendant in decades to be sentenced to death for rape. Moreover, the United States has not executed anyone for a crime other than murder since 1964. Since Kennedy's conviction, Louisiana has placed a second convicted person on death row for the rape of a child. Thus far, no other state judiciaries have followed Louisiana's lead. Nevertheless, several states and the federal government have recently enacted laws that allow death sentences for crimes other than homicides, including not only rape

of a child but also espionage and drug trafficking. The U.S. Supreme Court has not ruled on these recent laws, and Louisiana's decision in Patrick Kennedy's case represents the first death sentence handed down under the current laws.

### Facts

In 2003, a jury in Jefferson Parish, La., found Patrick Kennedy guilty of the 1998 rape of his then eight-year-old stepdaughter. In line with the jury's recommendation, the court sentenced Kennedy to death.

The state had charged Kennedy with aggravated rape of a child under Louisiana's capital rape statute, R.S. 14:42 D(2). At the time of Kennedy's trial, this statute made the death penalty available for defendants who raped a child less than 12 years of age. The alternative sentence was life imprisonment at hard labor without the possibility of parole. The district attorney sought the death penalty in Kennedy's case.

Kennedy appealed his conviction and sentence to the Louisiana Supreme Court, which affirmed the district court's conviction and sentence, rejecting Kennedy's claim that imposing the death sentence solely for rape was inherently unconstitutional and was a disproportionate penalty. The Louisiana Supreme Court said four states in addition to Louisiana had recently allowed the death penalty for such crimes. The Louisiana court acknowledged that this number was small but emphasized the emergence of a trend toward making rape of a child a capital crime. The Louisiana Supreme Court also rejected Kennedy's argument that the aggravating circumstances considered in the case did not sufficiently narrow the group of persons eligible for death sentences for this crime. The court determined that Louisiana's statute dealing with the rape of a child itself provided the necessary narrowing of the eligible group.

### Capital Punishment and the Victimization of Children

In deciding *Kennedy v. Louisiana*, the Court will first check in with the American public. What will the Court see when it looks for objective evi-

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dence of U.S. standards of decency on penalizing rape of a child?

According to the Louisiana Supreme Court and the state's district attorney, the U.S. Supreme Court will see a consistent recent trend in favor of allowing death sentences for such crimes. Nevertheless, the total number of states that have such provisions is still small. The Death Penalty Information Center's information lists five states that have recently enacted laws making the rape of a child a capital crime. Several of these states allow the death penalty only if the defendant had a previous conviction for a similar offense.

The *New York Times* notes that the trend toward allowing the death penalty for the rape of a child is a response to the public's outcry against sex crimes that victimize children. See Linda Greenhouse, *Justices to Decide if Rape of a Child Merits Death*, N.Y. TIMES (Jan. 5, 2008). States supporting Louisiana seem to bear out this assessment, noting the "unspeakable" and "irreparable" nature of the crime of child rape. Such outrage has also found expression in legislation that deals with registering, monitoring, and punishing sex offenders (for example, Megan's Law). One model statute, Jessica's Law, which has been enacted with some variation in a number of states, provides for monitoring sex offenders who have been released from prison and for imposing mandatory minimum sentences for the rape of a child. When Texas enacted its version of Jessica's Law, it added a capital punishment provision for repeat offenders. An amicus brief submitted in this case by various social workers' organizations and groups opposed to sexual assaults expressed concern about making child rape without murder a capital crime. The brief argued that such laws would be counterproductive for two main reasons: (1) The laws would discourage victims from coming forward when the perpetrator is a relative. (2) The laws would remove any disincentive the perpetrator may have for killing the victim. In another brief, the National Association of Criminal Defense Lawyers raised questions about the accuracy of convictions for child rape; the argument was based primarily on children's susceptibility to suggestion. The brief argued that these questions argue

for withholding the ultimate, irreversible punishment of death in such cases.

Beyond changes in punishment for the rape of a child, many states and the federal government have enacted death penalty provisions for crimes other than homicides—crimes ranging from drug trafficking to treason. Louisiana says that these laws provide even stronger evidence, in both absolute numbers and trends, in support of allowing death sentences for nonhomicides.

At the same time, both the Supreme Court and the rest of world seem to be moving in the opposite direction. In 2002, the Court invalidated use of the death penalty for mentally retarded persons and did the same in 2005 for defendants who were juveniles at the time of their crime. Great Britain has not authorized the death penalty for rape since 1841, according to the British Law Association's amicus brief in this case, and *no* Western democracy currently does so. The Supreme Court has paid attention to such international norms in its recent death penalty decisions. However, not all the justices agree that such norms are appropriate reference points for the Court's analysis of rights under the Eighth Amendment of the Constitution.

#### Analysis of the Eighth Amendment

Kennedy argues that the Eighth Amendment will not tolerate imposition of the death penalty for the rape of a victim of any age. Louisiana contends that the death penalty is not cruel and unusual punishment for the rape of a child. Kennedy reads *Coker v. Georgia* as a decision that disallowed capital punishment for crimes other than murder. 433 U.S. 584 (1977). According to Kennedy, *Coker* categorically stated that, if a criminal did not take a human life, the death penalty is disproportionate. See Brief for Petitioner at 29-21. Kennedy emphasizes that *Coker* did not distinguish adults from children.

In contrast, Louisiana narrowly reads *Coker* to hold that the Eighth Amendment will not tolerate capital punishment for the rape of an *adult woman*. Louisiana stresses that the *Coker* ruling includes 14 references to an "adult woman" in its concurring, dissenting, and plurality opinions. Louisiana con-

tends that these references imply that the permissible punishment for the rape of a child remains an outstanding question under *Coker*. Louisiana refers to several other state supreme courts that have interpreted *Coker* in this way, citing rulings made by courts in Georgia, Mississippi, and Florida.

#### The *Roper-Atkins* Analysis

The U.S. Supreme Court outlined its process of analysis in death penalty cases in *Roper v. Simmons*, 543 U.S. 551 (2005), and in *Atkins v. Virginia*, 536 U.S. 304 (2002)—both of which establish a two-pronged method of evaluation. See *State v. Kennedy*, 957 So. 2d 757, 782 (La. 2007). First, the Court examines the "objective indicia of consensus" to determine if U.S. jurisdictions tend to allow capital punishment for a crime. Second, the Court exercises its "independent judgment" as to whether capital punishment is disproportionate according to the "evolving standards of decency" contemplated by the Eighth Amendment.

Kennedy argues that the first prong of the schema used in *Roper* and *Atkins* calls for reversal in his case. He says that there is a national consensus against punishing rape by putting the perpetrator to death. Kennedy points out that in *Enmund v. Florida*, the Court found that eight states' authorization of the death penalty for felony murder did not establish a national consensus. Moreover, both *Roper* and *Atkins* found execution of juveniles and mentally retarded individuals, respectively, to be unconstitutional despite authorization under 21 different state schemes.

Louisiana counters that "evolving standards of decency" require affirmation of the Louisiana Supreme Court's decision. First, Louisiana underscores that legislative acts are presumed to be valid, because the legislatures that passed them are the representatives of the people. In addition, capital punishment is an option for some crimes in 37 American jurisdictions (including the federal government). Louisiana notes an upward—albeit slight—trend of state authorization of rape as a capital offense: five states now have some form of this provision (Georgia, Oklahoma, Texas, South Carolina, and Louisiana),

and three more states have legislation in the works (Alabama, Mississippi, and Missouri). Finally, Louisiana points out that finding a practice unconstitutional simply because it is rare goes against the nature of the “evolving standards” prong of the *Roper-Atkins* test, because standards change.

Kennedy argues that the second prong of the analysis also requires reversal, because the Court’s independent jurisprudence already supports the proposition that the death penalty for rape is unconstitutional. Because the Court has looked for the twin factors of retribution and deterrence in determining whether a punishment is, in its independent judgment, proportionate to a crime, Kennedy argues that both factors favor reversal in this case.

Louisiana argues that the Supreme Court’s prior jurisprudence is silent on capital rape; therefore, its independent judgment in this case may legitimately lead to a finding that capital rape is constitutional. Louisiana also highlights the fact that, in five cases of capital rape, death sentences were imposed in two of them.

### Narrowing Eligibility

Kennedy contends that the Supreme Court has long been wary of allowing unguided jury discretion in capital sentencing because of the potential for abuse and discriminatory application. Kennedy therefore argues that aggravating factors that duplicate an element of the crime should pass constitutional muster only when the definition of the crime itself sufficiently narrows the class of offenders eligible for the death penalty.

Louisiana counters that its law sufficiently narrows the class of offenders because of the restrictive definition of the offense of capital rape. Court precedent in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), requires capital sentences to be part of a logical scheme in which the imposition of the death penalty is justified and limited to a narrow class of offenders. According to Louisiana, § 14:42 satisfies the standard applied in *Lowenfield* by restricting the death penalty to rapes consisting of anal or vaginal intercourse with a child aged 12 or younger.

### Conclusion

The U.S. Supreme Court’s decision

in this case will clarify the constitutionality of statutes that make the rape of a child a capital offense. Whatever the outcome, the decision will have far-reaching consequences for the independence of state legislatures regarding the imposition of the death penalty. If Kennedy’s arguments are persuasive and the Court accepts a broad reading of *Coker v. Georgia*, then making person-on-person nonhomicides capital crimes will be beyond the reach of state legislatures. If Louisiana’s arguments are persuasive, the holding in *Coker* will at the least be narrowed in order to prohibit capital punishment for the rape of an adult woman, leaving state legislatures free to make crimes other than homicide crimes capital offenses. Such a holding could rely either on a new interpretation of *Coker* itself or on application of the criteria used in *Coker* to contemporary standards of decency. Alternatively, the Supreme Court could agree with Kennedy’s second argument: that Louisiana has not provided a sufficient hedge against arbitrary exercise of discretion. **TFL**

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*Prepared by Ellen Loeb and Victoria Bourke. Edited by Molly Curren Rowles.*

### **Bridge v. Phoenix Bond & Indemnity Co. (07-210)**

*Appealed from the U.S. Court of Appeals for the Seventh Circuit (Jan. 4, 2008)*

**Oral Argument: April 14, 2008**

In Cook County, Ill., the local government conducts public auctions of tax liens. The winning bidder pays the back taxes and can then recover the amount of the delinquent taxes from the property owner, along with a penalty. If the taxpayer does not pay the taxes owed, the winning bidder gains ownership of the property on which the lien was placed. Because multiple bidders often place identical bids in the auction, bidders must submit affidavits that they are not using agents to gain an unfair advantage through relationships with other bidders. Phoenix Bond and Indemnity Company (Phoenix) brought a RICO suit against John Bridge for mail fraud, alleging that he submitted false affidavits, which stated that Bridge was unrelated to other bidders. The District

Court dismissed the suit, stating that Phoenix was not the party that relied on the fraudulent mailings and therefore lacked standing to sue Bridge. The Court of Appeals reversed the District Court. The Supreme Court’s decision in this case will determine whether only those parties who were the target of a fraudulent communication can bring a civil suit seeking damages under RICO. Full text is available at [www.law.cornell.edu/supct/cert/07-210.html](http://www.law.cornell.edu/supct/cert/07-210.html). **TFL**

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*Prepared by Valerie Robart and John Busby.*

### **Engquist v. Oregon Dep’t of Agriculture (07-474)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit (Feb. 8, 2007)*

**Oral Argument: April 21, 2008**

Under what is known as the class-of-one theory, an individual plaintiff can bring an Equal Protection claim against a state actor for “irrational and wholly arbitrary treatment.” The person is a class-of-one when alleging that the government is subjecting only the plaintiff to differing and unique treatment compared to others who are similarly situated. Anup Engquist brought such a claim against her employer, the Oregon Department of Agriculture, alleging that it arbitrarily failed to promote her to a position for which she was qualified, allowed a supervisor with whom she had an acrimonious relationship to harass and degrade her, and eventually laid her off. The Ninth Circuit Court of Appeals, in overturning the District Court that found in her favor on the Equal Protection claim, held that the class-of-one theory is inapplicable to decisions made by state employers with regard to employment decisions. Engquist has appealed the decision to the Supreme Court, arguing that there is no basis in the Equal Protection Clause for a limitation on class-of-one claims in the employment context. Full text is available at [www.law.cornell.edu/supct/cert/07-474.html](http://www.law.cornell.edu/supct/cert/07-474.html). **TFL**

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*Prepared by Carrie Evans and Katie Higgins.*

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**Giles v. California (07-6053)**

*Appealed from the Supreme Court of California (March 5, 2007)*

**Oral Argument: April 22, 2008**

In 2002, Dwayne Giles shot his ex-girlfriend, Brenda Avie. Giles admitted to killing Avie, claiming he had done so in self-defense. Prosecutors sought to refute his defense by introducing statements Avie had made three weeks prior to her death, during an earlier investigation of her claim of domestic violence. The California state trial court ruled that Avie's statements were admissible, based on a hearsay exception for statements about physical harm suffered by an unavailable declarant. While Giles' appeal was pending, the U.S. Supreme Court held, in *Crawford v. Washington*, that "testimonial" statements were inadmissible under the Sixth Amendment's Confrontation Clause if a defendant could not cross-examine the witness. The California Court of Appeal affirmed the trial court's holding, reasoning that the "forfeiture by wrongdoing" doctrine survived *Crawford*. The Supreme Court of California held, contrary to Giles' arguments, that forfeiture by wrongdoing did not require showing that a defendant intended to make a witness unavailable. The U.S. Supreme Court's decision in this case will determine the scope of a defendant's right to cross-examine witnesses and how broadly courts may apply the forfeiture doctrine. Full text is available at [www.law.cornell.edu/supct/cert/07-6053.html](http://www.law.cornell.edu/supct/cert/07-6053.html). **TFL**

*Prepared by Joe Hashmall and Deepa Sarkar.*

**Greenlaw v. United States (07-330)**

*Appealed from the U.S. Court of Appeals for the Eighth Circuit (March 23, 2007)*

**Oral Argument: April 15, 2008**

Michael Greenlaw was charged with various drug and conspiracy crimes and two firearm-related offenses and was convicted of all of them by a jury. The government asserted that the second firearm charge

constituted a "second or subsequent offense" under 18 U.S.C. § 924(c) and therefore required the court to impose a consecutive 25-year incarceration sentence in addition to any other sentence. The trial court rejected the government's assertion and sentenced Greenlaw to 442 months in prison, 120 of which were imposed as a result of the second weapons charge. Despite the absence of an argument by the government for an increase in the sentence, the Eighth Circuit decided to remand the case to the lower court with an order to increase Greenlaw's sentence by 15 years. Greenlaw filed for certiorari with the U.S. Supreme Court, challenging the Eighth Circuit's sua sponte increase in his incarceration sentence. The Supreme Court's decision in this case will reflect its view of the appropriate balance between the interest of the courts in consistently interpreting and applying sentencing statutes and defendants' right to appeal without subjecting themselves to an increase in their sentence. Full text is available at [www.law.cornell.edu/supct/cert/07-330.html](http://www.law.cornell.edu/supct/cert/07-330.html). **TFL**

*Prepared by Debra A. Faulkner.*

**Irizarry v. United States (06-7517)**

*Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Oct. 26, 2006)*

**Oral Argument: April 15, 2008**

After their 2001 divorce, the defendant Richard Irizarry sent Leah Smith 255 e-mails, several of which threatened to kill Smith and her family. In 2003, Irizarry was arrested and pleaded guilty to sending threatening interstate communications to his ex-wife. As a result, he was sentenced to 60 months' imprisonment, a sentence that is nine months longer than the maximum sentence recommended by Federal Sentencing Guidelines. The District Court sentenced Irizarry to the maximum amount of time allowed under the statute. Irizarry objected to the sentence, because the court failed to give advance notice of its intent to depart upward from the sentencing guidelines,

as required by Federal Rule of Criminal Procedure 32(h). The Eleventh Circuit Court of Appeals upheld the sentence. In the Supreme Court, Irizarry argues that his sentence should be overturned, because Rule 32(h) requires a district court to give the parties notice any time it intends to depart from the sentencing range on a ground not previously identified in the presentence report or in a government submission. Full text is available at [www.law.cornell.edu/supct/cert/06-7517.html](http://www.law.cornell.edu/supct/cert/06-7517.html). **TFL**

*Prepared by Fritz Ernemann and Lauren Buechner.*

**Meacham v. Knolls Atomic Power Laboratory (06-1505)**

*Appealed from the U.S. Court of Appeals for the Second Circuit (Aug. 14, 2006)*

**Oral Argument: April 23, 2008**

In this case, a hair's breadth of analytical difference is worth almost \$6 million dollars, as the plaintiffs, former employees at Knolls Atomic Power Laboratory ask the U.S. Supreme Court to overturn the Second Circuit's finding for the defendants. The plaintiffs had prevailed at trial and on appeal on a disparate impact theory of illegal age discrimination under the Age Discrimination in Employment Act (ADEA) when the Supreme Court remanded the case for reconsideration in light of *Smith v. City of Jackson*, which requires the touchstone of analysis to be whether employers considered "reasonable factors other than age." The Second Circuit determined that this claim was a burden of persuasion to be borne by the plaintiffs. The employee-plaintiffs disagree, maintaining that the "reasonable factors other than age" harbor in the ADEA statute is a traditional affirmative defense on which the employer-defendants bear the burden of proof. In determining where the burden rests, the Supreme Court's decision will affect the nature of future employee litigation under the ADEA. Full text is available at [www.law.cornell.edu/supct/cert/06-1505.html](http://www.law.cornell.edu/supct/cert/06-1505.html). **TFL**

*Prepared by Victoria Bourke.*

## **MetLife v. Glenn (06-923)**

*Appealed from the U.S. Court of Appeals for the Sixth Circuit (Sept. 1, 2006)*

**Oral Argument: April 23, 2008**

The Employee Retirement Income Security Act of 1974 (ERISA) provides a private cause of action for employees challenging wrongful denials of benefits under an employee benefits plan. Under ERISA, Wanda Glenn challenged MetLife's discontinuation of her disability benefits on the ground that the company faced a conflict of interest by both determining eligibility for benefits payments and making these same payments. The U.S. District Court for the Southern District of Ohio affirmed MetLife's discontinuation of benefits. The U.S. Court of Appeals for the Sixth Circuit, siding with five other circuits, ruled that a court reviewing the denial of a claim must consider whether and to what extent a plan administrator's conflict of interest may have affected its determination of benefits. In this case, the U.S. Supreme Court will determine whether and to what extent a plan administrator that both authorizes the payment of benefits and is responsible for the payment of those benefits has a conflict of interest that must be considered on judicial review. Full text is available at [www.law.cornell.edu/supct/cert/06-923.html](http://www.law.cornell.edu/supct/cert/06-923.html). **TFL**

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*Prepared by Suzanne Cook and Carrie Payne.*

## **Plains Commerce Bank v. Long Family Land & Cattle (07-411)**

*Appealed from the U.S. Court of Appeals for the Eighth Circuit (June 26, 2007)*

**Oral Argument: April 14, 2008**

In 1999, the Plains Commerce Bank filed an eviction notice in Cheyenne River Sioux Tribal Court against the Long Family Land and Cattle Company. The bank had no tribal affiliation, but the company belonged to members of the Cheyenne River Sioux Tribe and operated on reservation land. After a jury trial, the tribal court awarded the company \$750,000 in damages and the option to buy back

its land. The bank then filed a lawsuit in District Court, claiming that the tribal court lacked jurisdiction to decide the case. Both the District Court and the Eighth Circuit, however, held that the tribal court did have jurisdiction. The bank now appeals to the U.S. Supreme Court in a case that will test the jurisdictional power of tribal courts over parties who are not members of the tribe. Full text is available at [www.law.cornell.edu/supct/cert/07-411.html](http://www.law.cornell.edu/supct/cert/07-411.html). **TFL**

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*Prepared by Allison Condon and Michael Litvin.*

## **Sprint Communications v. APCC Services Inc. (07-552)**

*Appealed from the U.S. Court of Appeals for the District of Columbia (June 8, 2007)*

**Oral Argument: April 21, 2008**

The Telecommunications Act of 1996 requires long-distance telephone companies, such as Sprint and AT&T, to compensate pay phone service providers (PSPs) fairly when consumers use the companies' access codes to complete long-distance calls on pay telephones. About 1,400 PSPs assigned their rights "of collection" to a third-party aggregator, American Public Communications Council Services (APCC), in order for APCC to sue Sprint and AT&T for inadequate compensation on behalf of the PSPs. The District Court initially dismissed APCC's suit for lack of standing under Article 3, § 2 of the Constitution, the court later vacated its ruling and denied the motion to dismiss. The Court of Appeals ultimately found that APCC had standing to sue as well as the private right to sue in federal court. On appeal, the U.S. Supreme Court will determine whether an assignment of claims "for purposes of collection" establishes standing for a third-party assignee. Full text is available at [www.law.cornell.edu/supct/cert/07-552.html](http://www.law.cornell.edu/supct/cert/07-552.html). **TFL**

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*Prepared by Hana Bae and Courtney Zanolco.*

## **Taylor v. Surgell (07-371)**

*Appealed from the U.S. Court of Appeals for the District of Columbia (June 22, 2007)*

**Oral Argument: April 16, 2008**

Brent Taylor, executive director of the Antique Aircraft Association (AAA) filed a Freedom of Information Act (FOIA) request with the Federal Aviation Administration (FAA) to obtain plans and specifications for a vintage aircraft. After FAA denied Taylor's request on the grounds of the information being a trade secret, Taylor sued to compel disclosure of the information. The D.C. Circuit affirmed the District Court's finding that Taylor's claim was barred because he had been "virtually represented" in a prior action by Greg Herrick, a fellow AAA member whose prior FOIA request for the same records was found by the Tenth Circuit to have been properly denied because it was protected as a trade secret. Taylor asserts that preclusion of his claim on the "virtual representation" theory violated his due process rights, because he had no legal relationship with Herrick and received no notice of the prior suit. FAA counters that preclusion was appropriate, because Herrick had adequately represented Taylor's interests in the earlier action. The Supreme Court's decision in this case will clarify the circumstances under which courts may bar claims under the theory of "virtual representation." Full text is available at [www.law.cornell.edu/supct/cert/07-371.html](http://www.law.cornell.edu/supct/cert/07-371.html). **TFL**

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*Prepared by William Grimshaw and Stephen Markus.*