PRESIDENT OBAMA'S POLICY AGENDA IN THE SUPREME COURT: WHAT WE KNOW SO FAR FROM THE OFFICE OF THE SOLICITOR GENERAL'S SERVICE AS AMICUS CURIAE

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I. INTRODUCTION

One window into the soul of a presidential administration is the work of the Office of the Solicitor General (OSG), the representative of the executive branch before the Supreme Court of the United States.[1] This could be particularly true in the case of a president who is a lawyer with work experience as law professor. President Obama appointed the Dean of his law school alma mater, Harvard, as his Solicitor General (SG).[2] Elena Kagan was appointed by President Obama to serve as the nation's 45th Solicitor General and was confirmed by the Senate in March 2009.[3] Traditionally, the SG enjoys a great deal of autonomy from the President, which contributes to the office's credibility before the Supreme Court of the United States.[4] In this sense, the OSG is sometimes characterized as 'above' politics.[5] It is unusual, for example, for the President to direct the SG to file a brief in a particular case or to dictate the position that the SG will take, though it has happened on occasion.[6] Furthermore, though the OSG is located within the Department of

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1. *See generally* Solicitor General's Web site, http://www.usdoj.gov/osg (last visited Mar. 3, 2010).
2. Elena Kagan began her employment at Harvard Law School as a law professor in 1999 and Mr. Obama graduated in 1991. However, they served together as faculty at the University of Chicago School of Law in the 1990s.
3. Solicitor General's Web site, *supra* note 1, at http://www.usdoj.gov/osg. Author's note: a few of the briefs discussed in this article were filed by the Obama administration OSG before Ms. Kagan was appointed by the acting SG, Edwin S. Kneedler. Mr. Kneedler is a career attorney with the OSG.
4. RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURE OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 6 (2003).
5. *Id.*
6. REBECCA SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 77 (1992). A recent example is President George W. Bush directing the filing of amicus curiae briefs in the affirmative action cases involving the University of Michigan's undergraduate campus and law school (Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003)).

Justice, it has always enjoyed minimal control from the Attorney General.[7] Nonetheless, it is a given that the SG will be selected not only for her legal expertise but because she shares the President's policy goals and views the OSG as a vehicle for advancing them.[8] Additionally, the institutional reality is that she can be removed and replaced at the pleasure of the President. Scholars have found empirical support for what is assumed to be true–there is a high level of ideological congruence between the views of the SG and his appointing president in a variety of policy areas.[9]

This article will examine the Obama administration's OSG efforts in filing voluntary amicus curiae briefs before the Supreme Court. In performing this task, the OSG is at the height of its discretion vis-à-vis the demands, implicit or otherwise, of the Supreme Court[10] and most free to represent the unadulterated views of the administration.[11] Scholars assume that the OSG's views in the capacity of voluntary amicus offer a pure window into the views of the administration.[12] When the OSG represents the United States before the Supreme Court, the OSG's position is constrained by its duty of client advocacy.[13] When entering the case as an amicus, however, the OSG is free to support either side.[14] The office typically selects approximately thirty-five cases per term where the United States is not a party through which it expresses the views of the executive branch.[15] The OSG is the most frequent filer of amicus curiae briefs before the Supreme Court, followed[16] by several well-known interest groups.

Another function of the OSG is filing *invited* amicus briefs when the Court asks for the views of the SG. Although these amicus briefs are technically voluntary, it would be imprudent for the office to ignore such a request from the Court.[17] When writing as an invited amicus, the OSG's views

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7. PACELLE, *supra* note 4.
8. PACELLE, *supra* note 4. S*ee also* SALOKAR, *supra* note 6.
9. Stephen S. Meinhold & Steven A. Shull,, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 1, June 1998, at 527–37 (examining OSG/presidential congruence from 1953–1988).
10. *Id*.
11. Michael Bailey, Brian Kamoie, & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 1, Jan. 2005, at 72–85.
12. *Id.*
13. PACELLE, *supra* note 4.
14. Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 1, Mar. 1990, at 137–152.
15. *See generally* Solicitor General's Web site, *supra* note 1, at http://www.usdoj.gov/osg.
16. PACELLE, *supra* note 4.
17. *Id.* The mechanism for this is the CVSG order, which means "calling for the views of the Solicitor General."

are typically geared more toward pleasing the Court, by performing a research function, rather than furthering the administration's policy goals.[18]

The most labor intensive function of the OSG is most likely the screening of losing cases involving the United States as a party and the preparation of certiorari petitions and supporting briefs in those cases selected to be appealed to the Supreme Court. Although these number around twenty per term,[19] the OSG refuses to file cert petitions in ninety percent of the eligible cases where the United States was the losing party.[20] Indeed, performance of this screening function, as well as filing invited amicus briefs, has earned the SG the moniker as "Tenth Justice"[21] or "Fifth Clerk."[22]

If certiorari is granted, the office is responsible for the merits briefs and for arguing the case before the Supreme Court. In amicus cases, the SG will usually be granted five minutes of oral argument time. The OSG's phenomenal success as a party[23] and as an amicus[24] is well documented by much research.[25] The speculated reasons for the office's success range from the Court's gratitude regarding the government's selectivity in appealing cases in which the United States lost, to the credibility of the office due to the quality of its work and the prestige of its occupants.[26] It is undisputed that the legal community holds the office in high esteem and considers the lawyers in the office to be among the best and the brightest who practice before the Supreme Court.[27] It is accepted that the Justices and their clerks pay close attention to the OSG's amicus briefs in preparing for oral argument and crafting their opinions.[28]

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18. *Id.*
19. LAWRENCE BAUM, THE SUPREME COURT (8th ed. 2004).
20. PACELLE, *supra* note 4, at 1.
21. *See generally* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987); *see generally* Bailey, et al., *supra* note 11, at 2.
22. PACELLE, *supra* note 4, at 1.
23. Christopher Zorn, *U.S. Government Appellate Strategies in the Federal Appellate Courts,* 55 POL. RES. Q. 1, Mar. 2002, at 145–66.
24. Stefanie A. Lindquist & Rorie Spill Solberg, *Judicial Review by the Burger and Rehnquist Courts: Explaining Justices' Responses to Constitutional Challenges*, 60 POL. RES. Q. 1, Mar. 2007, at 71–90; Segal, *supra* note 14, at 2.
25. *See* PACELLE, *supra* note 4, at 1.
26. PACELLE, *supra* note 4.
27. Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 1, May 2003, at 365–390.
28. PACELLE, *supra* note 4.

This article discusses the thirteen amicus briefs the Obama OSG selected to file during the Court's 2008 term[29] and provides more in-depth discussion of seven of these cases that the Court ultimately decided during the 2008 term. This article analyzes the Obama OSG's amicus choices and its level of success before the Supreme Court. One measure of the OSG's success is if the final outcome of the case is congruent with the OSG's position; another is whether the OSG's views were incorporated in the majority opinion.[30] This article looks at the OSG's success by considering both measures.

The OSG's efforts are not the only means by which the executive branch can influence the legal process, but they are the executive's only method of influencing the high court when the United States is not a party. The executive branch does not ignore the opportunity to file amicus briefs in the lower courts.[31] The Obama administration's Civil Rights Division, located within the Department of Justice, has been noteworthy for filing amicus briefs in discrimination lawsuits between private parties, a practice that dwindled with the previous administration.[32]

II. THE CASES

The OSG's use of amicus briefs on behalf of civil rights litigants dates back to the Truman administration, which advocated against race discrimination. The executive branch's role was crucial at that time, because assistance on civil rights was not forthcoming from Congress until 1964. Pacelle documents the essential role of the OSG and the NAACP in assisting the Court with the legal reasoning and backbone to chip away at *Plessy v. Ferguson*, to craft *Brown v. Board of Education*, and to implement the desegregation ideal.[33] The Obama administration's OSG has continued to carry the mantle of this tradition by weighing in on *Ricci v. DeStefano*[34] on behalf of the City of New Haven's affirmative action policy, arguably the most important case of the term.

In *Ricci*, a group of New Haven firefighters challenged then Mayor DeStefano's refusal to certify the results of an objective test used to identify

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29. The Court's 2008 term runs from October 2008 to June 2009. President Obama took office part way through the term. Thus, about half of the amicus filings from the OSG during the 2008 term were instituted by the Bush OSG and half by the Obama OSG.
30. Bailey, et al., *supra* note 11.
31. *See generally* The Department of Justice's Web site, http://www.justice.gov/crt/app/briefs (last visited Mar. 3 2010).
32. Charlie Savage, *White House to Shift Efforts on Civil Rights*, N. Y. TIMES, Sept. 13, 2009, at A1.
33. PACELLE, *supra* note 4.
34. Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

firefighters best qualified for promotion.[35] The City and the Mayor argued that using the test as the basis for promotions would have resulted in the promotion of only white (and one Hispanic) firefighters, but no African-Americans. This, the City argued successfully to the lower courts, would put the City at risk of losing a Title VII "disparate impact" lawsuit. The United States, as amicus curiae, supported the Mayor's actions and argued that DeStefano had taken the proper course in refusing to certify the results of the test as the basis for promoting firefighters.[36] The OSG's position was that if an employer has a "good faith" belief that the test results must be rejected to avoid "disparate impact" liability, the employer is insulated from a "disparate treatment" claim. In an attempt to appeal to moderation, the OSG detailed an option to "split the difference"– to generally endorse an employer's rejection of employment tests with racially-skewed results, but to remand this particular case for a determination of whether the mayor of New Haven's purported justification was a pretext for race discrimination. There may have been an effort to target the swing moderate, Justice Anthony Kennedy, as the OSG's brief cited his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*[37] three times.

The Supreme Court majority opinion rejected the views of the OSG and sided with the non-promoted firefighters. Though Justice Kennedy's majority opinion did not adopt the OSG's view, matters could have been "worse" for the OSG. The Court limited its ruling to the Title VII question, holding that throwing out the tests violated Title VII's "disparate treatment" provision because the employer did not demonstrate a strong basis in the evidence that, had it not discarded the test results, it would have been liable under Title VII's 'disparate impact' provisions.[38] Had the Court ruled on constitutional grounds, finding that the Equal Protection Clause of the Fourteenth Amendment had been violated, as urged by Ricci on behalf of the non-promoted firefighters, the Court's holding would have been more damaging to the administration's pro-affirmative action policy position. Ricci's position was that an employer can never take a race-based employment action to avoid "disparate impact" liability without violating the constitution. Justice Kennedy rejected this view, holding only that an employer cannot take a race-based employment action to avoid "disparate impact" liability unless the employer has a "strong basis in the evidence" that it must do so. Accordingly, it is possible that the OSG's

35. *Id.*
36. Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 08-328), 2009 WL 507014.
37. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
38. *Ricci*, 129 S. Ct. at 2664.

efforts muted the brunt of the loss for the administration in this case. It is difficult to do more than speculate, however, since the government's position, as set forth in the OSG's brief, was discussed but ultimately rejected by the majority opinion.[39] Thus, we know that Justice Kennedy read the brief, but we do not know if it was influential in the framing of a moderate, rather than wholly conservative, opinion.

The Obama OSG has been particularly active in the area of public education, siding with the interests of students and parents. The OSG weighed in on three cases involving education issues decided during the 2008 term, and prevailed in two out of three.[40] These include the much-watched case of *Safford v. Redding*,[41] in which the OSG successfully urged the Court to find that the strip-search of then thirteen-year-old eighth grader Savanna Redding by school officials was unconstitutional.[42] Surprisingly, eight Justices signed onto Justice Souter's opinion finding that the search was unconstitutional; only Justice Thomas found no violation of her rights.[43] The majority did, however, grant the school officials qualified immunity from monetary damages, finding that the school officials had not violated a "clearly established" constitutional rule. The larger victory, nonetheless, was for the rights of students.

In *Safford*, Redding was suspected by middle-school officials of possessing prescription ibuprofen and another over-the-counter painkillers, in clear violation of school policy. Redding denied to the authorities that she was in possession of the prohibited substances.[44] When a search of her backpack did not reveal the pills, female school officials ordered her to remove her outer clothes and then pull aside her bra and underpants and shake them, exposing her breasts and pelvic area. No pills were found.[45] Redding's mother sued the school district, the principal, and the individuals performing the search. Redding lost at the trial court level but the federal appellate court found that school officials violated Redding's constitutional rights and were not entitled to qualified immunity.[46]

The Court did not cite the OSG's brief in its opinion, but the majority opinion shares elements of the OSG's approach. The Court adopted the "split the difference" approach of the OSG: while it affirmed the appellate court's

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39. *Id.* at 2688.
40. *See* table 1 *infra* p. 369.
41. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009)
42. Brief for the United States as Amicus Curiae Supporting Reversal, Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 612115.
43. Two justices dissented as to the grant of qualified immunity. *Safford*, 129 S. Ct. at 2644–45.
44. *Id.* at 2638.
45. *Id.*
46. *Id.* at 2637–38.

holding that Redding suffered a constitutional violation, it granted the school officials qualified immunity from monetary damages because they did not violate a "clearly established" constitutional rule. Aspects of the OSG's reasoning concerning the Fourth Amendment violation are apparent in the Court's opinion also. In particular, the OSG urged for a distinction between a search of a student's outer clothing, pockets, and personal effects, which is permissible if supported by reasonable suspicion, and the more intrusive search of her underwear, which is justified only upon reasonable suspicion that the object of the search may be found there. The OSG also placed special emphasis on the vulnerability of young teenagers to psychological trauma.[47]

The OSG scored another victory in *Forest Grove School District v. T.A.*,[48] involving an interpretation of the Individuals with Disabilities Education Act (IDEA) in favor of the parents of a special education student. In *Forest Grove*, T.A.'s parents had enrolled him in a private school for special needs students when he was in high school and they sought reimbursement from the school district, a request that the school district denied because T.A. had not previously been given special education services in the public schools.[49] Since kindergarten, T.A. had been failing to thrive in the public schools–he had trouble completing assignments and paying attention.[50] When T.A. reached high school, his parents sought special education services for him, a request denied by school officials. He was diagnosed with ADHD and other learning disabilities by a private specialist, who recommended the private school.[51]

The Court upheld the lower court's order in favor of T.A. and held that IDEA does not bar a parent from receiving reimbursement from a school district for private school tuition, despite the student's lack of prior special education services.[52] Though the majority opinion does not cite the OSG's brief, it tracks the OSG's reasoning. The OSG emphasized the need for parents to enroll students in private school (and receive tuition reimbursement) if the public school was denying the student a "free, appropriate education" as T.A.'s school was doing here.[53] Most often, these students had been failed by the special education services provided by the public school. To deny tuition assistance to T.A., however, would "produce absurd results . . . where the

47. Brief for the United States, *supra* note 42.
48. Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009).
49. *Id.* at 2488–89.
50. *Id.*
51. *Id.*
52. *Id.* at 2492–94.
53. Brief for the United States as Amicus Curiae Supporting Respondent at 21, Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484 (2009) (No. 08-305), 2009 WL 870018.

only reason the child did not receive public special education is that the school district wrongly refused to provide it."[54]

The OSG lost a third education case, however, and it was the case that affected the most students. *Horne v. Flores*[55] began as a class action suit filed by the parents of Spanish-speaking children in Nogales, New Mexico, urging more funding for English Language Learner programs. In 2000, the trial court held that Arizona's plan for funding its English Language Learner programs was in violation of federal law and that the state had failed (1) to spend enough money and (2) to implement programs to remove the impediment of language barriers to its Spanish-speaking students' equal participation in the educational process.[56] The district court imposed a detailed remedial order and supervised its implementation.[57] In 2006, the state superintendant of schools, Tom Horne, asked to be released from supervision by the federal courts. The district court held a hearing on the matter and, in 2007, determined that the state had not made enough progress and that continued judicial supervision was necessary. This ruling was affirmed by the federal appellate court.[58] In a five-to-four decision, the United States Supreme Court declined to adopt the views of the OSG, which supported the district court's refusal to dissolve the remedial order.[59] Justice Alito's majority opinion ordered the federal appellate court to reconsider its finding that continued judicial supervision was necessary, in view of improvements that Nogales had made. The Court set a more lenient standard for institutional release from judicial supervision for findings of violation of federal law generally, potentially affecting schools in other types of cases as well as prisons. We know from references in two footnotes that Justice Alito considered the views of the OSG, but clearly they did not carry the day.[60]

The OSG suffered an important loss in *Gross v. FBL Financial Services, Inc.*,[61] for the rights of older workers to sue under the Age Discrimination in Employment Act (ADEA). In a five-to-four ruling, the Court held that workers claiming that an adverse employment decision was based, in part, on age (and in part on legitimate factors) must bear the full burden of proving that

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54. *Id.* at 10.
55. Horne v. Flores, 129 S. Ct. 2579 (2009).
56. *Id.* at 2589.
57. *Id.* at 2589–90.
58. *Id.* at 2590–92.
59. Brief for the United States as Amicus Curiae Supporting Respondents at 7, Horne v. Flores, 129 S. Ct. 2579 (2009) (Nos. 08-289, 08-294), 2009 WL 796293; *Horne*, 129 S. Ct. 2579.
60. *Horne*, 129 S. Ct. 2579.
61. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009).

age was the deciding factor.[62] Jack Gross alleged that he had been demoted by his employer, FBL Financial Group, Inc., because of his age. FBL, on the other hand, maintained that corporate restructuring motivated Gross's reassignment.[63] The parties disputed what type of evidence Gross would have to tender to shift the burden of proof onto FBL (direct evidence or circumstantial evidence of discrimination). The federal appellate court held that direct evidence was necessary while the petitioner, supported by the OSG, disputed this point.[64] Justice Thomas, writing for the Court, reasoned that such burden-shifting, which occurs in Title VII cases, is never appropriate in ADEA cases.[65] There is no evidence that Justice Thomas considered the OSG's position, though Justice Stevens' dissent did so. Justice Stevens charged the majority with deciding a question on which the Court had not granted certiorari, had not been briefed by the parties, and which the Court had been urged by the OSG not to reach in this case.[66] Congress is considering legislation to reverse this controversial ruling.[67]

The OSG's amicus involvement in the two criminal procedure cases decided by the Court thus far appears to have paid off. In *Rivera v. Illinois*,[68] a unanimous court concurred with the OSG's position that a judge's wrongful denial of a peremptory challenge was a harmless error not justifying a new trial.[69] Though the Court's opinion does not cite the OSG's brief, the reasoning is similar.

The OSG's victory in *Montejo v. Louisiana*,[70] however, was by a narrow five-to-four margin. The Court majority followed the OSG's position that a defendant's confession should be admitted into evidence.[71] Mr. Montejo had confessed to police after *Miranda* warnings had been given and counsel had been appointed, although Montejo had not invoked his right to counsel.[72] Though Justice Scalia's majority opinion did not cite the OSG, the Court followed the track urged by the OSG and overruled an earlier case,[73] *Michigan*

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62. *Id.*
63. *Id.* at 2347.
64. Brief for the United States as Amicus Curiae Supporting Petitioner at 8, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 253859.
65. *Gross*, 129 S. Ct. at 2351.
66. *Id.* at 2349 n.2 (Stevens, J., dissenting).
67. Editorial, *Preventing Age Discrimination*, N. Y. TIMES, Oct. 13, 2009, at A30.
68. Rivera v. Illinois, 129 S. Ct. 1446 (2009).
69. Brief for the United States as Amicus Curiae Supporting Respondent, Rivera v. Illinois, 129 S. Ct. 1446 (2009) (No. 07-9995), 2009 WL 208112.
70. Montejo v. Louisiana, 129 S. Ct 2079 (2009) *reh'g denied* 130 S. Ct. 23 (2009).
71. Brief for the United States as Amicus Curiae in Support of Overruling Michigan v. Jackson, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1019983.
72. *Montejo*, 129 S. Ct. 2079.
73. *Id.*

v. Jackson,[74] which automatically excluded confessions made in response to police-initiated questioning that occurred after a defendant's right to counsel had attached, unless counsel was present.

The OSG's victories in *Rivera* and *Montejo* bode well for the OSG's success in several other pending criminal procedure cases that, as a friend of the Court, it has taken an interest in. Thus far the OSG has only taken such interest in the side of state government.[75]

74. Michigan v. Jackson, 475 U.S. 625 (1986).

75. These include Brief for the United States as Amicus Curiae Supporting Petitioner, Alvarez v. Smith, 130 S. Ct. 576 (2009) (No. 08-351), 2009 WL 1397196; Brief for the United States as Amicus Curiae Supporting Petitioner, McDaniel v. Brown, 130 S. Ct. 665 (2010) (No. 08-559), 2009 WL 1303392; Brief for the United States as Amicus Curiae Supporting Petitioner, Maryland v. Shatzer, 2010 WL 624042 (2010) (No. 08-680), 2009 WL 1069335; Brief for the United States as Amicus Curiae Supporting Affirmance, Padilla v. Kentucky, 130 S. Ct. 42 (2009) (No. 08-651), 2009 WL 2509223; Brief for the United States as Amicus Curiae Supporting Petitioners, Pottawattamie County, Iowa v. McGhee, 2010 WL 6917 (2010) (No. 08-1065), 2009 WL 2159654; and Brief for the United States as Amicus Curiae Supporting Petitioner, Florida v. Powell, 2010 WL 605603 (2010) (No. 08-1175), 2009 WL 2903916.

Table 1: Obama OSG Voluntary Amicus Curiae Briefs 2008 Term

Case name	Topic	Party OSG supported	Ideology of SG's Position	SG success in outcome	SG brief cited?
Ricci v. DeStefano	Affirmative action	DeStefano (Mayor of New Haven)	Liberal	No	Majority discusses and rejects
Montejo v. Louisiana	Criminal procedure	Louisiana	Conservative	Yes	By dissent
Rivera v. Illinois	Criminal procedure	Illinois	Conservative	Yes	No
Horne v. Flores	Education	Flores (parents)	Liberal	No	Majority discusses in 2 footnotes
Forest Grove School District v. T.A.	Education	T.A. (student)	Liberal	Yes	By dissent
Safford Unified School District No. 1 v. Redding	Education	Redding (parent)	Liberal	Yes	No
Gross v. FBL Financial Services, Inc.	Employment discrimination	Gross (employee)	Liberal	No	By dissent
Alvarez v. Smith	Due process/ Forfeiture	Alvarez (state prosecutor)	Conservative	N/A–case dismissed as moot	No
McDaniel v. Brown	Criminal procedure	McDaniel (prison warden)	Conservative	Yes	No
Maryland v. Shatzer	Criminal procedure	Maryland	Conservative	To be decided 2009 term	
Reed Elsevier, Inc. v. Muchnick, et al.	Copyright infringement	Reed Elsevier, Inc.	?	To be decided 2009 term	
Jones v. Harris Associates, L.P.	Securities fraud/Consumer protection	Jones (consumer)	Liberal	To be decided 2009 term	
Perdue v. Kenny A.	Attorneys' fees	Perdue (Ga. governor)	Conservative	To be decided 2009 term	

III. ANALYSIS OF THE OSG'S RECORD

The Obama OSG record in cases filed before the Court during the 2008 term (which have been decided by the Court) is mixed ideologically. The Obama OSG took liberal positions in five cases and conservative positions in two cases. In contrast, all of the 2008 term Bush administration OSG amicus briefs took the conservative position.[76] With that came success for the Bush OSG in non-invited amicus appearances: ten wins and two losses.[77] With four wins and three losses, the Obama OSG has a winning record, although not an overwhelming success rate. This differential success rate is consistent with Bailey, et al.'s finding that a Justice is more apt to concur with the OSG when the OSG's views are ideologically congruent with the Justice's.[78] With six of the nine justices appointed by Republican presidents, the Obama OSG fights an uphill battle when it takes a liberal position. Indeed, the OSG won only two of the cases in which it took a liberal position (*Safford* and *Forest Grove*). In the cases the OSG lost while taking a liberal position (*Ricci*, *Gross*, *Horne*), the Court was divided five-to-four along their usual ideological fault line. The OSG won both cases in which it took a conservative position (*Rivera* and *Montejo*).

It is important to note that we do not know if the OSG influenced the Court's decision or merely expressed views congruent with the majority, unless the OSG's brief is cited favorably. The OSG's amicus brief, however, was not cited by the majority in any opinion decided congruently with the OSG's position.[79] We know the OSG was not in the unprecedented position of being ignored by the 2008 term Court, however. The OSG's amicus briefs were cited in five of the decisions in which the OSG participated: by the dissent in *Montejo*, *Forest Grove*,and *Gross;* unfavorably by the majority in *Ricci*; and for a point not central to the majority's reasoning in *Horne*.

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76. *See generally* Solicitor General's website, *supra* note 1, at http://www.usdoj.gov/osg; *see* explanation *supra* note 29 of 2008 term for Presidents Obama and Bush.

77. The wins: 14 Penn. Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009); Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 129 S. Ct. 1732 (2009); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009); Bartlett v. Strickland, 129 S. Ct. 1231 (2009); Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009); Arizona v. Johnson, 129 S. Ct. 781 (2009); Kansas v. Ventris, 129 S. Ct. 1841 (2009); Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2008); Dist. Attorney's Office for the 3rd Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009); Vermont v. Brillon, 129 S. Ct. 1283 (2009). The losses: Kennedy v. Louisiana, 129 S. Ct. 2641 (2009); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

78. Bailey, *supra* note 11.

79. *See* table 1 *supra* p. 369.

Thus, where lies the soul of the Obama administration? To answer this question, we can consider the cases in which the OSG participated during the 2008 term that have not yet been decided by the Court and those cases the OSG has selected to participate in as an uninvited amicus during the 2009 term.[80] The Obama OSG clearly takes seriously its role of protecting the law enforcement powers of the federal government, not simply furthering the administration's political goals or those of the Democratic party. Indeed, in the eight cases involving criminal procedure, the administration has sided with the interests of law enforcement. These include two cases discussed above that the Court has decided (*Rivera* and *Montejo*); three in which the OSG filed amicus briefs during the 2008 term which are still pending (*Alvarez v. Smith*, *McDaniel v. Brown*, and *Maryland v. Shatzer*); and three in which the OSG has elected to participate during the 2009 term to date (*Padilla v. Kentucky*, *Pottawattamie County, Iowa v. McGhee* and *Florida v. Powell*).[81]

Conversely, the soul of the Obama OSG is clearly not with the rights of the criminal defendant. For example, the administration has elected not to weigh in on an important set of cases concerning whether the sentence of life in prison without the possibility for parole imposed on a defendant who was a juvenile when the crime was committed is consistent with the Eighth Amendment right to be free from cruel and unusual punishment.[82] These cases have attracted a great deal of balanced interest group amicus activity, and one might expect guidance from the United States on this issue. The Bush administration signaled its support for law enforcement in important Eighth Amendment cases decided during its tenure.[83]

Education policy is certainly a focus of the administration, as evidenced by the three cases discussed above in which the OSG participated during the 2008 term. The administration's focus on economic issues is germinating, but its interest in both supporting consumers (*Jones v. Harris Associates, L.P.A.*; *Jerman v. Carslisle, McNellie, Rini, Kramer & Ulrich LPA)*[84] and businesses

80. As of the publication of this article, the OSG has weighed in on nine cases pending in the 2009 term as an amicus in an uninvited fashion.

81. *See* cases cited *supra* note 62.

82. Graham v. Florida, 982 So. 2d 43 (Fla. 2008), *cert. granted*, 77 U.S.L.W. 3609 (U.S. May 4, 2009) (No. 08-7412); Sullivan v. Florida, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 77 U.S.L.W. 305 (U.S. May 4, 2009) (No. 08-7621).

83. *See*, *e.g.*, Kennedy v. Louisiana, 129 S. Ct. 1 (2008); Baze v. Reese, 553 U.S. 35 (2008).

84. Jones v. Harris Assocs., 527 F.3d 627 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3499 (U.S. Mar. 9, 2009) (No. 08-586); Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich LPA, 538 F.3d 469 (6th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3701 (U.S. June 29, 2009) (No. 08-1200).

(*United Student Aid Funds, Inc. v. Espinosa*; *American Needle, Inc. v. NFL*)[85] is evident in its choices during the 2008 term as well as what we know of 2009. The OSG has shown an interest in civil rights, mostly (but not exclusively) on behalf of civil rights claimants (*Ricci* and *Horne*). The OSG took a conservative position, adverse to that of the NAACP, in *Perdue v. Kenny A.*,[86] a case concerning the permissibility of awarding the winning party in a civil rights lawsuit attorney fees beyond the "lodestar fee."[87] The trial court judge enhanced the award to the winning party in a civil rights lawsuit filed against the state of Georgia on behalf of children in foster care, resulting in a ruling that the State was behaving illegally in its administration of the foster care system. The judge awarded extra fees to compensate the attorneys for exceptionally high quality work; the OSG opposes this practice.

This article is but a first look at the amicus participation of the Obama OSG, but offers clues to the administration's policy agenda, to the OSG's success rate, and to the general ideological tenor of the Obama administration. As viewed through the lens of the OSG, that tenor must be characterized as "moderate." Of course, the work of the OSG as an amicus curiae before the Supreme Court is but one indicator of the administration's policy agenda before the courts. Beyond the scope of this article, but also worth probing, are the choices the OSG has made in selectively appealing government losses to the Supreme Court that offer clues to the Obama administration's policy agenda.

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85. United Student Aid Funds v. Espinosa, 553 F.3d 1193 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3531 (U.S. June 15, 2009) (No. 08-1134); American Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3701 (U.S. June 29, 2009) (No. 08-661).

86. Perdue v. Kenny A., 547 F.3d 1319 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3442 (U.S. Apr. 6, 2009) (No. 08-970).

87. Brief for the United States as Amicus Curiae Supporting Petitioners, Perdue v. Kenny A., 130 S. Ct. 50 (2009) (No. 08-970), 2009 WL 1864009.