

April 4, 2018
Vol. 10, No. 1

GIBSON DUNN

Supreme Court Round-Up

Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

Decided Cases

1. ***Encino Motorcars, LLC v. Navarro*, No. 16-1362 (9th Cir., 845 F.3d 925; cert. granted Sept. 28, 2017; argued Jan. 17, 2018).** The Fair Labor Standards Act generally requires employers to pay time-and-a-half overtime pay for hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1). One of the FLSA's provisions exempts from the overtime pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). **Must employers pay car dealership "service advisors," whose primary job responsibilities involve identifying service needs and selling service solutions, overtime?**



Theodore B. Olson
202.955.8500
tolson@gibsondunn.com



Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com



Brandon L. Boxler
202.955.8575
bboxler@gibsondunn.com



Rajiv Mohan
202.955.8507
rmohan@gibsondunn.com

Decided Apr. 2, 2018 (584 U.S. __). Ninth Circuit/Reversed and remanded. Justice Thomas for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that service advisors at car dealerships are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," 29 U.S.C. § 213(b)(10)(A), and are therefore exempt from the overtime-pay requirement of the Fair Labor Standards Act ("FLSA"). The FLSA exempts from its overtime-pay requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* The plain meaning of "salesman" is "someone who sells goods or services," and service advisors "do precisely that." Moreover, service advisors are "primarily engaged in . . . servicing automobiles," *id.*, because they play an "integral" role in the servicing process by meeting with customers when they drop off their vehicles, suggesting repairs to the vehicles, and discussing completed maintenance when customers pick up their vehicles. The Ninth Circuit erred in narrowly construing § 213(b)(10)(A) based on the "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). The FLSA has more than two dozen exemptions in § 213(b) alone. Because those exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement," courts must read the overtime-pay exemption fairly, not narrowly.



The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, noting that over the past decade, “Gibson Dunn’s army kept on overpowering, outmaneuvering, and plain old clobbering its opponents in court.” This award followed our unprecedented three wins in this biennial competition – as the 2016, 2012, and 2010 Litigation Department of the Year – and 2014 Finalist honors.

2. **Hall v. Hall**, No. 16-1150 (3d Cir., 679 F. App’x 142; cert. granted Sept. 28, 2017; argued Jan. 16, 2018). In *Gelboim v. Bank of America*, the Court held that in cases consolidated for multidistrict litigation, a judgment entered in a single case is an appealable final order. Is a judgment entered in a single case out of several consolidated in a single district under Federal Rule of Civil Procedure 42 similarly an appealable final order?

Decided Mar. 27, 2018 (584 U.S. ___). Third Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held that a case consolidated under Federal Rule of Civil Procedure 42(a) is immediately appealable upon an order disposing of the particular case regardless of whether any of the other consolidated cases remain pending. The Court based its holding largely on case law preceding the enactment of Rule 42(a) indicating that a judgment completely resolving one of several consolidated cases is an immediately appealable final decision. Some of that case law, for instance, indicates that courts must individually analyze each constituent case on appeal to ascertain whether jurisdiction exists, and that courts should resolve constituent cases with separate decrees or judgments. Because Rule 42(a) does not contain a definition of “consolidate,” that term “presumably carried forward the same meaning . . . ascribed to it” at the time of enactment. The Court rejected the contention that “consolidate” took on a new meaning in Rule 42(a), reasoning that nothing in the text of the rule or in the Advisory Committee Notes clearly indicates a new meaning. “[I]f Rule 42(a) were meant to transform consolidation into something sharply contrary to what it had been, we would have heard about it.”

3. **Ayestas v. Davis**, No. 16-6795 (5th Cir., 826 F.3d 214; cert. granted Apr. 3, 2017; argued Oct. 30, 2017). Whether 18 U.S.C. § 3599(f), which authorizes payment of fees for investigative, expert, or other services that are reasonably necessary for the representation of a criminal defendant, authorizes fees regarding an ineffective-assistance-of-counsel claim that state habeas counsel forfeited.

Decided Mar. 21, 2018 (584 U.S. ___). Fifth Circuit/Vacated and remanded. Justice Alito for a unanimous Court (Sotomayor, J., concurring, joined by Ginsburg, J.). The Court held that a district court’s denial of funding under 18 U.S.C. § 3599(f)—which allows district courts to authorize funding for “investigative, expert, or other services . . . reasonably necessary for the representation of the defendant”—is a judicial decision “subject to appellate review under the standard jurisdictional provisions,” and that the Fifth Circuit’s “substantial need” test for evaluating funding requests is improper. Petitioner moved for funding under § 3599(f) to develop his claim that his previous trial counsel and state habeas counsel were ineffective. The circuit court rejected the request, reasoning that funding applicants must show a “substantial need” for investigative or other services. Reversing, the Court first explained that the denial of petitioner’s funding request was a “judicial” decision, not an “administrative” decision, and thus the denial is reviewable under 28 U.S.C. §§ 1291 and 2253, which give the courts of appeals jurisdiction to review final “decisions” and “orders” of a district court. The “mere fact that a § 3599 funding request may



The preeminence of the group is underscored by its placement on *The National Law Journal's* 2017 Appellate Hot List, which recognized 20 firms that "posted hard-fought wins at the U.S. Supreme Court or in federal circuit courts."



2018
Benchmark Litigation in 2018 recognized Gibson Dunn as the Appellate Firm of the Year.



Law360 named Gibson Dunn a 2017 Appellate Practice Group of the Year.



U.S. News - Best Lawyers® "Best Law Firms" recognized Gibson Dunn as the 2018 Appellate Law Firm of the Year.

sometimes be made *ex parte*" hardly makes rulings on those requests "administrative." Nor does it matter that the chief judge of the circuit or another designated circuit judge—not a three-judge panel—must approve funding grants exceeding the generally applicable statutory cap of \$7,500, as "[n]othing in the Constitution ties Congress to the typical structure of appellate review established by statute." Finally, the circuit court erred in applying a "substantial need" standard when evaluating petitioner's funding request. That standard is arguably more demanding than the "reasonably necessary" standard set forth in § 3599(f). And although the difference between "reasonably necessary" and "substantial need" might be small, the circuit court exacerbated the difference by also requiring petitioner to present a viable constitutional claim as a prerequisite to funding.

4. ***Marinello v. United States*, No. 16-1144 (2d Cir., 839 F.3d 209; cert. granted June 27, 2017; argued Dec. 6, 2017). Whether a conviction under 26 U.S.C. § 7212(a) for corruptly endeavoring to obstruct or impede the due administration of the tax laws requires proof that the defendant acted with knowledge of a pending Internal Revenue Service action.**

Decided Mar. 21, 2018 (584 U.S. ___). Second Circuit/Reversed and remanded. Justice Breyer for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that, to secure a felony conviction under 26 U.S.C. § 7212(a)—which forbids "corruptly or by force or threats of force . . . obstruct[ing] or impeded[ing], or endeavor[ing] to obstruct or impede, the due administration" of the Tax Code—the Government must demonstrate that the defendant knew about a pending tax-related administrative proceeding or that such a proceeding was reasonably foreseeable when the defendant acted. Reversing the circuit court's conclusion that a defendant need not be aware of a particular action or investigation by the IRS to be convicted under § 7212(a), the Court explained that "the due administration" referenced in the statute means targeted proceedings like investigations or enforcement actions, not every conceivable task involved with administering the Tax Code. A broader reading of the statute would include essentially every action taken by the IRS, transforming the Tax Code's numerous misdemeanor provisions into felonies for obstruction, and "making the specific provisions redundant." Indeed, interpreted broadly, § 7212(a) "could apply to a person who pays a babysitter \$41 per week in cash without withholding taxes" or who "fails to keep donation receipts from every charity to which he or she contributes." If Congress had intended such actions to constitute felony tax obstruction, "it would have spoken with more clarity than it did in §7212(a)."

5. ***Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15-1439 (Cal. Ct. App., unreported adoption of oral ruling (No. CGC-14-538355, Oct. 23, 2015); CVSG Oct. 3, 2016; cert. supported May 23, 2017; cert. granted June 27, 2017; argued Nov. 28, 2017). Whether state courts lack subject-matter jurisdiction over "covered class actions"—within the meaning of Section 16 of the Securities Act of 1933, as amended by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p—that allege only claims under the 1933 Act.**

Decided Mar. 20, 2018 (583 U.S. ___). Cal. Ct. App./Affirmed. Justice Kagan for a unanimous Court. The Court held that the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) neither strips state courts of jurisdiction over class actions alleging only claims brought under the Securities Act of 1933 nor authorizes defendants to remove such actions to federal court. The Securities Act of 1933 grants federal and state courts concurrent jurisdiction over suits brought under that statute, and bars the removal of such suits to federal court. In 1995, Congress enacted the Private Securities Litigation Reform Act (“PSLRA”) to limit perceived abuses of the class-action vehicle in securities cases. To avoid PSLRA’s procedural reforms, which apply only in federal court, plaintiffs increasingly began filing securities class actions in state courts under state law. Congress responded by enacting SLUSA, which provides that state and federal courts have jurisdiction over securities claims “except as provided in section 77p . . . with respect to covered class actions.” 15 U.S.C. § 77v(a). Section 77p, in turn, prohibits in both state and federal court any “covered class action” that is “based upon the statutory or common law of *any State*.” *Id.* § 77p(b) (emphasis added). Investors in Cyan, Inc., filed a class action against the company in California state court asserting claims arising under only the Securities Act of 1933. Cyan argued that SLUSA stripped state courts of jurisdiction over *all* large securities class actions and therefore the state court lacked jurisdiction over the case. The Court disagreed, holding that “SLUSA’s text, read most straightforwardly, leaves in place state courts’ jurisdiction over 1933 Act claims, including when brought in class actions.” Although § 77p “bars certain securities class actions based on *state* law,” the section “says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law.” Cyan’s arguments based on legislative history and purpose came “nowhere close” to “overcom[ing] [SLUSA’s] clear statutory language.” Moreover, SLUSA authorizes removal to federal court of only “covered class actions,” which SLUSA defines as “*state-law* class actions alleging securities misconduct.” Class actions alleging only claims under the 1933 Act, by contrast, are not “covered” class actions and thus “remain subject to the 1933 Act’s removal ban.”

6. ***Texas v. New Mexico*, No. 220141 (Original Jurisdiction; CVSG Apr. 15, 2013; leave to file a bill of complaint supported Dec. 10, 2013; leave to file a bill of complaint granted Jan. 27, 2014; U.S. motion for leave to intervene filed Feb. 27, 2014; U.S. motion for leave to intervene granted Mar. 31, 2014; exceptions to Special Master Report set, on Oct. 10, 2017, for oral argument in due course; argued Jan. 8, 2018). Whether New Mexico is in violation of the Rio Grande Compact and the Rio Grande Project Act, which apportion water to Rio Grande Project beneficiaries.**

Decided Mar. 5, 2018 (583 U.S. ___). Justice Gorsuch for a unanimous Court. The Court held that the United States, as an intervenor, may pursue a claim against New Mexico for violations of the Rio Grande Compact (“Compact”). The Compact regulates the flow of the Rio Grande from Colorado to the Elephant Butte Reservoir (“Reservoir”) in New Mexico. The Reservoir was built after the United States and Mexico entered into a treaty in 1906, in which the federal government guaranteed the annual delivery of 60,000 acre-feet of water to Mexico. The federal government, in related contracts, also ensured downstream

water districts in New Mexico and Texas that they would receive a certain amount of water every year from the Reservoir's resources. In 2013, Texas sued New Mexico alleging violations of the Compact. The United States intervened, asserting that New Mexico's breaches of the Compact had harmed the federal government's interests. The Special Master appointed to consider this original-jurisdiction case recommended dismissal of the United States's complaint, reasoning that the Compact does not confer on the United States the power to enforce its terms. "[B]earing in mind [its] unique authority to mold original actions," the Court disagreed and held that the United States does have standing to intervene. Although "it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of" interstate agreements, four factors weigh in favor of allowing the intervention here. First, the Compact is "inextricably intertwined" with the duties of the federal government to ensure distribution of water to downstream water districts. Second, the United States is an "indispensable party" because it promised to deliver water to downstream water districts. Third, "a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations." Fourth, "the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection." Considered together, these four factors favor allowing the United States to intervene and pursue its Compact claims in this original action.

7. ***U.S. Bank, N.A. v. The Village at Lakeridge, LLC*, No. 15-1509 (9th Cir., 814 F.3d 993; CVSG Oct. 3, 2016; cert. opposed Feb. 13, 2017; cert. granted Mar. 27, 2017; argued Oct. 31, 2017). The bankruptcy code contains a non-exhaustive list of persons and entities that are considered "insiders." Creditors not described on that list that have comparably close relationships to the debtor can also be treated as insiders (a "non-statutory insider"). Before a Chapter 11 reorganization plan can be approved, at least one class of impaired claims must vote in favor of the plan, "without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(1). Is a bankruptcy court's determination that a claimholder is a non-statutory insider reviewable *de novo* or for clear error?**

Decided Mar. 5, 2018 (583 U.S. ____). Ninth Circuit/Affirmed. Justice Kagan for a unanimous Court (Kennedy, J., concurring; Sotomayor, J., concurring, joined by Kennedy, Thomas, and Gorsuch, J.J.). The Court held that clear-error review applies to a bankruptcy court's determination that a transaction was negotiated at arm's length and thus precludes a creditor from being deemed a non-statutory insider of the debtor. For a bankruptcy court to approve a so-called "cram down" restructuring plan, an impaired class of creditors must consent to the plan, but the consent of an "insider" creditor does not count. 11 U.S.C. § 1129(a). Although the Bankruptcy Code defines "insider," courts have devised tests for identifying non-statutory insiders who generally must have transacted with the debtor at arm's length. The arm's-length determination is a mixed question of law and fact, and so the applicable standard of review of that determination depends on whether making it "entails primarily legal or factual work." If the work is primarily legal, then *de-novo* review applies; if the work is primarily factual, then clear-error review applies. Here, because the definition of an arm's-

length transaction is “widely (universally?) understood,” and because “[p]recious little” legal work is required to apply the definition to a set of facts, clear-error review applies. Moreover, “appellate review of the arm’s-length issue—even if conducted *de novo*—will not much clarify legal principles or provide guidance to other courts resolving other disputes,” and thus the arm’s-length issue is best left to the bankruptcy court, subject only to review for clear error.

8. ***Jennings v. Rodriguez*, No. 15-1204 (9th Cir., 804 F.3d 1060; cert. granted June 20, 2016; argued Nov. 30, 2016; supplemental briefing ordered Dec. 15, 2016; restored for reargument June 26, 2017; argued Oct. 3, 2017). The Questions Presented are: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) as inadmissible aliens must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. (2) Whether aliens who are subject to mandatory detention under Section 1226(c) as criminals or terrorists must be afforded bond hearings, with the possibility of release, if detention lasts six months. (3) Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community. (4) Whether the length of the alien’s detention must be weighed in favor of release. (5) Whether new bond hearings must be afforded automatically every six months.**

Decided Feb. 27, 2018 (583 U.S. __). Ninth Circuit/Reversed and remanded. Justice Alito for a 5-3 Court (Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch, J., except as to footnote 6; Breyer, J., dissenting, joined by Ginsburg and Sotomayor, J.J.; Kagan, J., took no part in the decision). The Court held that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention. Section 1225(b) generally requires the Government to detain certain aliens seeking to enter the country, § 1226(a) permits the Attorney General to detain certain aliens already in the country pending the outcome of their removal proceedings, and § 1226(c) requires the Attorney General to “take into custody” aliens who fall into certain categories involving criminal offenses and terrorist activities. Concerned that the statutes as written might violate the Due Process Clause of the Fifth Amendment, the court of appeals relied on the canon of constitutional avoidance and held that § 1225(b) and § 1226(c) authorized detention for only six months, and construed § 1226(a) as requiring a bond hearing every six months to determine whether the Government had “clear and convincing evidence” to justify further detention. Reversing, the Court explained that the Ninth Circuit misapplied the canon of constitutional avoidance, which comes into play only when a statute is susceptible to more than one plausible reading. The Ninth Circuit’s reading was implausible. The plain language of § 1225(b) mandates detention of aliens until certain admission proceedings have concluded, and nothing in the statute “even hints” at a limit on the length of detention. The same is true for § 1226(c), but its language is “even clearer” because it states that the Attorney General “may release” an alien “only if” the Attorney General decides that certain conditions are met, meaning that if those

conditions are not met, the alien shall not be released. Likewise, § 1226(a) does not mention bond hearings every six months—let alone bond hearings where the Attorney General must justify continued detention by “clear and convincing evidence.” Accordingly, because the court of appeals “erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here,” the Court reversed and remanded the case for consideration of the “constitutional arguments on their merits.”

9. ***Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, No. 16-784 (7th Cir., 830 F.3d 690; cert. granted May 1, 2017; argued Nov. 6, 2017). Section 546(e) of the Bankruptcy Code prohibits a trustee from avoiding a transfer “by or to (or for the benefit of)” a financial institution. Does that safe harbor provision prohibit avoidance of such a transfer even if the institution has a beneficial interest in the transferred property?**

Decided Feb. 27, 2018 (583 U.S. ___). Seventh Circuit/Affirmed and remanded. Justice Sotomayor for a unanimous Court. The Court held that in determining whether a securities transaction falls within the safe harbor of 11 U.S.C. § 546(e) and is therefore exempt from a bankruptcy trustee’s power to avoid transfers under § 548(a), “the only relevant transfer . . . is the transfer that the trustee seeks to avoid,” not the component parts of that transfer. Section 548(a) allows a bankruptcy trustee to set aside and recover certain payments that a debtor made, including fraudulent transfers “of an interest of the debtor in property.” Section 546(e), in turn, contains a securities safe harbor that exempts from a trustee’s avoidance power any “settlement payment” made “in connection with a securities contract” if the payment is “by or to (or for the benefit of)” a financial institution. At issue was an allegedly fraudulent transfer in which the debtor paid \$55 million for its competitor’s stock. As part of the transaction, the debtor directed an offshore bank to transfer funds to another bank, which acted as an escrow agent and eventually transferred the funds to the competitor’s shareholders. The debtor, competitor, and competitor’s shareholders were not financial institutions. Thus, the two financial institutions involved in the transfer (the offshore bank and the escrow agent) acted as mere conduits that helped transfer the funds. The trustee sought to claw back the funds under § 548(a). One of the shareholders argued that the securities safe harbor of § 546(e) barred the claw back because the overarching transfer’s component parts—the transfers from the offshore bank to the escrow agent, and from the escrow agent to the competitor’s shareholders—involved “settlement payment[s]” under a “securities contract” “made by or to (or for the benefit of)” financial institutions. The Court disagreed, interpreting the Code’s text and structure to mean that the securities safe harbor of § 546(e) did not apply because the trustee was attempting to avoid the overarching transfer from the debtor to its competitor’s shareholders. That the parties used financial institutions as intermediaries did not bring that overarching transaction within the securities safe harbor. The bankruptcy trustee could therefore avoid the transaction under § 548(a).

10. ***Patchak v. Zinke*, No. 16-498 (D.C. Cir., 828 F.3d 995; cert. granted May 1, 2017; argued Nov. 7, 2017). While petitioner’s suit was pending in district court, Congress enacted a statute that provides that any action (even a**

pending action) relating to the land at issue “shall be promptly dismissed.” **Pub. L. No. 113-179, § 2. Does that statute violate the Constitution’s separation of powers principles, even though the statute does not direct that the court make any findings or issue any judgment on the merits?**

Decided Feb. 27, 2018 (583 U.S. __). D.C. Circuit/Affirmed. Justice Thomas for a 6-3 Court (Breyer, J., concurring; Ginsburg, J., concurring in the judgment, joined by Sotomayor, J.; Sotomayor, J., concurring in the judgment; Roberts, C.J., dissenting, joined by Kennedy and Gorsuch, J.J.). The Court held that section 2(b) of the Gun Lake Act—which provides that an action (including a pending action) relating to certain land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians “shall not be filed or maintained in a Federal court and shall be promptly dismissed”—does not violate the Constitution’s separation of powers. The plurality reasoned that Congress violates Article III when it exercises judicial power by compelling findings or results under old law, but Congress does not violate Article III when it exercises legislative power by changing the law. Section 2(b) permissibly changed the law by stripping federal courts of jurisdiction to hear certain actions. The Madisonian Compromise resolved the Framers’ disagreement about creating lower federal courts by leaving their creation to Congress and permitting Congress to limit the jurisdiction of the courts it creates. Thus, Congress exercises a valid legislative power where, as here, it strips lower federal courts of jurisdiction over certain disputes.

11. ***Class v. United States*, No. 16-424 (D.C. Cir., op. unpublished; cert. granted Feb. 21, 2017; argued Oct. 4, 2017). Whether a guilty plea inherently waives a defendant’s right to challenge the constitutionality of his statute of conviction.**

Decided Feb. 21, 2018 (583 U.S. __). D.C. Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Alito, J., dissenting, joined by Kennedy and Thomas, J.J.). The Court held that a guilty plea, standing alone, does not bar a criminal defendant from challenging the statute of conviction as unconstitutional on direct appeal. Petitioner pleaded guilty to possessing firearms on the grounds of the U.S. Capitol Building. The written plea agreement said nothing about waiving the right to challenge on direct appeal the constitutionality of the statute of conviction, and before entering the plea, petitioner asked the district court to dismiss the indictment on Second Amendment grounds. After entering the plea, petitioner sought to raise his constitutional claim on appeal, but the circuit court held that petitioner had waived that claim by pleading guilty. Reversing, the Court cited *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), and reasoned that constitutional challenges going to “the very power of the State to prosecute the defendant” are not waived by a guilty plea alone. Contrary to other claims concerning procedural or non-substantive errors that may be cured by re-prosecution, a challenge that the Government lacks the power to prosecute the defendant’s conduct does not conflict with an admission by the defendant that he committed the acts charged in the indictment. Thus, a guilty plea alone does not waive a challenge to whether the Government is constitutionally permitted to punish that conduct.

12. ***Digital Realty Trust, Inc. v. Somers*, No. 16-1276 (9th Cir., 850 F.3d 1045; cert. granted June 26, 2017; argued Nov. 28, 2017).** Whether the anti-retaliation provision for “whistleblowers” in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act’s statutory definition of “whistleblower.”

Decided Feb. 21, 2018 (583 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court (Sotomayor, J., concurring, joined by Breyer, J.; Thomas, J., concurring in part and concurring in the judgment, joined by Alito and Gorsuch, J.J.). The Court held that to sue for a violation of Dodd-Frank’s anti-retaliation provision, 15 U.S.C. § 78u-6(h)(1)(A), a whistleblower must first report a violation of the securities laws to the SEC. Section 78u-6(a)(6) defines “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission,” and further provides that this definition “shall apply” to “this section”—that is, throughout § 78u-6. That clear statutory definition of “whistleblower” ends the inquiry even if the definition might vary from the “term’s ordinary meaning.” Because Congress spoke clearly and conclusively, the SEC’s Rule 21F-2—which embraces a definition of “whistleblower” that allows persons to sue under the anti-retaliation provision even if they have *not* first provided information to the SEC—was not entitled to *Chevron* deference.

13. ***Murphy v. Smith*, No. 16-1067 (7th Cir., 844 F.3d 653; cert. granted Aug. 25, 2017; argued Dec. 6, 2017).** The Prison Litigation Reform Act provides that “a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.” 42 U.S.C. § 1997e(d)(2). Does the phrase “not to exceed 25 percent” mean any amount up to 25 percent or exactly 25 percent?

Decided Feb. 21, 2018 (583 U.S. ___). Seventh Circuit/Affirmed. Justice Gorsuch for a 5-4 Court (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that when awarding attorney’s fees under 42 U.S.C. § 1997e(d)(2)—which provides that “a portion of [a prevailing prisoner’s civil rights] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant”—the district court must first apply “as much of the judgment as necessary to satisfy the fee award, without [] exceeding the 25% cap,” *before* shifting the burden to the defendant to satisfy the remainder of the fee award. Petitioner was awarded a judgment in his federal civil rights suit, including an award of attorney’s fees. The district court ordered petitioner to pay 10% of his judgment toward the fee award, but the Seventh Circuit reversed, holding that § 1997e(d)(2) required petitioner to pay 25% of his judgment toward the fee award before demanding payment from the defendants. The Court agreed. Emphasizing the plain meaning of “shall” and “satisfy” in § 1997e(d)(2), the Court explained that the statute imposes a nondiscretionary duty on district courts to (1) “apply judgment funds toward the fee award (2) with the *purpose* of (3) *fully discharging* the fee award.” The statute’s mandatory language stands in contrast to language in other fee-shifting statutes that grant district courts discretion to award fees. If Congress had intended to grant district



Gibson Dunn
Counsel for
Amicus Curiae
Victims of
Terrorism

courts discretion in determining what portion of the fee award the prisoner must pay, it would not have “omit[ted] all the words that afforded discretion . . . and then replace[d] those old discretionary words with new mandatory ones.”

14. ***Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017; argued Dec. 4, 2017).** Victims of a 1997 suicide bombing in Jerusalem seek to collect on a \$71.5 million default judgment against the Islamic Republic of Iran as a state sponsor of terrorism. Plaintiffs sought to attach and execute on collections of ancient Persian artifacts located in Chicago museums. A foreign state’s property is immune from attachment and execution with few exceptions, and the Seventh Circuit rejected plaintiffs’ argument that the Foreign Sovereign Immunities Act provides a freestanding terrorism exception to execution immunity. Does 28 U.S.C. § 1610(g) provide a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under Section 1610?

Decided Feb. 21, 2018 (583 U.S. ___). Seventh Circuit/Affirmed. Justice Sotomayor for a unanimous Court (Kagan, J., took no part in the consideration or decision). The Court held that Section 1610(g) of the Foreign Sovereign Immunities Act of 1976 (“FSIA”) does not provide an independent basis for parties holding a judgment against a foreign state to attach and execute that judgment against the foreign state’s property. FSIA grants foreign states immunity from suit in the United States and grants their property immunity from attachment and execution in satisfaction of judgments against them, with some exceptions. Section 1610(g)(1) is one such exception. It provides that certain property will be “subject to attachment in aid of execution, and execution, upon [a] judgment [against a foreign state] as provided *in this section*.” 28 U.S.C. § 1610(g)(1) (emphasis added). The “most natural reading” of “this section” in § 1610(g)(1) refers to § 1610 as a whole. Thus, the immunity exception in § 1610 does not extend to the judgment held by petitioner against the Islamic Republic of Iran because petitioner acquired that judgment under § 1605A—a provision that permits suit against foreign state sponsors of terrorism. This reading of § 1610(g)(1) is consistent with the interpretive canon that a statute should be construed to effectuate all provisions, as a contrary ruling would render superfluous express references to § 1605A judgements in other of § 1610’s immunity-abrogating provisions.

15. ***Artis v. District of Columbia*, No. 16-460 (D.C. Ct. App., 135 A.3d 334; cert. granted Feb. 27, 2017; argued Nov. 1, 2017).** Whether 28 U.S.C. § 1367, the supplemental jurisdiction statute, tolls the period of limitations to provide a litigant whose claim is dismissed in federal court with 30 days to refile her state-law claim in state court free of an otherwise applicable limitations bar; or whether it stops the clock on the state statute of limitations until federal dismissal, then adds 30 days, so that she has 30 days plus the remaining time that she had before filing in federal court.

Decided Jan. 22, 2018 (583 U.S. __). D.C. Ct. App./Reversed and remanded. Justice Ginsburg for a 5-4 Court (Gorsuch, J., dissenting, joined by Kennedy, Thomas, and Alito, J.J.). The Court held that 28 U.S.C. § 1367(d)'s instruction to "toll" a state limitations period "means to hold it in abeyance, *i.e.*, to stop the clock." Federal courts may exercise supplemental jurisdiction over state claims that "are so related to claims . . . within [federal court competence] that they form part of the same case or controversy." 28 U.S.C. § 1367(a). When federal courts dismiss jurisdiction-conferring claims, they ordinarily decline to continue exercising supplemental jurisdiction and dismiss the related state claims. Section 1367(d) provides that the "period of limitations for" refiling those state claims in state court "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The word "toll" means that § 1367(d) pauses the clock on the limitations period while the state claims are pending in federal court. When the federal court dismisses the state claims, "the tolling period starts running again," "picking up where it left off." The Court rejected the argument that § 1367(d) exceeds Congress's enumerated powers and undermines principles of federalism, reasoning that the statute is connected to Congress's "authority over the federal courts" and that the harm to federalism "may be more theoretical than real."

16. ***District of Columbia v. Wesby*, No. 15-1485 (D.C. Cir., 765 F.3d 13; cert. granted Jan. 19, 2017; argued Oct. 4, 2017).** Police officers found late-night partygoers inside a vacant home belonging to someone else. After giving conflicting explanations for their presence, some partygoers claimed that a person known as "Peaches," who was not at the party, had invited them. The lawful owner told officers that he had not authorized entry by anyone. The officers arrested the partygoers for unlawful entry in violation of D.C. Code § 22-3302 (Supp. 2008). **The Questions Presented are: (1) Whether police officers had probable cause to arrest respondents for unlawful entry. (2) Whether, even if the officers lacked probable cause to arrest, they were entitled to qualified immunity because the law was not clearly established.**

Decided Jan. 22, 2018 (583 U.S. __). D.C. Circuit/Reversed and remanded. Justice Thomas for a unanimous Court (Sotomayor, J., concurring in part and concurring in the judgement; Ginsburg, J., concurring in the judgement in part). The Court held that, considering the totality of the circumstances, police officers had probable cause to arrest raucous late-night partygoers in a vacant house for unlawful entry and, in any event, the officers were entitled to qualified immunity. The circuit court erred in viewing each fact "in isolation rather than as a factor in the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003). It further erred in dismissing outright any circumstances that were susceptible of innocent explanation, rather than asking whether a reasonable officer could conclude that there was a "substantial chance of criminal activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). The officers could infer that the partygoers knew the party was unauthorized because, among other reasons, the partygoers scattered when the officers arrived, provided implausible answers to questioning, and were partaking in activities that most homeowners would not allow, including leaving beer bottles and cups of liquor on the floor. Regardless, the officers are entitled to qualified immunity because, even if they lacked

probable cause to make the arrests, the unlawfulness of the officers' conduct was not "clearly established at the time." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). The circuit court and the partygoers failed to identify any precedent from the Court finding a Fourth Amendment violation under similar circumstances, and this is not an "obvious case" where a "body of relevant case law" is not required to pierce the officers' qualified immunity. *White v. Pauly*, 580 U.S. ___ (2017) (slip op. at 6).

17. ***Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299 (6th Cir., 817 F.3d 261; cert. granted Jan. 13, 2017; argued Oct. 11, 2017). The courts of appeals have jurisdiction under 33 U.S.C. § 1369(b)(1) to review agency actions "in issuing or denying any permit" under Section 1342 of the Clean Water Act. Do courts of appeals have jurisdiction under that provision to review the Clean Water Rule, which defines the scope of the term "waters of the United States" in the Clean Water Act, 33 U.S.C. § 1251, even though it does not "issu[e] or den[y] any permit?"**

Decided Jan. 22, 2018 (583 U.S. ___). Sixth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that federal district courts, not federal courts of appeals, have exclusive original jurisdiction to consider challenges to the Environmental Protection Agency's and the Army Corps of Engineers' jointly promulgated rule defining the "Waters of the United States" under the Clean Water Act (the "WOTUS Rule"). Shortly after the EPA and the Corps issued the WOTUS Rule, challenges to the WOTUS Rule arose across the country, with some challenges brought under the Administrative Procedure Act in district courts, and others brought under 33 U.S.C. § 1369(b)(1) in the courts of appeals. The Sixth Circuit held that the courts of appeals have exclusive jurisdiction under § 1369(b)(1), but the Supreme Court reversed. The Court rejected the Government's contention that the WOTUS Rule was an action under § 1369(b)(1)(E) "approving or promulgating any effluent limitation or other limitation." By its plain terms, the WOTUS Rule is not an "effluent limitation" (*i.e.*, a "restriction . . . on quantities, rates, [or] concentrations" of certain pollutants" discharged into navigable waters). Rather, the WOTUS Rule is "a regulatory definition" of the term "Waters of the United States," and itself "imposes no enforceable duty" on the "private sector." Nor is the WOTUS Rule an "other limitation" under § 1369(b)(1)(E) because "other limitation," in context, refers to limitations "similar in kind to an 'effluent limitation'"—*i.e.*, substantive limitations on the discharge of pollutants, not a rule governing the geographic scope of such limitations. The Court also rejected the contention that § 369(b)(1)(F), which covers an EPA decision "issuing or denying any permit under section 1342," provides exclusive jurisdiction in the courts of appeals, explaining that the WOTUS Rule is "unambiguous[ly]" not encompassed by subparagraph (F) because the decision to define the broader geographic scope of *which* waters require a permit is not a decision to issue or deny an actual permit. Finally, the Court rejected the Government's "litany of extratextual considerations that [the Government] believe[d] support[ed] direct circuit-court review of the WOTUS Rule," reasoning that policy considerations such as uniformity and efficiency of review could "not obscure what the statutory language makes clear:



Subparagraphs (E) and (F) do not grant courts of appeals exclusive jurisdiction to review the WOTUS Rule.”

18. ***Hamer v. Neighborhood Hous. Servs. of Chi.*, No. 16-658 (7th Cir., 835 F.3d 761; cert. granted Feb. 27, 2017; argued Oct. 10, 2017).** Appellants can seek extensions of the time within which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(C), but “[n]o extension . . . may exceed 30 days.” Even so, the district court granted petitioner a 60-day extension, and petitioner filed her appeal near the end of that period. Does Rule 4(a)(5)(C) deprive courts of appeals of jurisdiction to hear appeals filed after the 30-day extension period, or is the Rule a non-jurisdictional claim-processing rule that is subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine?

Decided Nov. 8, 2017 (583 U.S. ___). Seventh Circuit/Vacated and remanded. Justice Ginsburg for a unanimous Court. The Court held that the 30-day limit on extensions of time to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(5)(C) is not jurisdictional. “If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional.” But if the time prescription appears in a court rule, it “fits within the claim-processing category” and is not jurisdictional. Thus, because Rule 4(a)(5)(C) is not a statute, it is not jurisdictional, and the Seventh Circuit erred in dismissing petitioner’s appeal for lack of jurisdiction because he filed his notice of appeal within the court-ordered 60-day extension of time.

Cases To Be Decided

1. ***Epic Sys. Corp. v. Lewis*, No. 16-285 (7th Cir., 823 F.3d 1147; consolidated with *Ernst & Young LLP v. Morris*, No. 16-300 and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307; cert. granted Jan. 13, 2017; argued Oct. 2, 2017).** Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act preventing employers from limiting employees’ rights to engage in “concerted activities” in pursuit of their “mutual aid or protection.” 29 U.S.C. §§ 102, 157.
2. ***Sessions v. Dimaya*, No. 15-1498 (9th Cir., 803 F.3d 1110; cert. granted Sept. 29, 2016; argued Jan. 17, 2017; restored for reargument June 26, 2017; argued Oct. 2, 2017).** Whether 18 U.S.C. § 16(b) (defining a “crime of violence”), as incorporated into the Immigration and Nationality Act’s provisions governing an alien’s removal from the United States, is unconstitutionally vague.
3. ***Gill v. Whitford*, No. 16-1161 (W.D. Wis., 218 F. Supp. 3d 837; jurisdiction postponed June 19, 2017; argued Oct. 3, 2017).** The Questions Presented are: (1) Whether district courts have the authority to entertain statewide



challenges to a State’s redistricting plan, instead of requiring a district-by-district analysis. (2) Whether Wisconsin’s redistricting plan is an impermissible partisan gerrymander. (3) Whether the district court violated *Vieth v. Jubelirer* by adopting a version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*. (4) Whether defendants are entitled to present additional evidence showing that they would have prevailed under the district court’s test, which the court announced only after the record had closed. (5) Whether partisan-gerrymandering claims are justiciable.

4. *Jesner v. Arab Bank, PLC*, No. 16-499 (2d Cir., 822 F.3d 34; cert. granted Apr. 3, 2017; argued Oct. 11, 2017). Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.
5. *Wilson v. Sellers*, No. 16-6855 (11th Cir., 834 F.3d 1227; cert. granted Feb. 27, 2017; argued Oct. 30, 2017). A federal court sitting in habeas reviews the last state-court decision on the merits of a petitioner’s claims under the deferential standard in 28 U.S.C. § 2254(d). In *Harrington v. Richter*, this Court held that courts must apply this standard even when the state court does not explain its decision, because § 2254(d) requires the federal habeas court to review state courts’ “decision[s],” not their reasoning. But if the last state court’s summary merits decision was preceded by a lower court’s opinion, does the federal habeas court “look through” the last state-court merits decision and review the lower state court’s reasoning?
6. *Oil States Energy Servs. LLC v. Greene’s Energy Grp., LLC*, No. 16-712 (Fed. Cir., 639 F. App’x 639; cert. granted June 12, 2017; argued Nov. 27, 2017). Whether inter partes review, an adversarial process used by the Patent and Trademark Office to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.
7. *SAS Inst. Inc. v. Lee*, No. 16-969 (Fed. Cir., 825 F.3d 1341; cert. granted May 22, 2017; argued Nov. 27, 2017). Inter partes review is an adversarial process used by the Patent and Trademark Office to analyze the validity of existing patents. Does 35 U.S.C. § 318(a), which provides that in an inter partes review the Patent Trial and Appeal Board “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner,” require the Board to issue a final written decision as to every claim challenged by the petitioner, or does it allow the Board to address only some of the patent claims challenged by the petitioner?
8. *Carpenter v. United States*, No. 16-402 (6th Cir., 819 F.3d 880; cert. granted June 5, 2017; argued Nov. 29, 2017). Whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of a cell-phone user over the course of 127 days is permitted by the Fourth Amendment.



Gibson Dunn
Counsel for
Amici Curiae
Dell, Inc., et al.



Gibson Dunn
Counsel for
Petitioner



Gibson Dunn
Counsel for
Amicus Curiae
National
Association
for Public
Defense

9. *Christie v. NCAA*, No. 16-476 (3d Cir., 852 F.3d 309; CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477; argued Dec. 4, 2017). The Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. § 3701 *et seq.*, prohibits States from “authoriz[ing] by law” sports-wagering schemes. 28 U.S.C. § 3702(1). PASPA also prohibits private persons from operating sports-wagering schemes pursuant to state law. 28 U.S.C. § 3702(2). New Jersey repealed certain of its prohibitions on sports wagering in specified venues in the State, but the Third Circuit held that New Jersey’s repeal was unlawful under PASPA. Does PASPA impermissibly commandeer the regulatory power of States, in contravention of *New York v. United States*, by dictating the extent to which States must maintain their prohibitions on sports wagering?
10. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, No. 16-111 (Colo. App., 370 P.3d 272; cert. granted June 26, 2017; argued Dec. 5, 2017). Colorado’s public accommodations law forbids sexual-orientation discrimination by businesses engaged in sales to the public. Does that law impermissibly compel speech when it is applied to a commercial bakery that refuses to sell a wedding cake of any kind to any same-sex couple?
11. *Florida v. Georgia*, No. 22O142 (Original Jurisdiction; CVSG Mar. 3, 2014; leave to file a bill of complaint opposed Sept. 18, 2014; leave to file a bill of complaint granted Nov. 3, 2014; exceptions to Special Master Report set, on Oct. 10, 2017, for oral argument in due course; argued Jan. 8, 2018). Whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.
12. *Byrd v. United States*, No. 16-1371 (3d Cir., 679 F. App’x 146; cert. granted Sept. 28, 2017; argued Jan. 9, 2018). A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter’s permission to drive the car but is not listed as an authorized driver on the rental agreement?
13. *Collins v. Virginia*, No. 16-1027 (Va., 790 S.E.2d 611; cert. granted Sept. 28, 2017; argued Jan. 9, 2018). Whether the Fourth Amendment’s automobile exception permits a police officer—uninvited and without a warrant—to enter private property, approach a house, and search a vehicle parked a few feet from the house.
14. *Husted, Ohio Sec. of State v. Randolph Inst.*, No. 16-980 (6th Cir., 838 F.3d 699; cert. granted May 30, 2017; argued Jan. 10, 2018). The National Voter Registration Act of 1993 requires States to maintain accurate voter rolls by



making a reasonable effort to remove ineligible voters, but that maintenance “shall not result in the removal of the name of any person . . . by reason of the person’s failure to vote.” 52 U.S.C. § 20507(b)(2). In the Help America Vote Act of 2002, Congress clarified that States are not prohibited from removing individuals from the rolls if they fail to respond to an address-verification notice and then fail to vote during two federal elections. Ohio sends address-verification notices to registered voters who have not voted or otherwise contacted election officials for two years. Does that practice violate the National Voter Registration Act?

15. *Dalmazzi v. United States*, No. 16-961 (C.A.A.F., 76 M.J. 1; consolidated with *Cox v. United States*, No. 16-1017 and *Ortiz v. United States*, No. 16-1423; cert. granted Sept. 28, 2017; argued Jan. 16, 2018). The Questions Presented are: (1) Whether petitioner’s challenge to a judge’s continued service on the U.S. Air Force Court of Criminal Appeals (“AFCCA”) after he was nominated and confirmed to the Article I U.S. Court of Military Commission Review (“CMCR”) was moot because his judicial commission was not signed until after the AFCCA decided her case, even though she moved for reconsideration after his commission was signed. (2) Whether the judge’s service on the CMCR disqualified him from continuing to serve on the AFCCA because 10 U.S.C. § 973(b)(2)(A)(ii) requires active-duty military officers to obtain congressional authorization before holding a “civil office,” including positions that require “an appointment by the President by and with the advice and consent of the Senate.” (3) Whether the judge’s simultaneous service on the CMCR and the AFCCA violated the Appointments Clause. (4) Whether the Court has jurisdiction under 28 U.S.C. § 1259(3) to review this case, *Cox v. United States*, and *Ortiz v. United States*.
16. *McCoy v. Louisiana*, No. 16-8255 (La., 218 So.3d 535; cert. granted Sept. 28, 2017; argued Jan. 17, 2018). McCoy was charged with first-degree murder. He maintained his innocence to his attorney, Larry English, and opposed English’s proposal to concede that he was guilty in hopes of being spared the death penalty. A few days before trial, the trial court denied his request to fire English and represent himself. During trial, and over McCoy’s interruptions, English conceded McCoy’s guilt, and McCoy was convicted and sentenced to death. Did English’s concession of guilt constitute ineffective assistance of counsel?
17. *Currier v. Virginia*, No. 16-1348 (Va., 798 S.E.2d 164; cert. granted Oct. 16, 2017; argued Feb. 20, 2018). The Double Jeopardy Clause’s issue-preclusion component precludes a future criminal trial if a defendant is acquitted in an earlier trial and he establishes that the jury necessarily determined an issue of ultimate fact that the prosecution would need to prove at the second trial. Does a defendant who consents to the severance of multiple charges into sequential trials waive the issue-preclusive effect of an acquittal?
18. *City of Hays, Kansas v. Vogt*, No. 16-1495 (10th Cir., 844 F.3d 1235; cert. granted Sept. 28, 2017; argued Feb. 20, 2018). Is the Fifth Amendment violated when the prosecution uses compelled statements in pre-trial



Gibson Dunn
Counsel for
Amicus Curiae
Cato Institute

proceedings, such as probable cause hearings, or is it violated only when such statements are used at a criminal trial?

19. *Rosales-Mireles v. United States*, No. 16-9493 (5th Cir., 850 F.3d 246; cert. granted Sept. 28, 2017; argued Feb. 21, 2018). Only plain errors that “seriously affect the fairness, integrity or public reputation of judicial proceedings” call for a court of appeals to exercise its discretion to remedy the error. What types of plain error meet this standard?
20. *Dahda v. United States*, No. 17-43 (10th Cir., 852 F.3d 1281; cert. granted Oct. 16, 2017; argued Feb. 21, 2018). Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, authorizes a judge to issue a wiretap order to intercept communications within the court’s territorial jurisdiction and provides for the suppression of communications intercepted pursuant to a facially insufficient order. Should communications intercepted pursuant to a wiretap order that allowed wiretaps outside of the court’s jurisdiction be suppressed, even though the communications at issue were intercepted within the court’s jurisdiction?
21. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, No. 16-1466 (7th Cir., 851 F.3d 746; cert. granted Sept. 28, 2017; argued Feb. 26, 2018). In *Abood v. Detroit Board of Education*, the Court held that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. Should *Abood* be overruled and public-sector agency fee arrangements be declared unconstitutional under the First Amendment?
22. *Ohio v. Am. Express Co.*, No. 16-1454 (2d Cir., 838 F.3d 179; cert. granted Oct. 16, 2017; argued Feb. 26, 2018). Nearly a third of all merchants who accept credit cards do not accept Amex, but those that do agree not to discriminate against Amex cards by steering cardholders to another card (for example, one that charges the merchant lower fees) at the point of sale. Do those anti-steering provisions violate Section 1 of the Sherman Act under the “rule of reason”? In particular, must the Government show both that the provisions have anticompetitive pricing effects on the merchant side and that those effects outweigh the benefits to cardholders?
23. *United States v. Microsoft Corp.*, No. 17-2 (2d Cir., 829 F.3d 197; cert. granted Oct. 16, 2017; argued Feb. 27, 2018). The Stored Communication Act, 18 U.S.C. § 2701 *et seq.*, bars providers of electronic communications services from voluntarily “divulg[ing]” the contents of stored electronic communications without the customer’s permission. Federal, state, and local law enforcement officials may obtain search warrants under the Act to compel disclosure of the contents of stored communications. Must a United States provider of email services comply with a warrant seeking the disclosure of stored communications even if they are stored outside of the United States?

24. *Lozman v. City of Riviera Beach, Florida*, No. 17-21 (11th Cir., 681 F. App'x 746; cert. granted Nov. 13, 2017; argued Feb. 27, 2018). After Lozman was arrested at a city council meeting, he asserted a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983; a jury later found that probable cause existed for the arrest. In *Hartman v. Moore*, the Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause similarly defeat a First Amendment retaliatory-arrest claim?
25. *Minn. Voters Alliance v. Mansky*, No. 16-1435 (8th Cir., 849 F.3d 749; cert. granted Nov. 13, 2017; argued Feb. 28, 2018). A Minnesota statute prohibits individuals who enter a polling place on an election day from wearing “a political badge, political button, or other political insignia” while inside. Is that statute facially overbroad under the First Amendment?
26. *Sveen v. Melin*, No. 16-1432 (8th Cir., 853 F.3d 410; cert. granted Dec. 8, 2017; argued Mar. 19, 2018). A Minnesota statute provides that the designation of a spouse as a life insurance beneficiary is automatically revoked upon divorce. Does applying that statute to a life insurance policy signed before the statute was enacted violate the Contracts Clause?
27. *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (9th Cir., 839 F.3d 823; cert. granted Nov. 13, 2017; argued Mar. 20, 2018). The California Reproductive FACT Act requires licensed medical clinics, as well as unlicensed facilities providing services such as pregnancy testing and ultrasound imaging, to notify patients that information about state-funded prenatal care, family planning, and abortion services is available through a county health department phone number. The Court granted certiorari on the following question: “Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.”
28. *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387 (Wash., 389 P.3d 569; cert. granted Dec. 8, 2017; argued Mar. 21, 2018). In a property dispute, plaintiffs filed a quiet title action against the tribe. Does the state court have jurisdiction, even though the tribe did not waive sovereign immunity and Congress has not limited it, because it is exercising jurisdiction over the property, not the tribe?
29. *United States v. Sanchez-Gomez*, No. 17-312 (9th Cir., 859 F.3d 649; cert. granted Dec. 8, 2017; argued Mar. 26, 2018). The U.S. Marshals Service for the Southern District of California, with approval from the district judges in that district, implemented a policy of shackling every pre-trial detainee. Did the Ninth Circuit have jurisdiction to review an interlocutory challenge to that policy, notwithstanding its recognition that respondents' individual claims were moot?



Gibson Dunn
Counsel for
Amici Curiae
U.S. Chamber
of Commerce
and Retail
Litigation
Center

30. *China Agritech, Inc. v. Resh*, No. 17-432 (9th Cir., 857 F.3d 994; cert. granted Dec. 8, 2017; argued Mar. 26, 2018). In *American Pipe & Construction Co. v. Utah*, the Court held that the timely filing of a defective class action suspends the applicable statute of limitations as to the individual claims of purported class members. Two defective class actions were filed within the limitations period, and absent members of the rejected classes filed a third class action outside of the limitations period. Does *American Pipe* tolling permit the previously absent class members—whose individual claims are timely under *American Pipe*—to file a subsequent class action outside of the limitations period on behalf of all purported class members whose claims are also timely under *American Pipe*?
31. *Hughes v. United States*, No. 17-155 (11th Cir., 849 F.3d 1008; cert. granted Dec. 8, 2017; argued Mar. 27, 2018). In *Freeman v. United States*, the Court issued a 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. Under *Marks v. United States*, the holding of a 4-1-4 case is the position taken by the Justices who concurred in the judgment on the narrowest grounds. But in *Freeman*, the four-Justice plurality and Justice Sotomayor’s concurrence shared no common rationale. Does the four-Justice plurality’s opinion or Justice Sotomayor’s opinion control?
32. *Koons v. United States*, No. 17-5716 (8th Cir., 850 F.3d 973; cert. granted Dec. 8, 2017; argued Mar. 27, 2018). Koons was subject to a statutory mandatory minimum sentence, but he substantially assisted the government and received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e). Subsequently, the Sentencing Commission retroactively lowered the advisory Sentencing Guidelines range that would have applied absent the statutory mandatory minimum. Under 18 U.S.C. § 3582(c)(2), which allows a district judge to reduce a sentence if the inmate was sentenced “based on a sentencing range that has subsequently been lowered by the” Sentencing Commission, is he eligible for a further sentence reduction?
33. *Benisek v. Lamone*, No. 17-333 (D. Md., 2017 WL 3642928; jurisdiction postponed Dec. 8, 2017; argued Mar. 28, 2018). Republican voters filed a First Amendment retaliation challenge to Maryland’s 2011 redistricting statute, arguing that it constituted a partisan gerrymander. The Questions Presented are: (1) Whether, to establish a concrete injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district. (2) Whether the *Mount Healthy City Board of Education v. Doyle* burden-shifting framework applies to First Amendment retaliation challenges to partisan gerrymanders. (3) Whether the record below permits a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in 2012, 2014, or 2016.



Gibson Dunn
Counsel for
Amicus Curiae
Freedom Partners
Chamber of
Commerce



Gibson Dunn
Counsel for
Petitioner

34. *WesternGeco LLC v. ION Geophysical Corp.*, No. 16-1011 (Fed. Cir., 837 F.3d 1358; CVSG May 30, 2017; cert. supported Dec. 6, 2017; cert. granted Jan. 12, 2018; argument scheduled Apr. 16, 2018). Under 35 U.S.C. § 271(f), it is an act of patent infringement to supply “components of a patented invention,” “from the United States,” knowing or intending that the components be combined “outside of the United States,” in a manner that “would infringe the patent if such combination occurred within the United States.” Are lost profits from prohibited combinations occurring outside of the United States categorically unavailable in cases where patent infringement is proven?
35. *Wis. Cent. Ltd. v. United States*, No. 17-530 (7th Cir., 856 F.3d 490; cert. granted Jan. 12, 2018; argument scheduled Apr. 16, 2018). The Railroad Retirement Tax Act defines taxable “compensation” as “any form of money remuneration paid to an individual for services rendered as an employee.” 26 U.S.C. § 3231(e)(1). The Question Presented is whether stock that a railroad transfers to its employees constitutes “money remuneration”—and thus taxable compensation—under the Act.
36. *South Dakota v. Wayfair, Inc.*, No. 17-494 (S.D., 901 N.W.2d 754; cert. granted Jan. 12, 2018; argument scheduled Apr. 17, 2018). In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court held that the dormant commerce clause prohibits states from requiring retailers to collect sales taxes on sales made to state residents unless the retailer is physically present in the state. Should *Quill* be overruled?
37. *Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215 (11th Cir., 848 F.3d 953; CVSG June 19, 2017; cert. supported Nov. 9, 2017; cert. granted Jan. 12, 2018; argument scheduled Apr. 17, 2018). Whether (and, if so, when) a statement concerning a specific asset of a debtor can be a “statement respecting the debtor’s . . . financial condition” within Section 523(a)(2) of the Bankruptcy Code, preventing a debt obtained by that statement from being nondischargeable.
38. *Washington v. United States*, No. 17-269 (9th Cir., 853 F.3d 946; cert. granted Jan. 12, 2018; argument scheduled Apr. 18, 2018). Whether road culverts that restrict salmon passage violate Native American fishing rights granted by treaty.
39. *Lagos v. United States*, No. 16-1519 (5th Cir., 864 F.3d 320; cert. granted Jan. 12, 2018; argument scheduled Apr. 18, 2018). The Mandatory Victims Restitution Act requires a criminal defendant to reimburse the victim of a crime for “expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.” 18 U.S.C. § 3663A(b)(4). The Question Presented is whether expenses incurred outside of the government’s investigation are reimbursable under the statute.



Gibson Dunn
Counsel for
Petitioner

40. *Lucia v. SEC*, No. 17-130 (D.C. Cir., 832 F.3d 277; cert. granted Jan. 12, 2018; argument scheduled Apr. 23, 2018). Whether the SEC’s administrative law judges are Officers of the United States within the meaning of the Appointments Clause.
41. *Pereira v. Sessions*, No. 17-459 (1st Cir., 866 F.3d 1; cert. granted Jan. 12, 2018; argument scheduled Apr. 23, 2018). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence in the country. 8 U.S.C. § 1229b(a)-(b). Under the so-called “stop-time rule,” those periods are deemed to end when the government serves a “notice to appear,” defined as “written notice . . . specifying” “[t]he time and place at which proceedings will be held,” among other information. *Id.* § 1229b(a)(1) & (d)(1). The Question Presented is whether service of a document that is labeled as a “notice to appear,” but lacks information about the time and place of proceedings, triggers the stop-time rule.
42. *Chavez-Meza v. United States*, No. 17-5639 (10th Cir., 854 F.3d 655; cert. granted Jan. 12, 2018; argument scheduled Apr. 23, 2018). A district court may grant a proportional sentence reduction under 18 U.S.C. § 3582(c)(2) “after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” The Question Presented is whether, in denying a proportional sentence reduction, the district court must provide greater explanation than a rote statement that the court took into account the relevant Sentencing Commission policy statement and the factors set forth in Section 3553(a).
43. *Abbott v. Perez*, No. 17-586 (W.D. Tex., 2017 WL 3495922; jurisdiction postponed Jan. 12, 2018; consolidated with *Abbott v. Perez*, No. 17-626; argument scheduled Apr. 24, 2018). Whether the Texas Legislature’s 2013 redistricting plan constituted racial gerrymandering or intentional vote dilution, or was enacted with an unlawful purpose.
44. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (2d Cir., 837 F.3d 175; CVSG June 26, 2017; cert. supported Nov. 14, 2017, limited to Question 2; cert. granted Jan. 12, 2018, limited to Question 2; argument scheduled Apr. 24, 2018). Whether courts owe deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime.
45. *Trump v. Hawaii*, No. 17-965 (9th Cir., 878 F.3d 662; cert. granted Jan. 19, 2018; argument scheduled Apr. 25, 2018). The President issued Proclamation No. 9645, which suspends entry, subject to certain exceptions and waivers, of certain categories of aliens from eight foreign countries. The Questions Presented are: (1) Whether a challenge to the suspension of entry is



Gibson Dunn
Counsel for
Amicus Curiae
U.S. Conference
of Catholic
Bishops



Gibson Dunn
Counsel for
Petitioner

justiciable. (2) Whether the Proclamation is a lawful exercise of the President’s authority to suspend entry of aliens abroad. (3) Whether the global injunction against enforcement of the Proclamation is overbroad. (4) Whether the Proclamation violates the Establishment Clause.

46. *Leidos, Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581 (2d Cir., 818 F.3d 85; cert. granted Mar. 27, 2017; argument scheduled Nov. 6, 2017; argument canceled Oct. 17, 2017 pursuant to joint motion to hold case in abeyance). Under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, an omission is actionable only if the omitted information is necessary to make an affirmative statement “not misleading.” Does Item 303 of Securities and Exchange Commission Regulation S-K create an actionable duty to disclose, even if the alleged omission did not cause any affirmative statement in the filing to be misleading?

Cases Determined Without Argument



Gibson Dunn
Counsel for
Amicus Curiae
U.S. Conference
of Catholic
Bishops

1. *Trump v. Int’l Refugee Assistance Project*, No. 16-1436 (4th Cir., 857 F.3d 554; Vacated and remanded Oct. 10, 2017). Per Curiam (Sotomayor, J., dissenting). The Court held that because Section 2(c) of Executive Order No. 13,780, which temporarily suspended entry of aliens abroad, had “expired by its own terms,” the appeal challenging that suspension no longer presented a live case or controversy. As a result, the Court vacated the judgment and remanded to the Fourth Circuit with instructions to dismiss the case as moot.



Gibson Dunn
Counsel for
Amicus Curiae
U.S. Conference
of Catholic
Bishops

2. *Trump v. Hawaii*, No. 16-1540 (9th Cir., 859 F.3d 741; Vacated and remanded Oct. 24, 2017). Per Curiam (Sotomayor, J., dissenting). The Court held that because Section 2(c) and Section 6 of Executive Order No. 13,780, which temporarily suspended entry of aliens abroad, had “expired by [their] own terms,” the appeal no longer presented a live case or controversy. As a result, the Court vacated the judgment and remanded to the Ninth Circuit with instructions to dismiss the case as moot.
3. *Kernan v. Cuero*, No. 16-1468 (9th Cir., 827 F.3d 879; Reversed and remanded Nov. 6, 2017). Per Curiam. The Court held that federal law, as interpreted by the Court, did not clearly establish that the state court was required to impose the lower sentence that respondent would have received under a plea agreement had the State not been permitted to amend the criminal complaint. Respondent originally pleaded guilty to a criminal complaint allowing for a maximum sentence of fourteen years in prison. The state court allowed the State to amend the complaint, which allowed for a minimum sentence of twenty-five years, and thereafter sentenced respondent to a term with a minimum of twenty-five years. After his conviction and sentence were affirmed on direct appeal, respondent sought federal habeas relief. The district court denied relief, but the Ninth Circuit reversed, holding that sentencing respondent to fourteen years instead of twenty-five years was “necessary to maintain the integrity and fairness of the criminal justice system.” The Court reversed, explaining that “no decision from this Court clearly establishes” that a state court must impose a previous, lower sentence rather than a higher sentence pursuant to an amended complaint.



Gibson Dunn
Counsel for
Respondents

4. ***Dunn v. Madison*, No. 17-193 (11th Cir., 851 F.3d 1173; Reversed Nov. 6, 2017).** Per Curiam (Ginsburg, J., concurring, joined by Breyer and Sotomayor, J.J.; Breyer, J., concurring). The Court held that the circuit court erred in granting habeas relief because the state court’s determination—that respondent recognized he would be put to death as punishment for a murder he committed and was therefore competent to be executed—was neither an unreasonable application of the Court’s jurisprudence nor an unreasonable assessment of the evidence. Respondent was convicted of capital murder and sentenced to death. As his execution neared, he suffered several strokes and petitioned the state trial court for a suspension of his death sentence. The state court denied the petition, concluding that respondent is competent to be executed even though he does not remember his offense. Respondent sought federal habeas relief, and the circuit court held that the state court’s conclusion was “plainly unreasonable.” Reversing, the Court explained that its precedents do not “clearly establish” that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, “as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case.”
5. ***In re United States*, No. 17-801 (9th Cir., 875 F.3d 1200; Vacated and remanded Dec. 20, 2017).** Per Curiam. The Court held that the district court adjudicating a challenge to the rescission of the Deferred Action for Childhood Arrivals program, commonly known as DACA, erred in failing to consider the Government’s “threshold arguments” before ordering the Government to complete the administrative record. After finding that the administrative record was incomplete, the district court declined to stay its order requiring production of additional documents until after resolving the Government’s motion to dismiss, which argued that (i) the decision to rescind DACA is “committed to agency discretion” and therefore unreviewable, 5 U.S.C. § 701(a)(2); and (ii) the Immigration and Nationality Act deprives the district court of jurisdiction. Because either of those arguments, if accepted, could eliminate the need for production of a complete administrative record, the district court should have ruled on those arguments before compelling the Government to disclose additional documents.
6. ***Tharpe v. Sellers*, No. 17-6075 (11th Cir., 2017 WL 4250413; Vacated and remanded Jan. 8, 2018).** Per Curiam (Thomas, J., dissenting, joined by Alito and Gorsuch, J.J.). The Court held that the circuit court erred in denying petitioner’s request for a certificate of appealability “based solely on its conclusion, rooted in the state court’s factfinding, that [petitioner] had failed to show prejudice.” Petitioner moved to reopen his federal habeas proceedings under Federal Rule of Civil Procedure 60(b)(6) on the ground that the jury that convicted him of murder and sentenced him to death did so because a white juror was biased against black people. The district court found the motion procedurally defaulted because petitioner had “failed to produce any clear and convincing evidence contradicting the state court’s determination that [the juror’s] presence on the jury did not prejudice him.” The circuit court denied a certificate of appealability after concluding that jurists of reason could not dispute the correctness of the district court’s procedural ruling. That denial was error because an affidavit from the juror—in which he expresses racist opinions about black

people—presents “a strong factual basis” for concluding that race *did* affect his vote for a death sentence. Thus, jurists of reason could debate whether petitioner has offered clear and convincing evidence that the state court’s factual determination was wrong.

7. ***CNH Indus. N.V. v. Reese*, No. 17-515 (6th Cir., 854 F.3d 877; Reversed and remanded Feb. 20, 2018)**. Per Curiam. The Court held that courts must interpret collective-bargaining agreements (“CBAs”) according to the traditional rules of contract interpretation, including when determining whether a contract is ambiguous. Before the Court issued its decision in *M&G Polymers USA, LLC v. Tackett*, 574 U.S. — (2015), the Sixth Circuit had applied a CBA-specific set of rules of construction—so-called “*Yard-Man* inferences”—that applied to the interpretation of CBAs, including a presumption that general durational clauses do not apply to the vesting of retiree benefits and that retiree benefits vest for life. The Court in *Tackett* rejected the *Yard-Man* inferences because their application “distort[ed] the text” of CBAs and conflicted with the traditional rule that contracts must be construed according to their plain language. In this case, the parties disputed whether a CBA vests retirees with health benefits for life. The Sixth Circuit used the *Yard-Man* inferences to render ambiguous the CBA’s durational clause and thus considered extrinsic evidence about lifetime vesting. That approach “cannot be squared with *Tackett*.” A contract is not ambiguous unless it is subject to more than one reasonable interpretation using “ordinary principles of contract law,” and the *Yard-Man* inferences cannot create a reasonable interpretation because they are not “ordinary principles of contract law.” *Tackett*, 135 S. Ct. at 930.
8. ***Montana v. Wyoming*, No. 1370 (Proposed judgment and decree of the Special Master entered Feb. 20, 2018)**. Per Curiam (Kagan, J., took no part in the consideration or decision). The Court awarded \$20,340 in judgment and \$67,270.87 in costs against Wyoming in favor of Montana for violations of the Yellowstone River Compact that occurred when Wyoming reduced the volume of water available in the Tongue River in 2004 and 2006. Article V(A) of the Yellowstone River Compact protects pre-1950 appropriative rights to “beneficial uses” of the water of the Yellowstone River System, including tributaries such as the Tongue River. The Compact gives Montana a right to store up to “72,500 acre feet of water in the Tongue River Reservoir” each “water year,” which ends on September 30. The Court entered a decree providing that, to protect its rights under the Compact, Montana must place a “call” to sufficiently “place Wyoming on clear notice that Montana needs additional water to satisfy its pre-1950 appropriative rights.” Wyoming will not be liable for diversions, storage, or withdrawals that take place when a call is not in effect.
9. ***Kisela v. Hughes*, No. 17-467 (9th Cir., 862 F.3d 775; Reversed and remanded Apr. 2, 2018)**. Per Curiam (Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that petitioner, a police officer, is entitled to qualified immunity because his decision to shoot a knife-wielding woman did not violate clearly established law. The case arose when someone called the police “to report that a woman was hacking a tree with a kitchen knife.” Petitioner and another responding officer spotted a woman, later identified as Sharon Chadwick,

standing next to a car in a driveway. Amy Hughes—who matched the description of the woman seen hacking the tree—left the home at the end of the driveway carrying a large knife. Hughes then walked to within six feet of Chadwick. The officers drew their guns and twice ordered Hughes to drop the knife. Hughes “appeared calm, but she did not acknowledge the officers’ presence or drop the knife.” Petitioner then shot Hughes four times. When Hughes sued under 42 U.S.C. § 1983, the Ninth Circuit held that the record, viewed in the light most favorable to Hughes, demonstrated that petitioner had used excessive force in violation of the Fourth Amendment. Reversing, the Court explained that this was “far from an obvious case in which any competent officer would have known that shooting . . . would violate the Fourth Amendment.” The officer had mere seconds to assess the danger that Hughes posed to Chadwick, Hughes was armed with a knife and was acting erratically, and Hughes ignored multiple commands to drop the knife. Because no precedent places the unlawfulness of the officer’s conduct “beyond debate,” petitioner is entitled to qualified immunity.

Pending Original Cases

1. ***Florida v. Georgia*, No. 22O142 (Original Jurisdiction; CVSG Mar. 3, 2014; leave to file a bill of complaint opposed Sept. 18, 2014; leave to file a bill of complaint granted Nov. 3, 2014; exceptions to Special Master Report set, on Oct. 10, 2017, for oral argument in due course; argued Jan. 8, 2018).** Whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.
2. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015; leave to file bill of complaint granted June 29, 2015).** The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents’ use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi’s border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.
3. ***Delaware v. Pennsylvania & Wisconsin*, No. 22O145 (Original Jurisdiction; leave to file a bill of complaint granted Oct. 3, 2016; consolidated with *Arkansas v. Delaware*, No. 22O146).** Whether check-like instruments that function like a money order or traveler’s check, issued in relatively large amounts by a bank or other financial institution, are governed by the Disposition of Abandoned Money Orders and Traveler’s Checks Act of 1974, 12 U.S.C. § 2501 *et seq.*, and which State has authority to claim ownership of such instruments that go unclaimed.



October Term 2018



Gibson Dunn
Counsel for
Petitioner

1. *Weyerhaeuser Co. v. Fish & Wildlife Serv.*, No. 17-71 (5th Cir., 827 F.3d 452; cert. granted Jan. 22, 2018). The Endangered Species Act requires the Secretary of the Interior to designate the “critical habitat” of an endangered species, which may include areas “occupied by the species,” plus “areas outside the geographical area occupied by the species” that are “essential for conservation of the species.” 16 U.S.C. § 1532(5)(A). The Fish and Wildlife Service designated a 1500-acre tract of land as critical habitat for the dusky gopher frog. The Questions Presented are: (1) Whether the Endangered Species Act allows the designation of private land that neither contains nor (absent a radical change in land use) could provide habitat for an endangered species. (2) Whether an agency’s decision not to exclude an area from critical habitat based on the economic impact of the designation is subject to judicial review.
2. *New Prime Inc. v. Oliveira*, No. 17-340 (1st Cir., 857 F.3d 7; cert. granted Feb. 26, 2018). Section 1 of the Federal Arbitration Act (“FAA”) says that the Act does not apply “to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. The Questions Presented are: (1) Whether a dispute over the applicability of the Section 1 exemption must be resolved in arbitration pursuant to a valid delegation clause. (2) Whether the exemption applies to independent-contractor agreements.
3. *Mount Lemmon Fire Dist. v. Guido*, No. 17-587 (9th Cir., 859 F.3d 1168; cert. granted Feb. 26, 2018). The Age Discrimination in Employment Act applies to private entities only if they had “twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 29 U.S.C. § 630(b). Does the twenty-employee minimum apply to political subdivisions of a State, or does the Act apply to State political subdivisions of any size?
4. *Madison v. Alabama*, No. 17-7505 (Ala., No. CC-1985-001385.80; cert. granted Feb. 26, 2018). The Questions Presented are: (1) Whether consistent with the Eighth Amendment, the State may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense. (2) Whether the Eighth Amendment prohibits the execution of a prisoner whose competency has been compromised by dementia and multiple strokes.
5. *Knick v. Scott*, No. 17-647 (3d Cir., 862 F.3d 310; cert. granted Mar. 5, 2018, limited to Question 1). Whether the Court should reconsider the requirement that property owners exhaust state court remedies before a federal takings claim ripens.
6. *Gundy v. United States*, No. 17-6086 (2d Cir., 695 F. App’x 639; cert. granted Mar. 5, 2018, limited to Question 4). Whether the Sex Offender Registration

and Notification Act's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.

7. *Nielsen v. Preap*, No. 16-1363 (9th Cir., 831 F.3d 1193; cert. granted Mar. 19, 2018). Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.
8. *Stokeling v. United States*, No. 17-5554 (11th Cir., 684 F. App'x 870; cert. granted Apr. 2, 2018). Whether a prior conviction for robbery under Florida law—which requires as an element overcoming “victim resistance”—is categorically a “violent felony” under the Armed Career Criminal Act.

Pending Cases Calling For The Views Of The Solicitor General

1. *Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs via the foreign state's diplomatic mission in the United States.
2. *Virginia Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017). Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining on nonfederal lands.
3. *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wa., 392 P.3d 1014; CVSG Oct. 2, 2017). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with “the right, in common with citizens of the United States, to travel upon all public highways.” Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?
4. *Apple, Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017). iPhone apps are available only through the App Store, and Apple charges independent software developers an annual fee to submit apps to be sold in the App Store. Do consumers have standing to seek antitrust damages based on that fee, or are they “indirect purchasers” who lack standing to assert antitrust claims under *Illinois Brick Co. v. Illinois*?
5. *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017). Does the FDA's rejection of a drug-label warning preempt a state-law failure-to-warn claim based on the absence of that warning?
6. *Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018). Whether exempting groups of state retirees from state income taxes,



without affording federal retirees the same treatment, violates the doctrine of intergovernmental tax immunity.

7. *Herrera v. Wyoming*, No. 17-532 (Wyo., No. S-17-0129; CVSG Jan. 8, 2018). Whether Wyoming’s admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians’ federal treaty rights to hunt such that those rights could not serve as a bar to criminal prosecution for unlawful hunting under state law.
8. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018). Section 411(a) of the Copyright Act says that no civil action for infringement of a copyright shall be instituted until preregistration or registration of the copyright claim has been made. 17 U.S.C. § 411(a). Does “registration of [a] copyright claim” occur when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, or when the Copyright Office acts on the application?
9. *Sterba v. PNC Bank*, No. 17-423 (9th Cir., 852 F.3d 1175; CVSG Jan. 22, 2018). Whether a federal court exercising bankruptcy jurisdiction should apply federal choice-of-law rules or the forum State’s choice-of-law rules to decide which statute of limitations applies to a creditor’s claim.
10. *Strang v. Ford Motor Co.*, No. 17-528 (6th Cir., 693 F. App’x 400; CVSG Jan. 22, 2018). Whether a plaintiff may pursue a claim under Section 502(a)(3) of ERISA based on the theory that the plan administrator violated its fiduciary duties by failing to make a benefits payment.
11. *United States ex rel. Carter v. Halliburton Co.*, No. 17-1060 (4th Cir., 866 F.3d 199; CVSG Mar. 5, 2018). Under the False Claims Act’s “first-to-file bar,” “[w]hen a person brings an action under this [statute], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action,” 31 U.S.C. § 3730(b)(5), and once an earlier action has been dismissed, it no longer bars later-filed suits. The Questions Presented are: (1) Once earlier actions have been dismissed, may a later-filed suit proceed without refiling or must that suit be dismissed and refiled? (2) Is the first-to-file bar jurisdictional and if so may it be applied only at the time of filing or may it be lifted by amendment, supplement, or other later events?
12. *Pioneer Centres Holding v. Alerus Financial*, 17-667 (10th Cir., 858 F.3d 1324; CVSG Mar. 19, 2018). Whether, in a breach-of-fiduciary-duty action under ERISA, the plaintiff bears the burden of establishing loss causation, or whether the burden shifts to the fiduciary to demonstrate the absence of loss causation once the plaintiff establishes a breach of fiduciary duty and associated loss.



Gibson Dunn
Counsel for
Respondent



Gibson Dunn
Counsel for
Respondent



CVSG Cases In Which The Solicitor General Supported Certiorari



Gibson Dunn
Counsel for
Amicus Curiae
Victims of
Terrorism

1. *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15-1439 (Cal. Ct. App., Unreported Adoption of Oral Ruling (No. CGC-14-538355, Oct. 23, 2015); CVSG Oct. 3, 2016; cert. supported May 23, 2017; cert. granted June 27, 2017; argued Nov. 28, 2017). Whether state courts lack subject-matter jurisdiction over “covered class actions”—within the meaning of Section 16 of the Securities Act of 1933, as amended by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p—that allege only claims under the 1933 Act.
2. *Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017, limited to Question 1; argued Dec. 4, 2017). Victims of a 1997 suicide bombing in Jerusalem seek to collect on a \$71.5 million default judgment against the Islamic Republic of Iran as a state sponsor of terrorism. Plaintiffs sought to attach and execute on collections of ancient Persian artifact located in Chicago museums. A foreign state’s property is immune from attachment and execution with few exceptions, and the Seventh Circuit rejected plaintiffs’ argument that the Foreign Sovereign Immunities Act provides a free-standing terrorism exception to execution immunity. Does 28 U.S.C. § 1610(g) provide a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under Section 1610?
3. *Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215 (11th Cir., 848 F.3d 953; CVSG June 19, 2017; cert. supported Nov. 9, 2017; cert. granted Jan. 12, 2018; argument scheduled Apr. 17, 2018). Whether (and, if so, when) a statement concerning a specific asset of a debtor can be a “statement respecting the debtor’s . . . financial condition” within Section 523(a)(2) of the Bankruptcy Code, preventing a debt obtained by that statement from being nondischargeable.
4. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (2d Cir., 837 F.3d 175; CVSG June 26, 2017; cert. supported Nov. 14, 2017, limited to Question 2; cert. granted Jan. 12, 2018, limited to Question 2; argument scheduled Apr. 24, 2018). The Questions Presented are: (1) Whether courts of appeals have jurisdiction under 28 U.S.C. § 1291 to review a pre-trial order denying a motion to dismiss following a full trial on the merits. (2) Whether courts owe deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime. (3) Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.



5. *WesternGeco LLC v. ION Geophysical Corp.*, No. 16-1011 (Fed. Cir., 837 F.3d 1358; CVSG May 30, 2017; cert. supported Dec. 6, 2017; cert. granted Jan. 12, 2018; argument scheduled Apr. 16, 2018). Under 35 U.S.C. § 271(f), it is an act of patent infringement to supply “components of a patented invention,” “from the United States,” knowing or intending that the components be combined “outside of the United States,” in a manner that “would infringe the patent if such combination occurred within the United States.” Are lost profits from prohibited combinations occurring outside of the United States categorically unavailable in cases where patent infringement is proven?

CVSG Cases In Which The Solicitor General Opposed Certiorari



Gibson Dunn
Counsel for
Petitioner

1. *Christie v. NCAA*, No. 16-476 (3d Cir., 852 F.3d 309; CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477; argued Dec. 4, 2017). The Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. § 3701 *et seq.*, prohibits States from “authoriz[ing] by law” sports-wagering schemes. 28 U.S.C. § 3702(1). PASPA also prohibits private persons from operating sports-wagering schemes pursuant to state law. 28 U.S.C. § 3702(2). New Jersey repealed certain of its prohibitions on sports wagering in specified venues in the State, but the Third Circuit held that New Jersey’s repeal was unlawful under PASPA. Does PASPA impermissibly commandeer the regulatory power of States, in contravention of *New York v. United States*, by dictating the extent to which States must maintain their prohibitions on sports wagering?



Gibson Dunn
Counsel for
Respondents

2. *Bank Melli v. Bennett*, No. 16-334 (9th Cir., 825 F.3d 949; CVSG Jan. 9, 2017; cert. opposed May 23, 2017; held for *Rubin* June 27, 2017; cert. denied Mar. 5, 2018). The Questions Presented are: (1) Whether Section 1610(g) of the Foreign Sovereign Immunities Act establishes a freestanding exception to sovereign immunity, or instead merely supersedes *First National City Bank v. Banco Para El Comercio Exterior de Cuba*’s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in Section 1610. (2) Whether a court should apply federal or state law to determine whether assets constitute “property of” or “assets of” the sovereign under the Terrorism Risk Insurance Act and Section 1610(g), and whether those provisions require that the sovereign own the property in question.

3. ***Magee v. Coca-Cola Refreshments USA, Inc.***, No. 16-668 (5th Cir., 833 F.3d 530; CVSG Feb. 27, 2017; cert. opposed July 19, 2017; cert. denied Oct. 2, 2017). Petitioner, who is visually impaired, sued Coca-Cola under Title III of the Americans with Disabilities Act of 1990, claiming that its vending machines are not accessible to individuals with visual impairments. Does Title III, which prohibits public accommodations from discriminating on the basis of disability, apply only to physical spaces that people can enter?
4. ***Snyder v. Doe***, No. 16-768 (6th Cir., 834 F.3d 696; CVSG Mar. 27, 2017; cert. opposed July 7, 2017; cert. denied Oct. 2, 2017). Whether retroactively applying a sex-offender-registry law that classifies offenders into tiers based on crime of conviction, requires certain offenders to register for life, requires offenders to report in person periodically and within days of certain changes to registry information, and restricts offenders' activities within school zones imposes "punishment" in violation of the Ex Post Facto Clause.
5. ***Samsung Elecs. Co. v. Apple Inc.***, No. 16-1102 (Fed. Cir., 839 F.3d 1034; CVSG June 26, 2017; cert. opposed Oct. 4, 2017; cert. denied Nov. 6, 2017). The Questions Presented are: (1) Whether Samsung proved by clear and convincing evidence that two of Apple's patents were obvious as a matter of law. (2) Whether the court of appeals correctly directed entry of a narrowly tailored injunction against infringement by a direct competitor after determining that the four traditional equitable factors, set forth in *eBay Inc. v. MercExchange, L.L.C.*, favored injunctive relief. (3) Whether the jury's verdict of infringement of a now-expired patent was supported by substantial evidence.
6. ***Clark v. Va. Dep't of State Police***, No. 16-1043 (Va., 793 S.E.2d 1; CVSG May 15, 2017; cert. opposed Oct. 12, 2017; cert. denied Dec. 4, 2017). In 1974, Congress authorized servicemembers to sue state-government employers in federal court for employment discrimination based on military service. 38 U.S.C. § 4323(b)(2). After the Court held in *Seminole Tribe of Florida v. Florida* that Congress may not use its Article I powers to override state immunity in federal court, Congress amended the statute in 1998 to allow servicemembers to sue state employers in state court instead. 38 U.S.C. § 4323(b)(2). Subsequently, however, the Court held in *Alden v. Maine* "that the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. 706, 712 (1999). Is the 1998 amendment constitutional?
7. ***Rinehart v. California***, No. 16-970 (Cal., 377 P.3d 818; CVSG May 15, 2017; cert. opposed Dec. 6, 2017; cert. denied Dec. 4, 2017). Whether the Mining Law of 1872, as amended, which was intended to encourage productive mining on federal lands, preempts state bans of mining on federal lands.



Gibson Dunn
Counsel for
Petitioner

8. ***Brewer v. Ariz. Dream Act Coal.***, No. 16-1180 (9th Cir., 855 F.3d 957; CVSG June 26, 2017; urging Court to hold petition pending disposition of DACA cert. petition Feb. 14, 2018; cert. denied Mar. 19, 2018). Whether the Deferred Action for Childhood Arrivals program preempts Arizona’s policy of denying driver’s licenses to deferred action recipients.
9. ***Sokolow v. Palestine Liberation Org.***, No. 16-1071 (2d Cir., 835 F.3d 317; CVSG June 26, 2017; cert. opposed Feb. 22, 2018; cert. denied Apr. 2, 2018). Whether the Fifth Amendment’s Due Process Clause allows federal courts to exercise personal jurisdiction over a suit by American victims of terrorist attacks abroad carried out by the Palestinian Authority and the Palestine Liberation Organization.

Petition For Certiorari Dismissed As Improvidently Granted

1. ***PEM Entities LLC v. Levin***, No. 16-492 (4th Cir., 655 F. App’x 971; cert. granted June 27, 2017; cert. dismissed as improvidently granted Aug. 10, 2017). Whether bankruptcy courts should apply a federal rule of decision or a state law rule of decision when deciding to recharacterize a debt claim in bankruptcy as a capital contribution.

Petition For Certiorari Voluntarily Dismissed

1. ***Salt River Project Agric. Improvement & Power Dist. v. SolarCity Corp.***, No. 17-368 (9th Cir., 859 F.3d 720; cert. granted Dec. 1, 2017; argument scheduled Mar. 19, 2018; cert. dismissed Mar. 22, 2018). Are orders in antitrust cases denying immunity under the state-action doctrine immediately appealable under the collateral-order doctrine?



Supreme Court Statistics:

Gibson Dunn has a longstanding, high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases. During the Supreme Court's 5 most recent Terms, 9 different Gibson Dunn partners have presented oral argument; the firm has argued a total of 19 cases in the Supreme Court during that period, including closely watched cases with far-reaching significance in the class action, intellectual property, separation of powers, and First Amendment fields. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant 23 certiorari petitions since 2006.

Appellate and Constitutional Law Group Co-Chairs:

Mark A. Perry - Washington, D.C. (+1 202.887.3667, mperry@gibsondunn.com)

Caitlin J. Halligan - New York (+1 212.351.4000, challigan@gibsondunn.com)

Nicole A. Saharsky - Washington, D.C. (+1 202.887.3669, nsaharsky@gibsondunn.com)

© 2018 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

www.gibsondunn.com

Beijing	Denver	Houston	New York	San Francisco
Brussels	Dubai	London	Orange County	São Paulo
Century City	Frankfurt	Los Angeles	Palo Alto	Singapore
Dallas	Hong Kong	Munich	Paris	Washington, D.C.