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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.

Argued Cases

1. ***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?**

   Decided June 27, 2018 (585 U.S. __). Seventh Circuit/Reversed and remanded. Justice Alito for a 5-4 Court (Sotomayor, J., dissenting; Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, J.J.). The Court held that the First Amendment prohibits public-sector labor unions from collecting mandatory fees from nonmembers to cover the costs of collective bargaining. Petitioner is a non-union employee of Illinois. He brought this case to challenge mandatory "agency fees" that public-sector labor unions collect from him and other nonmembers, ostensibly to cover the costs of collective bargaining with governmental employers. Petitioner argued that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—which upheld such compulsory agency fees—should be overruled, contending that the fees force nonmembers to subsidize union speech intended to advocate for certain governmental policies with which petitioner disagrees. The Court agreed with petitioner and overruled *Abood*. "Compelling individuals to mouth support for views they find objectionable violates th[e] cardinal constitutional command" that citizens should not be forced to confess certain political, religious, or other views. And compelling a person "to *subsidize* the speech of other private speakers" raises these same First Amendment concerns. Because this "compelled subsidization of private speech seriously impinges on First Amendment rights," it must pass "exacting scrutiny"—that is, it must be the least restrictive way of achieving some "compelling state interest." The Illinois scheme fails that test. First, the scheme cannot be justified as a way to promote "labor peace" by avoiding conflicts among competing labor unions; federal public unions and the public unions of most States already prohibit agency fees and yet


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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.

still have "labor peace." Second, the scheme is not necessary to avoid the problem of "free riders"—nonpaying nonmembers obtaining benefits paid for by paying members—because in jurisdictions without agency fees, unions are still willing to represent nonpaying nonmembers. Finally, *stare decisis* does not require retaining *Abood*. That case was "not well reasoned," failed to give adequate consideration to First Amendment values, and drew an "unworkable" and "vague" line between "chargeable and nonchargeable union expenditures." Although reliance interests generally counsel against overturning precedents, "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*," and "public-sector collective-bargaining agreements are generally of rather short duration." Accordingly, *Abood* is overruled and "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

2. ***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.**

Decided June 27, 2018 (585 U.S. __). Remanded. Justice Breyer for a 5-4 Court (Thomas, J., dissenting, joined by Alito, Kagan, and Gorsuch, J.J.). The Court held that the special master applied an overly strict and rigid standard in recommending dismissal of Florida's request for equitable apportionment of water from the Apalachicola River. In this original action, Florida sued Georgia asking the Court to issue a decree equitably apportioning water from the Apalachicola River, which flows from Georgia to Florida and into the Gulf of Mexico. A special master recommended dismissing the complaint because Florida did not make a "threshold" showing with "clear and convincing evidence" that its injuries could be redressed by a decree capping Georgia's upstream water consumption. The Court, however, must approach disputes between sovereign States in an non-technical way, "remembering that there is no municipal code governing the matter, and that this [C]ourt may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone." *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911) (Holmes, J.). Further, equitable apportionment is a "flexible" process, not a "formulaic" one, and the goal is to reach a "just and equitable apportionment" after considering "all relevant factors." *South Carolina v. North Carolina*, 558 U.S. 256, 271 (2010) (quotation marks and emphasis omitted). The special master therefore applied "too strict" a standard, and erred in requiring definite proof of redressability at the outset of the case without first making "findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm." The Court remanded the case for additional fact findings guided by a more flexible inquiry

that is the "key[ ] to success in our efforts to resolve water disputes between sovereign states."

3. ***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 Question Presented is 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.**

Decided June 26, 2018 (585 U.S. __). Ninth Circuit/Reversed and remanded. Justice Thomas for a 5-4 Court (Kennedy, J., concurring, joined by Roberts, C.J., and Alito and Gorsuch, J.J.; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that petitioners are likely to succeed on their claim that the two notice requirements in the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), Cal. Health & Safety Code Ann. § 123470 *et seq*., violate the First Amendment. The FACT Act requires licensed clinics that primarily serve pregnant women to notify patients that California provides free or low-cost family planning services, including abortions. It also requires unlicensed clinics to post detailed notices that the facility is not licensed to provide medical services. Several crisis pregnancy clinics sought a preliminary injunction against the two notice requirements on the ground that they violate the clinics' free speech rights. The district court denied the motion after concluding that petitioners could not show a likelihood of success on the merits, and the Ninth Circuit affirmed. Reversing, the Court explained that, because the notice requirements target speech based on its content (*e.g.*, requiring clinics to speak a particular message), the requirements are unconstitutional unless California can prove that they are narrowly tailored to serve a compelling governmental interest. California likely cannot make that showing. The notice requirement for licensed clinics is "wildly underinclusive" and "not sufficiently drawn to achieve" California's stated goal of providing low-income women with information about state-subsidized abortions, as the law exempts several types of clinics from the notice requirement. Moreover, California could achieve its goal in less burdensome ways, such as informing women through a "public-information campaign" or posting the same information "on public property near crisis pregnancy centers." As for the other requirement that unlicensed clinics post a notice that the clinic is not licensed to provide medical services, California's justifications for the requirement are "purely hypothetical." *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994). "Indeed, California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals." The requirement also "unduly burdens protected speech" by drowning out "the facility's own message," imposing detailed requirements for scripted language that must accompany an

unlicensed facility's own advertisements. Both notice requirements in the FACT Act therefore chill protected speech and likely violate the First Amendment.

4. ***Trump v. Hawaii*, No. 17-965 (9th Cir., 878 F.3d 662; cert. granted Jan. 19, 2018; argued 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 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.**

Decided June 26, 2018 (585 U.S. __) Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a 5-4 Court (Kennedy, J., concurring; Thomas, J., concurring; Breyer, J., dissenting, joined by Kagan, J.; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that Presidential Proclamation No. 9645, which temporarily suspends the entry of aliens into the United States from eight nations, is a lawful exercise of the broad discretion granted to the President by 8 U.S.C. § 1182(f), and that respondents have not demonstrated a likelihood of success on their claim that the Proclamation violates the Establishment Clause. Section 1182(f) authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he or she determines that their entry "would be detrimental to the interests of the United States." "The Proclamation falls well within this comprehensive delegation." After federal agencies "conduct[ed] a comprehensive evaluation" that identified countries that either posed a national security risk (such as state sponsors of terrorism) or chronically failed to provide "sufficient information to assess the risks those countries' nationals pose to the United States," the President lawfully exercised his authority under § 1182(f) and "found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries." The Court declined respondents' request to conduct a "searching inquiry into the persuasiveness of the President's justifications," explaining that such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President" in the area of national security and immigration. Further, respondents failed to demonstrate a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause by singling out Muslims for disfavored treatment. Because the Proclamation is facially neutral, directed at aliens abroad, and addresses a "matter within the core of executive responsibility," rational basis review applies. And applying that "deferential standard," the Court found "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility." The Court "must accept that independent justification." Finally, although five of the nations included in the Proclamation have Muslim-majority populations, "that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks."

5. ***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; argued 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.**

   Decided June 25, 2018 (585 U.S. __). W.D. Tex./Reversed and remanded. Justice Alito for a 5-4 Court (Thomas, J., concurring, joined by Gorsuch, J.; Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that 28 U.S.C. § 1253 permits direct review of orders by three-judge panels resolving redistricting disputes when the orders have the "practical effect" of granting or denying an injunction, that the panel in this case wrongly disregarded the presumption of legislative good faith when it required Texas to show a lack of discriminatory intent in adopting new districting plans, and that one of the four challenged districts was racially gerrymandered. The case arises from orders of a three-judge panel in the Western District of Texas that "effectively direct[ed] the State not to conduct this year's elections" using the current districting plans. The Court has jurisdiction to review those orders under § 1253, which gives the Court jurisdiction to hear appeals from orders of three-judge panels "granting or denying . . . an interlocutory or permanent injunction." Although the panel did not say that its orders were "injunctions," the orders were "effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections," and it is the "practical effect" of orders, not their label, that is dispositive for purposes of appellate jurisdiction. Next, the Court explained that the panel erred when it required Texas to show that the 2013 Texas Legislature purged the "discriminatory taint" that the panel had attributed to the never-used districting plan enacted by the 2011 Texas Legislature. The burden of proof when a challenger claims a state law was enacted with discriminatory intent lies with the challenger, not the State, and there is a presumption of legislative good faith notwithstanding a finding of past discrimination. Thus, it is the intent of the 2013 Texas Legislature that matters, and the panel erred in requiring Texas to prove that it had experienced a "change of heart" since enacting the 2011 plan. Finally, the Court reversed the panel's invalidation of three districts, concluding that the districts did not improperly dilute minority votes, but agreed with the panel that a fourth district was an impermissible racial gerrymander: Texas did not dispute that race was the predominant factor in the design of that district, and the State failed to make a "strong showing" that it had good reasons to manipulate the racial makeup of the district.

6. ***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?**

Decided June 25, 2018 (585 U.S. __). Second Circuit/Affirmed. Justice Thomas for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that "anti-steering" provisions in Amex's merchant contracts—which prohibit merchants from avoiding fees by discouraging customers from using their Amex card—do not violate the Sherman Act, 15 U.S.C. § 1. Amex offers cardholder reward programs that encourage customers to use its cards, and funds the programs by charging merchants higher fees than other credit-card companies. To sustain this business model, Amex's merchant agreements contain "anti-steering" provisions that prohibit merchants from encouraging cardholders to use other, lower-fee cards. Confronting a "two-sided market" for the first time—*i.e.*, a market where one group provides goods or services to another group but the value to each group depends on the participation of the other—the Court explained that when the dependence between two groups is strong, they constitute one "market" for purposes of analyzing the anticompetitive effect of certain behavior. Here, because cardholders and merchants are necessary to each other for the consummation of a credit-card transaction, the Court analyzed them as one market—the "credit-card transaction market." And because both merchants and cardholders participate in that same market, the plaintiffs could not prove an antitrust violation based solely on evidence that the anti-steering provisions increased the price to merchants without considering the net effects on the market as a whole, such as whether the higher merchant fees were offset by cardholder benefits. As a result, applying the rule of reason, plaintiffs had not made a prima facie case of net anticompetitive effects on the relevant market.

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7. ***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?**

Decided June 22, 2018 (585 U.S. __). Va./Affirmed. Justice Gorsuch for a 5-4 Court (Kennedy, J., concurring in part; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that when a criminal defendant consents to a bifurcated trial, proceeding to a second trial that results in a conviction after the first trial had resulted in an acquittal does not violate the Double Jeopardy Clause. Petitioner was charged with burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. He requested a bifurcated trial so that the jury weighing the burglary and larceny charges would not be prejudiced by hearing evidence of his prior felony convictions. The burglary and larceny charges went to trial first, and petitioner prevailed. He then argued that proceeding to trial on the felony-in-possession charge would amount to double jeopardy. The trial court disagreed, petitioner was convicted at the second trial, and all lower appellate courts affirmed. So too did the Court. "[C]onsenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial." In these circumstances, the criminal defendant gains potential benefits,

such as preventing the jury from hearing the evidence for all charges against him. The defendant also "experiences none of the prosecutorial 'oppression' the Double Jeopardy Clause exists to prevent," as the defendant himself consents to the bifurcation.

8. ***Ortiz v. United States*, No. 16-1423 (C.A.A.F., 76 M.J. 125; cert. granted Sept. 28, 2017; argued Jan. 16, 2018). The Questions Presented are: (1) Whether Judge Mitchell's service on the U.S. Court of Military Commission Review ("CMCR") disqualified him from continuing to serve on the U.S. Air Force Court of Criminal Appeals ("AFCCA") under 10 U.S.C. § 973(b)(2)(A)(ii). (2) Whether Judge Mitchell's simultaneous service on both the CMCR and the AFCCA violated the Appointments Clause. (3) Whether the Court has jurisdiction to review the case.**

   Decided June 22, 2018 (585 U.S. __). C.A.A.F./Affirmed. Justice Kagan for a 7-2 Court (Thomas, J., concurring; Alito, J., dissenting, joined by Gorsuch, J.). The Court held that neither 10 U.S.C. § 973(b)(2)(A) nor the Constitution's Appointments Clause bars a military officer from simultaneously serving as a judge on both an Air Force appeals court and the CMCR. A court martial convicted petitioner of possessing and distributing child pornography. He was sent to prison and dishonorably discharged from the Air Force. A panel of the AFCCA that included Judge Mitchell affirmed, but petitioner argued that Judge Mitchell should have been disqualified from the panel because he had been appointed to simultaneously serve on the CMCR pursuant to 10 U.S.C. § 950f(b)(2), which empowers the Secretary of Defense to assign officers "who are appellate military judges" to serve on the CMCR. The Court first determined that it has jurisdiction to review decisions of the U.S. Court of Appeals for the Armed Forces, explaining that the Court sits in review of decisions from certain non-Article III judicial systems created by Congress—especially systems, like the U.S. Court of Appeals for the Armed Forces, that have "constitutionally rooted courts," possess a "judicial character," and result in "inherently judicial decisions." Next, the Court held that Judge Mitchell could simultaneously serve on both the AFCCA and the CMCR. Under 10 U.S.C. § 973(b)(2)(A), military officers "may not hold, or exercise the functions of, a civil office" in the federal government, "[e]xcept as otherwise authorized by law." Judge Mitchell's CMCR service is "authorized by law" because § 950f(b)(2) expressly authorizes the Secretary of Defense to assign qualified military officers to be judges on the CMCR. Finally, Judge Mitchell's dual appointment does not violate the Appointments Clause. Petitioner argued that judges on the AFCCA are inferior officers, that CMCR judges are principal officers, and that the Appointments Clause prohibits a judge from serving as an inferior officer on one court and as a principal officer on another court. The Court, however, has "never read the Appointments Clause to impose rules about dual service," and petitioner cited no authority holding that the Appointments Clause prohibits such simultaneous service.

9. ***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; argued 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?

Decided June 22, 2018 (585 U.S. __). Federal Circuit/Reversed and remanded. Justice Thomas for a 7-2 Court (Gorsuch, J., dissenting, joined by Breyer, J.). The Court held that the Patent Act's general damages provision, 35 U.S.C. § 284, allows patent owners to recover damages for overseas losses when the infringement involves shipping components of a patented invention from the United States to be assembled abroad. Section 271(f)(2) prohibits companies from producing components of a patented invention in the United States, only to assemble the components internationally, if domestic assembly of those components would constitute patent infringement. Section 284 authorizes "damages adequate to compensate for the infringement," but does not address whether the patent owner can recover damages for losses incurred outside the United States. Here, a jury found respondent liable for patent infringement after it manufactured components of a patented system in the United States and then shipped those components abroad for assembly. The Federal Circuit reasoned that respondent was not liable for lost profits under § 271(f)(2) because that provision does not apply extraterritorially and thus does not allow patent owners to recover for lost foreign profits. That was error. In determining whether a statute rebuts the presumption against extraterritoriality, the Court asks whether the statutory text provides a "clear indication of an extraterritorial application." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). If not, the Court asks whether conduct relevant to the focus of the statute occurred in the United States. *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. __, __ (2016). Because "addressing step one would require resolving difficult questions that do not change the outcome of the case," but could have far-reaching effects in the future, the Court skipped to step two and held that "the focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States." And that conduct in this case clearly occurred in the United States. Thus, petitioner could receive lost-profits damages under § 284 as a "domestic application" of the statute.

10. ***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.**

    Decided June 22, 2018 (585 U.S. __). Sixth Circuit/Reversed and remanded. Chief Justice Roberts for a 5-4 Court (Kennedy, J., dissenting, joined by Thomas and Alito, J.J.; Thomas, J., dissenting; Alito, J., dissenting, joined by Thomas, J.; Gorsuch, J., dissenting). The Court held that individuals generally have a reasonable expectation of privacy in the historical records of their cell-site location, even though the records are collected and retained by third-party phone

companies, and thus the Government's acquisition of those records is a Fourth Amendment search requiring a warrant supported by probable cause. The Government collected petitioner's cell-site location data from wireless carriers following the procedure in the Stored Communications Act, 18 U.S.C. §§ 2701-12, but without obtaining a warrant. Petitioner argued that the Government's acquisition of the data was an unconstitutional search that violated the Fourth Amendment. Agreeing, the Court explained that the Fourth Amendment protects cell-site location records because of their comprehensive and private nature: "In light of the deeply revealing nature of [this data], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." Accordingly, the Court would not give States "unrestricted access to a wireless carrier's database of physical location information." The Court did not address whether it constitutes a search under the Fourth Amendment when the Government collects real-time cell phone location information or historical location data covering a shorter period of time than was collected here (127 days).

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11. ***Wis. Cent. Ltd. v. United States*, No. 17-530 (7th Cir., 856 F.3d 490; cert. granted Jan. 12, 2018; argued 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.**

Decided June 21, 2018 (585 U.S. __). Seventh Circuit/Reversed and remanded. Justice Gorsuch for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that railroad employee stock options are not taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), because they are not "money remuneration." The Act imposes a special federal tax on "compensation" paid to railroad employees, and defines that term as "any form of money remuneration." *Id.* Some railroads issue stock options to employees, and the Government argued that stock options are taxable under the Act because they are easily convertible to money and thus qualify as "money remuneration." Rejecting that argument, the Court explained that when Congress adopted the Act in 1937, "money" was understood to mean currency "issued by [a] recognized authority as a medium of exchange." Webster's New International Dictionary 1583 (2d ed. 1942). Stock options clearly do not fall within that definition because they are not "money"—that is, people do not use stock options as a "medium of exchange" for goods and services. The word "remuneration" does not alter this plain meaning, as the adjective "money" simply limits the kinds of remuneration that qualify for taxation. Confirming this reading, in other statutes enacted about the same time as the Act, Congress differentiated between "money" and "all" remuneration. For example, the Federal Insurance Contributions Act of 1937 taxes "all remuneration," including benefits "paid in any medium other than cash," 26 U.S.C. § 3121(a), and the 1939 Internal Revenue Code treated differently "money" and "stock."

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12. ***Lucia v. SEC*, No. 17-130 (D.C. Cir., 832 F.3d 277; cert. granted Jan. 12, 2018; argued Apr. 23, 2018). Whether the SEC's Administrative Law Judges are Officers of the United States within the meaning of the Appointments Clause.**

    Decided June 21, 2018 (585 U.S. __). D.C. Circuit/Reversed and remanded. Justice Kagan for a 7-2 Court (Thomas, J., concurring, joined by Gorsuch, J.; Breyer, J., concurring in the judgment in part and dissenting in part, joined in part by Ginsburg and Sotomayor, J.J.; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that SEC Administrative Law Judges ("ALJs") are "Officers of the United States" under the Appointments Clause and, therefore, agency staff unconstitutionally appointed the SEC ALJs. Raymond Lucia challenged the lawfulness of sanctions that the SEC had imposed on him, arguing that the ALJ hearing his case was not constitutionally appointed. He asserted that SEC ALJs are "Officers of the United States" under the Constitution's Appointments Clause, which requires such officers to be appointed by the President, "Courts of Law," or "Heads of Departments." U.S. Const. Art. II, § 2, cl. 2. SEC ALJs, however, were appointed by agency staff. The Court agreed, relying principally on *Freytag v. Commissioner*, 501 U.S. 868 (1991). In *Freytag*, the Court held that special trial judges ("STJs") of the U.S. Tax Court were inferior "Officers" because they held a continuing office established by law and exercised significant authority under the laws of the United States. 501 U.S. at 881-82. In determining that STJs exercised significant authority, the Court noted that they were authorized to "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.* SEC ALJs are "near-carbon copies" of STJs: they too hold a continuing office established by law, and they too exercise significant authority. In particular, SEC ALJs have the power to preside over administrative enforcement actions, rule on evidentiary issues, punish contemptuous conduct, make credibility determinations, and enter decisions that often become the final action of the SEC. Accordingly, SEC ALJs are inferior "Officers" under the Appointments Clause and may not be appointed by agency staff; they must instead be appointed by the President, the SEC itself, or a court of law. The Court remanded for a new proceeding before a constitutionally appointed ALJ, reasoning that the ALJ who originally presided over Lucia's case could not be expected to consider the case "as though he had not adjudicated it before."

13. ***Pereira v. Sessions*, No. 17-459 (1st Cir., 866 F.3d 1; cert. granted Jan. 12, 2018; argued 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.**

Decided June 21, 2018 (585 U.S. __). First Circuit/Reversed and remanded. Justice Sotomayor for an 8-1 Court (Kennedy, J., concurring; Alito, J., dissenting). The Court held that a "putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear'" under 8 U.S.C. § 1229(a), and thus does not stop the continuous-residence period calculation necessary for cancellation of the noncitizen's removal. Under § 1229(b)(1)(A), nonpermanent residents subject to removal proceedings may have their removal cancelled if, among other things, they have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation. But under the stop-time rule of § 1229(d)(1)(A), the period of continuous presence stops "when the alien is served a notice to appear under section 1229(a)." And § 1229(a), in turn, requires that a "notice to appear" specify the "time and place at which the [removal] proceedings will be held." The plain meaning of those statutory provisions make it "clear" that, to trigger the stop-time rule of § 1229(d)(1)(A), "the Government must serve a notice to appear that, at the very least, 'specifies' the 'time and place' of the removal proceedings." The surrounding text also supports this reading: the statute gives nonresidents an opportunity to secure counsel by mandating that a "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." *Id.* § 1229(b)(1). That provision would be meaningless if the notice to appear did not specify the time and place of the hearing because the Government could undercut the noncitizen's ability to retain counsel by serving "a document labeled 'notice to appear' without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing when it becomes available." Moreover, "common sense" compels the conclusion that, for the words "notice to appear" to mean anything, they must mean that the Government provide notice of the time and place "that would enable the [noncitizen] to appear at the removal hearing in the first place." Finally, because Congress clearly defined "notice to appear," the Government's interpretation of that phrase in a regulation—stating that such notices must specify the time and place of a removal hearing only "where practicable"—is not entitled to *Chevron* deference.

14. ***South Dakota v. Wayfair, Inc.*, No. 17-494 (S.D., 901 N.W.2d 754; cert. granted Jan. 12, 2018; argued 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?**

Decided June 21, 2018 (585 U.S. __). S.D./Vacated and remanded. Justice Kennedy for a 5-4 Court (Thomas, J., concurring; Gorsuch, J., concurring; Roberts, C.J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that a State may require businesses with no physical presence in the State to collect sales taxes, overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, the Court reaffirmed that States could not require catalog retailers to collect sales taxes if the retailers did not have a physical presence in the State. Despite that ruling, South Dakota passed a statute requiring Internet

retailers to collect state sales taxes on sales to its residents. South Dakota then sued a number of Internet retailers for not collecting taxes under the statute, and the retailers countered that the statute was invalid under *Quill*. Siding with the State, the Court explained that *Quill*'s physical-presence test was devised (i) to ensure that state taxes apply only to those activities "with a substantial nexus with the taxing State" and (ii) to prevent "undue burdens on interstate commerce." Those twin rationales ignore the "substantial virtual connections" that Internet retailers have to States. The rationales also create artificial distinctions between businesses, contrary to the "case-by-case analysis of purposes and effects" required by the Court's Commerce Clause jurisprudence. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). *Quill*, the Court explained, "has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers," and the "Internet revolution" has only made *Quill*'s rule "further removed from economic reality."

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15. ***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.**

    Decided June 18, 2018 (585 U.S. __). D. Md./Affirmed. Per Curiam. The Court held that the district court did not abuse its discretion in denying a motion for a preliminary injunction to stop 2018 congressional elections in Maryland under an allegedly politically gerrymandered map. To obtain a preliminary injunction, plaintiffs must show that they are likely to succeed on the merits, that they likely will incur irreparable harm absent the injunction, that the balance of equities tips in favor of relief, and that an injunction is in the public interest. Here, even assuming that plaintiffs had demonstrated a likelihood of success on the merits, the balance of equities and the public interest tilted against their request for a preliminary injunction. First, plaintiffs did not act with reasonable diligence: they waited to seek a preliminary injunction until six years after the legislative map was adopted and three years after filing a complaint. Second, plaintiffs did not provide the district court with sufficient time to rule on the preliminary injunction and to ensure orderly elections. Third, the district court properly exercised its discretion to await further guidance from the Court because *Gill v. Whitford*, No. 16-1161 (U.S.) was pending at the time.

16. ***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?

Decided June 18, 2018 (585 U.S. __). Fifth Circuit/Reversed and remanded. Justice Sotomayor for a 7-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that the Fifth Circuit should have exercised its discretion under Federal Rule of Criminal Procedure 52(b) to vacate petitioner's sentence because the sentencing judge's miscalculation of petitioner's Guidelines range was plain and affects his substantial rights. Rule 52(b) permits a court of appeals to consider an error raised for the first time on appeal if (i) the defendant did not intentionally abandon the error, (ii) the error is obvious, (iii) the error affects the defendant's substantial rights, and (iv) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993). Here, petitioner pleaded guilty to illegal reentry into the United States. In determining his sentence, the district court mistakenly counted a prior conviction twice. As a result, the Guidelines range yielded a sentence of 77 to 96 months, when the correct range was 70 to 87 months. Petitioner did not raise the error until appeal. The Fifth Circuit concluded that, although petitioner had satisfied the first three prongs for Rule 52(b) relief, he had not satisfied the fourth prong because he had not demonstrated that the error or the result "would shock the conscience." Reversing, the Court explained that the Fifth Circuit's "shock the conscience" standard imposed an improperly heightened standard for relief. "A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b)." Such errors are particularly likely to undermine "the fairness, integrity, or public reputation of judicial proceedings" because they ultimately result from a judicial mistake and risk an "unnecessary deprivation of liberty." Further, the procedure to fix such errors—a resentencing hearing—imposes a relatively low burden on the judicial system, and the failure to fix the error would impact the fairness of sentencing more broadly by disrupting the uniformity of sentencing across the federal judicial system.

17. ***Chavez-Meza v. United States*, No. 17-5639 (10th Cir., 854 F.3d 655; cert. granted Jan. 12, 2018; argued 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).**

Decided June 18, 2018 (585 U.S. __). Tenth Circuit/Affirmed. Justice Breyer for a 5-3 Court (Kennedy, J., dissenting, joined by Sotomayor and Kagan, J.J.; Gorsuch, J., took no part in the consideration or decision). The Court held that, because the record as a whole demonstrated that the sentencing judge had a reasoned basis for reducing petitioner's sentence to the middle of the amended Sentencing Guidelines range, rather than to the bottom of that range, the judge's

explanation, which consisted of checking boxes on a standard form indicating consideration of all relevant factors, was adequate. Petitioner was sentenced at the low end of the Guidelines range, but he moved for a sentencing reduction after the Sentencing Commission lowered the relevant range to 108 to 135 months. The sentencing judge granted the motion, but reduced petitioner's sentence to 114 months, rather than to 108 months. The judge entered the order on a standard form and checked boxes indicating it had "considered" petitioner's motion and "tak[en] into account" the sentencing factors in 18 U.S.C. § 3553(a), but provided no further explanation. Relying on § 3553(c)(1), which requires a sentencing judge to explain "the reason for imposing a sentence at a particular point within the [Guidelines] range" if the range exceeds 24 months, petitioner argued that the judge's explanation was inadequate. The Court disagreed. The judge had adequately explained his rationale when petitioner was originally sentenced, and "[t]his record was before the judge when he considered petitioner's request for a sentence modification." Further, the judge certified on the form that he had considered petitioner's motion and taken into account the relevant factors. "And given the simplicity of *this* case, the judge's awareness of the arguments, his consideration of the relevant sentencing factors, and the intuitive reason why he picked a sentence above the very bottom of the new range [petitioner had broken a rule while in prison], the judge's explanation (minimal as it was) fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge."

18. ***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?**

    Decided June 18, 2018 (585 U.S. __). Eleventh Circuit/Vacated and remanded. Justice Kennedy for an 8-1 Court (Thomas, J., dissenting). The Court held that the existence of probable cause for petitioner's arrest did not defeat his First Amendment retaliation claim against a municipality under 42 U.S.C. § 1983, when his arrest was allegedly made pursuant to an official municipal policy of retaliating against him. The issue in the case "is a narrow one." Petitioner concedes that there was probable cause for his arrest at a city council meeting, but asserts that his arrest nevertheless violated the First Amendment "because the arrest was ordered in retaliation for his earlier, protected speech" of filing an open-meetings lawsuit against the council and publicly criticizing city officials. Where, as here, retaliation against protected speech is allegedly "elevated to the level of official policy, there is a compelling need for adequate avenues of redress." Thus, on alleged "facts like these," petitioner "need not prove the absence of probable cause to maintain a claim of retaliatory arrest" against the city. For similar reasons, the Court's prior decision in *Hartman v. Moore*, 547 U.S. 250 (2006), is inapposite. That case considered whether probable cause existed in determining whether governmental officials acted with retaliatory

animus, but here petitioner alleges harm based on an official policy, not "an ad hoc, on-the-spot decision" by an individual governmental official.

19. ***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.**

Decided June 18, 2018 (585 U.S. __). W.D. Wis./Vacated and remanded. Chief Justice Roberts for a unanimous Court (Kagan, J., concurring, joined by Ginsburg, Breyer, and Sotomayor, J.J.; Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch, J.). The Court held that the plaintiffs had failed to demonstrate Article III standing for their claim of unconstitutional partisan gerrymandering. The plaintiffs are a group of Democratic voters who challenged Wisconsin's redistricting plan, alleging that enforcement of the plan dilutes Democratic votes statewide, thereby violating plaintiffs' First Amendment right of association and Fourteenth Amendment right to equal protection. But because each voter in Wisconsin "is placed in a single district" and "votes for a single representative," any Article III injury to plaintiffs as a result of the plan must arise within "the particular district" in which they reside. That is, to establish standing, the plaintiffs must show harm arising from the particular composition of their own district that results in his or her vote carrying less weight than it would carry in another, hypothetical district. The plaintiffs therefore lacked standing based on their statewide-injury theory of harm. Nevertheless, the Court remanded to allow the plaintiffs an opportunity to present evidence supporting their assertions that they live in partisan gerrymandered districts. The Court did not address whether claims based on partisan gerrymandering are justiciable.

20. ***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; argued Apr. 24, 2018). Whether courts owe deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime.**

Decided June 14, 2018 (585 U.S. __). Second Circuit/Vacated and remanded. Justice Ginsburg for a unanimous Court. The Court held that Federal Rule of Civil Procedure 44.1 requires federal courts to "accord respectful consideration" to a foreign government's interpretation of its own law, but that federal courts are not required to give "conclusive effect" to that interpretation. Here, Chinese corporations moved to dismiss a price-fixing lawsuit on the ground that Chinese law requires them to set prices at certain levels, and the Chinese government filed an *amicus* brief supporting the motion. The Second Circuit treated as binding the

Chinese government's interpretation of its own law, concluding that federal courts are "bound to defer" to a foreign government's construction of its law if the construction is "reasonable." That was error. Rule 44.1 requires federal courts to consider "any relevant material or source" when determining the meaning of foreign law, and the "appropriate weight in each case will depend upon the circumstances." Federal courts are "neither bound to adopt the foreign government's characterization nor required to ignore" other relevant materials that may be contrary to that characterization. In light of the many and diverse legal systems around the world, and the range of interests foreign governments could have in litigation pending in the United States, "no single formula or rule will fit all cases in which a foreign government describes its own law." The weight given to such descriptions must reflect "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." The Court therefore vacated the Second Circuit's judgment and remanded for reconsideration of whether Chinese law requires the price-fixing conduct of the Chinese corporations.

21. ***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?**

Decided June 14, 2018 (585 U.S. __). Eighth Circuit/Reversed and remanded. Chief Justice Roberts for a 7-2 Court (Sotomayor, J., dissenting, joined by Breyer, J.). The Court held that Minnesota's ban on political apparel at polling places violates the First Amendment's Free Speech Clause because there is no readily discernible way to determine what apparel is "political." A Minnesota statute prohibits individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place on election days. Minn. Stat. § 211B.11(1). Polling places are nonpublic forums—that is, they are not spaces traditionally regarded as public forums—and, as such, may be subject to viewpoint-neutral, content-based restrictions that are "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Here, the Minnesota statute serves the permissible objective of creating a campaign-free zone inside polling places to minimize interference with the purpose of those places: voting. But "the unmoored use of the term 'political'" in the statute provides no sensible way to distinguish between permissible and impermissible apparel. Further, Minnesota failed to show a reasonable relationship between its legitimate interest and some of the categories of apparel prohibited by the statute. For example, one category of prohibited apparel—"issue oriented material designed to influence or impact voting"—sweeps in nearly every possible political subject and requires election judges to maintain mental lists of all possible topics in an election. Another category of prohibited apparel—"promoting a group with recognizable political views"—is vulnerable to erratic application because it could cover all associations, businesses, or religious organizations. If Minnesota wishes to limit

partisan speech inside polling places, "it must employ a more discernible approach" than its current statute.

22. ***Washington v. United States*, No. 17-269 (9th Cir., 853 F.3d 946; cert. granted Jan. 12, 2018; argued Apr. 18, 2018). Whether road culverts that restrict salmon passage violate Native American fishing rights granted by treaty.**

    Decided June 11, 2018 (584 U.S. __). Ninth Circuit/Affirmed. Per Curiam (Kennedy, J., took no part in the decision). The judgment is affirmed by an equally divided Court.

23. ***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?**

    Decided June 11, 2018 (584 U.S. __). Eighth Circuit/Reversed and remanded. Justice Kagan for an 8-1 Court (Gorsuch, J., dissenting). The Court held that retroactively applying a Minnesota law that, upon a divorce, automatically nullifies a former spouse's designation as a life-insurance beneficiary does not violate the Contracts Clause of the U.S. Constitution. Minnesota law provides that "the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual's former spouse." Minn. Stat. § 524.2-804, subd. 1. Here, the ex-wife of a deceased policyholder argued that the statute unconstitutionally impaired the contractual relationship contemplated in the life-insurance policy, which had named her as the beneficiary, because the law did not exist when the policy was purchased. The Eighth Circuit agreed, holding that retroactively applying Minnesota's law violates the Contracts Clause. Reversing, the Court explained that the Contracts Clause prohibits only those state laws that (1) substantially impair a contractual relationship and (2) are not drawn in an "appropriate" and "reasonable" way to advance a "significant and legitimate public purpose." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983). The analysis ends at the first step because Minnesota law "does not substantially impair pre-existing contractual arrangements." First, the law is designed to further a policyholder's intent—and thus supports, rather than impairs, contracts—because most divorcing parties do not intend for their former spouses to benefit from their life insurance proceeds. Second, the law "is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done" and, therefore, an insured "cannot reasonably rely on a beneficiary designation remaining in place after a divorce." Third, the statute "supplies a mere default rule" that a policyholder can easily undo post-divorce with "minimal paperwork" by submitting a change-of-beneficiary form to re-designate the ex-spouse. A statute does not violate the Contracts Clause where, as here, it merely makes "contract benefits contingent on some simple filing."

24. ***Husted, Ohio Sec'y. 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?

Decided June 11, 2018 (584 U.S. __). Sixth Circuit/Reversed. Justice Alito for a 5-4 Court (Thomas, J., concurring; Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.; Sotomayor, J., dissenting). The Court held that Ohio's procedure for removing individuals from its voter rolls due to a change in residence does not violate the National Voter Registration Act ("NVRA"). The NVRA prohibits States from removing voters from voting rolls based on a change in residence unless the voter (A) confirms in writing that he or she has moved or (B) fails to respond to a postage "return card" and then fails to vote in an election during the next two general federal elections. 52 U.S.C. § 20507(d)(1). The statute also contains a "Failure-to-Vote Clause" that proscribes "removal of the name of any person . . . by reason of the person's failure to vote, except that nothing in this [clause] may be construed to prohibit a State from using the procedures described in subsection[ ] (d)." *Id.* § 20507(b)(2). Further, "no registrant may be removed *solely* by reason of a failure to vote." *Id.* § 21083(a)(4)(A) (emphasis added). In Ohio, any registered voter who does not vote, sign a petition, or engage in other voting-related activity for two consecutive years receives a mailed notice. If the person does not respond to the notice and does not engage in voting-related activity for four additional years—for a total of six years of nonvoting—he or she is presumed to have moved and is removed from the voter rolls. This process does not violate the NVRA because it follows § 20507(d) to the letter: "a State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote," and Ohio's process relies on a failure to vote *and* a failure to respond to the mailed notice.

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25. ***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*?**

Decided June 11, 2018 (584 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court (Sotomayor, J., concurring in the judgment). The Court held that the filing of a class action does not toll the statute

of limitations for putative class members to file their own class actions and, thus, if class certification is denied, putative class members cannot file successive or "stacked" class actions after the limitations period expires. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that the timely filing of a class action tolls the applicable statute of limitations for the *individual* claims of persons encompassed by the class complaint. Here, respondent brought a class action against China Agritech after the relevant limitations period had expired, arguing that two prior putative class actions—neither of which was certified—tolled the limitations period for filing additional class actions. Rejecting this argument, the Court explained that "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *American Pipe* tolls the limitations period for *individual* claims because "economy of litigation favors delaying those claims until after a class-certification denial." But economy of litigation does not similarly support the "maintenance of untimely successive class actions." To the contrary, efficiency favors early assertion of competing class claims: Extending *American Pipe* to class claims would allow "[e]ndless tolling" of the statute of limitations, as every time a class is denied certification, a new named plaintiff could file a new class complaint that "resuscitates the litigation."

26. ***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; argued 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.**

Decided June 4, 2018 (584 U.S. __). Eleventh Circuit/Affirmed. Justice Sotomayor for a unanimous Court (Thomas, Alito, and Gorsuch, J.J., joining all but Part III-B). The Court held that a statement about a debtor's single asset, as opposed to the debtor's overall finances, may qualify as a "statement . . . respecting the debtor's . . . financial condition" for purposes of the bankruptcy-discharge exception of 11 U.S.C. § 523(a)(2)(B). After respondent filed for bankruptcy, petitioner initiated an adversary proceeding to collect a debt based on respondent's false statements about a tax refund, relying on § 523(a)(2)(A), which bars discharge of debts arising from "a false representation . . . respecting the debtor's financial condition." Respondent moved to dismiss, arguing that the debt is dischargeable because the false statement about the tax refund was not "in writing," as required by § 523(a)(2)(B). The Court agreed with respondent, focusing on the scope of the word "respecting" in the statute. Because the Bankruptcy Code does not define that word, dictionaries provide guidance, and they generally define the word "respecting" broadly to mean "concerning" or "in relation to." The Court also has given the word "respecting" an "expansive reading" when interpreting other statutes, and lower courts have consistently construed an identical phrase in a prior version of the Bankruptcy Code to "encompass statements addressing just one or some of a debtor's assets or liabilities." Thus, a "statement is 'respecting' a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status." And

because a "single asset has a direct relation to and impact on aggregate financial condition," a statement about a "single asset can be a 'statement respecting the debtor's financial condition.'"

27. ***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?**

    Decided June 4, 2018 (584 U.S. __). Eighth Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that a defendant sentenced pursuant to a statutory mandatory minimum and who received a sentence below the minimum by providing substantial assistance to the Government is generally ineligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range. District courts may reduce the sentences of prisoners whose sentences are "based on a sentencing range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2). Here, the district court discarded the Guidelines range and sentenced petitioners based on statutory mandatory minimums with a reduction for petitioners' substantial assistance to the Government. Petitioners were not subject to a sentencing reduction under § 3582(c)(2) because, for that provision to apply, the Guidelines range must at least play a part in the framework the district court used when imposing the sentence, and here "the court scrapped the ranges in favor of the mandatory minimums, and never considered the ranges again." Because those ranges "dropped out of the case," the sentences were not "based on" them.

28. ***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?**

    Decided June 4, 2018 (584 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Kennedy for a 6-3 Court (Sotomayor, J., concurring; Roberts, C.J., dissenting, joined by Thomas and Alito, J.J.). The Court did not consider the proper application of *Marks v. United States*, 430 U.S. 188 (1977), because the Court resolved the substantive sentencing issue that led to the plurality opinion in *Freeman v. United States*, 564 U.S. 522 (2011), and held that a defendant who

enters into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) ("Type-C agreement") is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range. Petitioner and the Government negotiated a Type-C agreement that stipulated a sentence of 180 months when the Guidelines range was 188 to 235 months. About two months later, an amendment to the Guidelines changed the relevant range to 151 to 188 months. Petitioner moved for a reduced sentence under 18 U.S.C. § 3582(c)(2), which allows district courts to reduce sentences "based on a sentencing range that has subsequently been lowered." The circuit court concluded that petitioner was ineligible for a reduced sentence because his plea agreement did not expressly rely on the Guidelines range and thus was not "based on a sentencing range." Reversing, the Court held that "a sentence imposed pursuant to a Type-C agreement is 'based on' the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement." That happened here: the district court analyzed whether to accept the Type-C agreement by comparing the agreed-upon sentence to the Guidelines range. Thus, petitioner's sentence was "based on" the Guidelines range and he is eligible for a sentence reduction under § 3582(c)(2).

29. ***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?**

    Decided June 4, 2018 (584 U.S. __). Colo. App./Reversed. Justice Kennedy for a 7-2 Court (Kagan, J., concurring, joined by Breyer, J.; Gorsuch, J., concurring, joined by Alito, J.; Thomas, J., concurring in part and concurring in the judgment, joined by Gorsuch, J.; Ginsburg, J., dissenting, joined by Sotomayor, J.). The Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause in ruling that petitioner had violated the Colorado Anti-Discrimination Act. Jack Phillips, a devout Christian and expert baker, owns and operates Masterpiece Cakeshop. When he refused to create a custom wedding cake for a same-sex couple because doing so would violate his sincere religious beliefs, the couple filed a discrimination complaint with the Commission, alleging violations of the Act. Phillips, in turn, argued that requiring him to make the cake would violate both his right to free speech and his right to free exercise of religion. The Commission rejected that argument after holding formal public hearings about the case, during which some commissioners disparaged Phillips's religious beliefs and suggested they were insincere. Resolving the case on narrow grounds, the Court held that the Commission had violated the Free Exercise Clause because it did not give "neutral and respectful consideration" to the sincere religious beliefs that motivated Phillips's objection. The Court also articulated principles that should guide the resolution of similar cases in the future: "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression," yet "such objections do not allow

business owners and other actors in the economy and in society to deny protected persons equal access to goods and services."

30. ***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.**

Decided May 29, 2018 (584 U.S. __). Va./Reversed and remanded. Justice Sotomayor for an 8-1 Court (Thomas, J., concurring; Alito, J., dissenting). The Court held that the Fourth Amendment's "automobile exception" does not permit a law-enforcement officer without a warrant to enter a home or its curtilage in order to search a vehicle. Acting without a warrant, an officer searched a motorcycle under a tarp parked inside a partially enclosed portion of petitioner's driveway abutting his house. The officer removed the tarp, ran the license plate, discovered the motorcycle was stolen, and arrested petitioner when he returned home. The state courts reasoned that the warrantless search was permitted under the automobile exception, but the Court disagreed. The motorcycle was parked on the curtilage of petitioner's home, and nothing in the Court's case law "suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant." The two rationales underlying the automobile exception—the "ready mobility" of vehicles and the "pervasive regulation of vehicles capable of traveling on the public highways"—balance "the intrusion on an individual's Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle." Expanding the automobile exception to allow the warrantless search of a vehicle parked in the curtilage of a home "would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application." The Court remanded for a determination of whether the warrantless search at issue was reasonable on a different basis, such as exigent circumstances.

31. ***Lagos v. United States*, No. 16-1519 (5th Cir., 864 F.3d 320; cert. granted Jan. 12, 2018; argued 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.**

Decided May 29, 2018 (584 U.S. __). Fifth Circuit/Reversed and remanded. Justice Breyer for a unanimous Court. The Court held that the Mandatory Victims Restitution Act ("MVRA") requires defendants to reimburse victims for expenses incurred during participation in governmental investigations or criminal proceedings, but not private investigations and civil or bankruptcy proceedings. Petitioner was convicted of using a company he controlled to defraud a lender. To uncover the extent of the fraud, the lender conducted a private investigation and participated in the bankruptcy proceedings for petitioner's company, spending

nearly $5 million overall. The district court ordered petitioner to reimburse those expenses after he pleaded guilty to wire fraud, relying on a provision of the MVRA requiring defendants convicted of certain offenses, including wire fraud, to reimburse victims for lost income and other 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 Fifth Circuit affirmed, reasoning that the lender's private investigation and bankruptcy proceedings qualified as an "investigation" and "proceedings" under the statute. That was error. A close reading of the text reveals that the term "investigation" is limited to governmental investigations: the word "investigation" appears in the phrase "investigation or prosecution," and because the word "prosecution" must refer to the government's criminal prosecution, the word "investigation" naturally refers to the government's criminal investigation. Similar reasoning compels the conclusion that "proceedings" refers to criminal proceedings. Moreover, the statute refers to the *victim's* "participation" in the "investigation" and "attendance" at "proceedings," and there would be "awkwardness" if the statute used "participation" to refer to a victim's role in its own private investigation, and the word "attendance" to refer to a victim's role as a party in a noncriminal proceeding. The Court also noted concerns with the "significant administrative burdens" of determining what expenses are "necessary" if the statute were to extend beyond governmental investigations and criminal proceedings. "A district court might, for example, need to decide whether each witness interview and each set of documents reviewed was really 'necessary' to [a private] investigation."

32. ***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?**

    Decided May 21, 2018 (583 U.S. __). Wash./Vacated and remanded. Justice Gorsuch for a 7-2 Court. (Roberts, C.J., concurring, joined by Kennedy, J.; Thomas, J., dissenting, joined by Alito, J.). The Court held that *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), did not decide whether tribal sovereign immunity applies to *in rem* actions. The Upper Skagit Indian Tribe asserted sovereign immunity as a defense in a dispute about the ownership of land in Washington. The Washington Supreme Court rejected the Tribe's immunity claim, reasoning that, under *Yakima*, tribal sovereign immunity does not apply to *in rem* actions. That was error. *Yakima* addressed only a question of statutory interpretation of the Indian General Allotment Act of 1887, and did not resolve any issue about tribal sovereign immunity. The Court therefore vacated the decision below and remanded for reconsideration of the immunity issue.

33. ***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.

Decided May 21, 2018 (584 U.S. __). Seventh Circuit/Reversed and remanded. Justice Gorsuch for a 5-4 Court (Thomas, J., concurring; Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that arbitration agreements that require individual arbitration and waive the right to class proceedings are enforceable under the Federal Arbitration Act ("FAA"), notwithstanding a provision of the National Labor Relations Act ("NLRA") giving employees the right to engage in "concerted activities," 29 U.S.C. § 157. The FAA's "saving clause" provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That language recognizes only generally applicable contract defenses such as fraud and duress; it does not recognize defenses that specifically "target arbitration by name or by more subtle methods." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Here, the employees do not argue that their arbitration agreements with their employers were extracted by fraud, duress, or other impropriety that would render *any* contract unenforceable; instead, the employees argue that the agreements are invalid because they require "individualized arbitration proceedings instead of class or collective ones." By "attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes," and the FAA overrides such arbitration-specific objections. The NLRA's "concerted activities" provision does not help the employees. That provision "focuses on the right to organize unions and bargain collectively," and "does not express approval or disapproval of arbitration." The absence of any specific statutory discussion of arbitration or class actions in that provision "is an important and telling clue" that it does not displace the FAA. Finally, the contrary interpretation of the National Labor Relations Board is not subject to *Chevron* deference because the question presented implicates a potential conflict between two statutes (the FAA and the NLRA), and the Board has the authority to interpret only the NLRA. Moreover, the Solicitor General and the Board took competing positions before the Court, and the Court "will not defer" when the Executive speaks "from both sides of its mouth, articulating no single position on which it might be held accountable."

Gibson Dunn
Counsel for
Petitioner

34. ***Murphy 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?

Decided May 14, 2018 (584 U.S. __). Third Circuit/Reversed. Justice Alito for a 6-3 Court (Thomas, J., concurring; Breyer, J., concurring in part and dissenting in part; Ginsburg, J., dissenting, joined by Sotomayor, J., and joined in part by Breyer, J.). The Court held that provisions of the Professional and Amateur Sports Protection Act ("PASPA") prohibiting States from authorizing sports gambling violate the Constitution's "anticommandeering rule," and that the provisions at issue are not severable from the rest of the statute. PASPA makes it unlawful for any State or its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . betting, gambling, or wagering" on competitive sports, 28 U.S.C. § 3702(1), and for "a person to sponsor, operate, advertise, or promote" gambling "pursuant to the law or compact of a governmental entity," *id.* § 3702(2). Despite those prohibitions, New Jersey enacted legislation that repealed prior state-law provisions that had outlawed sports gambling. The Third Circuit held that New Jersey's repeal violates PASPA. Reversing, the Court explained that the Constitution's anticommandeering rule—rooted in the Tenth Amendment—prohibits Congress from issuing "direct orders to the governments of the States." Thus, Congress may not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992). PASPA violates these rules because it "unequivocally dictates what a state legislature may and may not do"—namely, authorize sports gambling. And it is "clear" that "[w]hen a State completely or partially repeals old laws banning sports gambling," it "authorize[s]" that activity within the meaning of PASPA. In other words, the distinction between compelling a State to enact legislation and prohibiting a State from repealing an existing statute is "empty," and the "basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." The Court further held that, because Congress never would have contemplated enacting §§ 3702(1)-(2) standing alone, "no provision of PASPA is severable from the provision directly at issue." Thus, the entire statute is unconstitutional.

35. ***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?**

Decided May 14, 2018 (584 U.S. __). Tenth Circuit/Affirmed. Justice Breyer for a unanimous Court (Gorsuch, J., took no part in the consideration or decision). The Court held that wiretap orders containing all statutorily required information

are not facially insufficient just because they also contain improper language authorizing interception beyond the court's territorial jurisdiction. The Omnibus Crime Control and Safe Streets Act authorizes judges to issue wiretap orders to intercept communications "within the territorial jurisdiction of the court," and sets forth detailed requirements for the orders and wiretaps. 18 U.S.C. § 2518(3). Here, a judge in Kansas authorized wiretap orders for communications within Kansas, but also included language in the orders allowing interceptions outside of Kansas. The Government later intercepted communications in Kansas and Missouri, and indicted petitioners on drug charges. Petitioners moved to suppress all wiretap evidence, pointing to statutory language requiring suppression of evidence obtained via a wiretap order that is "insufficient on its face." *Id.* § 2518(10)(a)(ii). The Tenth Circuit rejected that argument, and the Supreme Court agreed. A wiretap order is "insufficient" insofar as it is deficient or lacks what is necessary or required, and the wiretap orders in this case contained all information required by the statute. Although the orders also contained a "defect"—language authorizing interception outside of the court's territorial jurisdiction—"not every defect results in an insufficiency." The improper language was "surplus," and if the Court removed the language, the orders "would then properly authorize wiretaps within the authorizing court's territorial jurisdiction."

36. ***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?**

Decided May 14, 2018 (584 U.S. __). La./Reversed and remanded. Justice Ginsburg for a 6-3 Court (Alito, J., dissenting, joined by Thomas and Gorsuch, J.J.). The Court held that the Sixth Amendment guarantees a defendant the right to insist that his counsel refrain from admitting guilt, even when counsel believes that confessing guilt is the best strategy. The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence," U.S. Const. Amend. VI, and "an assistant, however expert, is still an assistant," *Faretta v. California*, 422 U.S. 806, 820 (1975). Although lawyers generally have discretion to manage trial strategy, some decisions are reserved for the client, including whether to assert innocence. Accordingly, defense counsel "may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission," even if "counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." The Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), is not to the contrary. There, the Court held that a defendant's explicit consent is not required to implement a strategy of conceding guilt when defense counsel repeatedly proposes that strategy to the defendant and the defendant is nonresponsive. Here,

the defendant "adamantly objected to any admission of guilt" and "vociferously insisted that he did not engage in the charged acts."

37. ***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?**

Decided May 14, 2018 (584 U.S. __). Third Circuit/Vacated and remanded. Justice Kennedy for a unanimous Court (Thomas, J., concurring, joined by Gorsuch, J.; Alito, J., concurring). The Court held that drivers in lawful possession of rental cars have a reasonable expectation of privacy under the Fourth Amendment even if they are not listed on the rental agreement as authorized drivers. Petitioner had a companion rent a car for him and then used the car to transport drugs. When police officers stopped petitioner for a possible traffic violation, they noticed he was not an authorized driver on the rental agreement, conducted a nonconsensual search, and found 49 bricks of heroin. The circuit court affirmed the denial of petitioner's motion to suppress the drug evidence as fruit of an unlawful search, reasoning that he had no reasonable expectation of privacy in the car because he was not listed on the rental agreement. That was error. "[O]ne who . . . lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978). In an analogous scenario, the Court held that a guest staying with permission in a friend's apartment had a reasonable expectation of privacy in that apartment because he had control over the apartment and could exclude others from it. *Jones v. United States*, 362 U.S. 257, 259 (1960). Just as it did not matter in *Jones* whether the friend owned or leased the apartment that he permitted the guest to use, it does not matter here whether "the car in question is rented or privately owned by someone other than the person in current possession of it." A reasonable expectation of privacy attaches whenever one has "lawful possession and control and the attendant right to exclude," and "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."

38. ***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?**

Decided May 14, 2018 (584 U.S. __). Ninth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court. The Court held that respondents' challenge to the use of full restraints during nonjury pretrial criminal proceedings was moot because the underlying criminal cases had ended before the Ninth

Circuit issued its decision. Federal courts may adjudicate only "actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). Because respondents' criminal cases had ended while their appeals were pending, respondents no longer had a direct stake in the outcome of the litigation. The Ninth Circuit was therefore wrong to rule that the litigation could continue because it involved "class-like claims" with an "inherently transitory nature." 859 F.3d 649, 658 (9th Cir. 2017) (en banc). That exception to the mootness doctrine applies only to *civil* class actions where the judgment would bind unnamed class members who have a direct stake in the outcome of the lawsuit. The criminal rules do not establish a comparable class-action vehicle, and "we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class." The Court also rejected the argument that respondents' claims fell within an exception to the mootness doctrine for controversies that are "capable of repetition yet evading review." That exception applies when "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011). Although respondents argued that they likely would "again violate the law, be apprehended, and be returned to pretrial custody," the Court has "consistently refused to find the case or controversy requirement satisfied where, as here, the litigants simply 'anticipate violating lawful criminal statutes.'" *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

39. ***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?**

    Decided Apr. 24, 2018 (584 U.S. __). Federal Circuit/Reversed and remanded. Justice Gorsuch for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.; Breyer, J., dissenting, joined by Ginsburg and Sotomayor, J.J., and joined in part by Kagan, J.). The Court held that if the Patent Trial and Appeal Board exercises its discretion to institute inter partes review, the Board must issue an opinion on all challenged claims. By statute, the Board may institute inter partes review if the petitioner shows a "reasonable likelihood" of success on at least one claim. 35 U.S.C. § 314(a). If the Board institutes inter partes review, it "*shall* issue" a written decision as to the patentability of "*any* patent claim challenged by the petitioner." *Id.* § 318(a) (emphasis added). In this case, SAS Institute, Inc., petitioned the Board for inter partes review of a certain patent. The Board reviewed only some of the claims raised in the petition, as regulations of the U.S. Patent and Trademark Office permit, and SAS Institute appealed, arguing that the Board was required to issue a final decision on all of the claims. The Court agreed. "[T]he plain text of § 318(a) supplies a ready answer." The word "shall" in that provision imposes "a nondiscretionary duty,"

and the word "any" carries a broad meaning. Thus, "when § 318(a) says the Board's final written decision 'shall' resolve the patentability of 'any patent claim challenged by the petitioner,' it means the Board *must* address *every* claim the petitioner has challenged." The Board's regulation permitting review of only some claims is contrary to the plain language of the statute. "Rather than contemplate claim-by-claim institution," the statutory language "anticipates a regime where a reasonable prospect of success on a single claim justifies review of all."

40. ***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.**

Decided Apr. 24, 2018 (584 U.S. __). Federal Circuit/Affirmed. Justice Thomas for a 7-2 Court (Breyer, J., concurring, joined by Ginsburg and Sotomayor, J.J.; Gorsuch, J., dissenting, joined by Roberts, C.J.). The Court held that inter partes review does not violate Article III or the Seventh Amendment. The America Invents Act, 35 U.S.C. § 100 *et seq.*, created a new adversarial process within the U.S. Patent and Trademark Office ("PTO") known as inter partes review, which allows anyone to challenge the validity of an existing patent on certain grounds. Here, petitioner challenged the PTO's decision to revoke a patent following inter partes review, arguing that the review violates Article III because the review was not conducted by a federal court and also violates the Seventh Amendment because petitioner had no right to a jury. The Court disagreed, explaining that patents are public rights, not purely private rights, and thus Congress may allow non-Article III tribunals like the PTO to adjudicate those rights. Just as the decision to *grant* a patent is a matter involving public rights, so too is the decision to *reconsider* that grant in inter partes review. And "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53-54 (1989).

41. ***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.**

Decided Apr. 24, 2018 (584 U.S. __). Second Circuit/Affirmed. Justice Kennedy for a 5-4 Court (Thomas, J., concurring; Alito, J., concurring in part and concurring in the judgment; Gorsuch, J., concurring in part and concurring in the judgment; Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, J.J.). The Court held that foreign corporations may not be sued under the Alien Tort Statute ("ATS"). The ATS provides that foreign nationals may sue in federal court "for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Relying on the ATS, petitioners sued Arab Bank, PLC—a Jordanian financial institution with a branch in New York—alleging that the bank helped finance terrorist attacks in the Middle East. The

Second Circuit dismissed the ATS claims, reasoning that the statute does not permit suits against foreign corporations. Affirming, the Court explained that neither the language of the ATS nor the Court's precedents interpreting it supports extending the statute to authorize suits against foreign corporations. The political branches, rather than the courts, are responsible for weighing foreign-policy concerns and deciding whether and when foreign corporations should face liability in federal courts. The Judiciary is "not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one."

42. ***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?**

Decided Apr. 17, 2018 (584 U.S. __). Second Circuit/Vacated and remanded. Per Curiam. The Court held that the case was moot. In December 2013, the Government obtained a warrant "requiring Microsoft to disclose all e-mails and other information" associated with an account involved in drug trafficking. Because the emails were stored in a datacenter in Ireland, Microsoft refused to deliver the emails on the ground that the Stored Communications Act, 18 U.S.C. § 2701 *et seq*., does not apply to emails stored overseas. That statute authorizes the Government to require an email provider to disclose the contents of emails and certain other electronic data within its control if the Government obtains a warrant based on probable cause. In March 2018, President Trump signed into law the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act"), which amended the Stored Communications Act to encompass all records "within [a] provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." CLOUD Act § 103(a)(1) (to be codified at 18 U.S.C. § 2713). Because the parties' dispute arose under the pre-CLOUD Act version of the Stored Communications Act, the case is now moot.

43. ***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.**

Decided Apr. 17, 2018 (584 U.S. __). Ninth Circuit/Affirmed. Justice Kagan for a 5-4 Court (Gorsuch, J., concurring in part and concurring in the judgment; Roberts, C.J., dissenting, joined by Kennedy, Thomas, and Alito, J.J.; Thomas, J., dissenting, joined in part by Kennedy and Alito, J.J.). The Court held that the residual clause in 18 U.S.C. § 16(b), which provides a definition of "crime of

violence" for purposes of the Immigration and Nationality Act's removal provisions, is unconstitutionally vague. Under the Act, the United States may deport any alien convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The definition of "aggravated felony" includes a "crime of violence" as defined in 18 U.S.C. § 16 "for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(F). Section 16(b) of Title 18—known as the "residual clause"—provides that a "crime of violence" includes any felony that, "by its nature, involves a substantial risk that physical force" may be used against another. Courts applying the residual clause use the "categorical approach," which involves (1) imagining an "idealized ordinary case of the crime" and (2) determining whether that "ordinary case" exceeds some threshold level of risk. But "[h]ow does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?" And how does one go about determining "some not-well-specified-yet-sufficiently-large degree of risk?" Because those questions "have no good answers," applying the residual clause involves an unconstitutional amount of unpredictability and arbitrariness. Thus, as in *Johnson v. United States*, 576 U.S. __ (2015), which invalidated a similar residual clause in the Armed Career Criminal Act, the "ordinary-case requirement" and an "ill-defined risk threshold" make the residual clause in § 16(b) unconstitutionally vague.

44. ***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?**

Decided Apr. 17, 2018 (584 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Breyer for a 6-3 Court (Gorsuch, J., dissenting, joined by Thomas and Alito, J.J.). The Court held that a federal habeas court reviewing an unreasoned state-court decision on the merits should "look through" that unreasoned decision to the last state-court decision providing a relevant rationale and presume that the unreasoned decision adopted the same rationale, but "the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds." Petitioner sought habeas relief in Georgia state court claiming that his counsel was unconstitutionally ineffective. The trial court denied relief, reasoning that petitioner's counsel was not ineffective and did not prejudice him. In a summary disposition without any reasoning, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal. When petitioner filed a federal habeas petition, the district court "looked through" the Georgia Supreme Court's unreasoned decision to defer to the reasoning of the state trial court. Although the Eleventh Circuit affirmed, it concluded that the district court should have asked what arguments "could have supported" the Georgia Supreme Court's summary disposition instead of "looking

through" that disposition to the reasoning of the trial court. That conclusion was error because "federal habeas law employs a 'look through' presumption." This presumption is the most realistic way to identify the state court's reasoning, as judges frequently author summary opinions "when they have examined the lower court's reasoning and found nothing significant with which they disagree." Furthermore, the "look through" presumption is easy to apply because it focuses the analysis on "what the state court actually did." Nonetheless, the State may rebut this "look through" presumption by showing that a summary disposition likely relied on different grounds than the lower-court opinion, "such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed."

45. ***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?**

    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.

46. ***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."

47. ***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 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.

48. ***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 imped[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)."

49. ***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."

50. ***Texas v. New Mexico*, No. 22O141 (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. __). United States's exception sustained; all other exceptions overruled/Remanded. 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.

51. ***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.

52. ***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).

53. ***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."

54. ***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.

55. ***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 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."

56. ***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 cannon 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.

57. ***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.

58. ***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.

59. ***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."

60. ***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."

61. ***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).

62. ***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 Determined Without Argument

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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.

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.

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. 137O (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." Petitioner 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 petitioner's conduct "beyond debate," he is entitled to qualified immunity.

10. ***Azar v. Garza*, No. 17-654 (D.C. Cir., 874 F.3d 735; Vacated and remanded June 4, 2018)**. Per Curiam. The Court held that the case was moot. At issue was an en banc ruling of the D.C. Circuit in favor of a pregnant woman who unlawfully entered the United States and requested an abortion while in federal custody. When the Government denied her request, she sued and sought an order allowing the abortion. The woman had the abortion after the D.C. Circuit's ruling but before the Government could seek an emergency stay of that ruling. The abortion mooted the case. The Court therefore followed its "established practice" of vacating the judgment below and remanding with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Although "not every moot case will warrant vacatur, the fact that the relevant claim here became moot before certiorari" compelled vacatur and a remand with instructions for the circuit court to direct the district court to dismiss the case.

11. ***Sause v. Bauer*, No. 17-742 (10th Cir., 859 F.3d 1270; Reversed and remanded June 28, 2018)**. Per Curiam. The Court held that the Tenth Circuit erred in affirming the dismissal of a pro se complaint brought under 42 U.S.C. § 1983 and that, when the complaint is construed liberally, it could support a claim under the First and Fourth Amendments. In her pro se § 1983 complaint, petitioner alleged that police officers visited her apartment in response to a noise complaint and proceeded to engage in abusive conduct, including ordering her to stop praying when at one point she knelt and began to pray, and refusing to investigate her claim that she had been assaulted. The district court found that the officers were entitled to qualified immunity and dismissed the complaint. The Tenth Circuit affirmed, but that was error. When petitioner's pro se complaint is liberally construed, it may be understood to allege Fourth Amendment claims for

unreasonable search and seizure "that could not properly be dismissed for failure to state a claim." Likewise, the First Amendment claim could not be dismissed without full consideration of "the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question." Without considering those matters, "neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved." The Court therefore remanded the case for further proceedings.

12. ***Sexton v. Beaudreaux*, No. 17-1106 (9th Cir., unreported; Reversed and remanded, June 28, 2018)**. Per Curiam (Breyer, J., dissenting). The Court held that the Ninth Circuit applied the wrong legal analysis when it overturned the denial of federal habeas relief under 28 U.S.C. § 2254, on the ground "that the state court had unreasonably rejected respondent's claim of ineffective assistance of counsel." Respondent was convicted of murder based on eyewitness identifications. In his second state habeas petition, respondent argued that his trial attorney was ineffective because the attorney did not move to suppress those identifications. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Respondent then filed a federal habeas petition, which the district court denied. But the Ninth Circuit reversed, spending "most of its opinion conducting a *de novo* analysis of the merits of the would-be suppression motion," and ultimately concluding that failing to file the motion rendered respondent's trial counsel unconstitutionally ineffective. That was clear error. In evaluating a federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 where, as here, there is "no reasoned state-court decision on the merits," a federal court must evaluate what arguments or theories could have supported the state court's unreasoned decision. The federal court must then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Here, "[a] fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed." The Ninth Circuit thus committed two "fundamental errors that this Court has repeatedly admonished courts to avoid." First, it "effectively inverted the rule established in *Richter*" by considering arguments "against the state court's decision that [respondent] never even made in his state habeas petition." Second, it "failed to assess [respondent's] ineffectiveness claim with the appropriate amount of deference."

13. ***North Carolina v. Covington*, No. 17-1364 (M.D.N.C., 283 F. Supp. 3d; Affirmed in part and reversed in part June 28, 2018)**. Per Curiam (Thomas, J., dissenting). The Court held that the district court correctly entered an order to remedy racial gerrymandering of four legislative districts, but abused its discretion in revising five additional districts that were not alleged to be racially gerrymandered. The case concerns the redistricting of state legislative districts by the North Carolina General Assembly in 2011 following plaintiffs' successful challenge to the districts as racially gerrymandered. When the General Assembly redrew the districts following that successful challenge, plaintiffs argued that four of the redrawn districts "still segregated voters on the basis of race." The district

court appointed a special master to redraw the lines of the districts to which plaintiffs objected, and ultimately adopted the special master's recommended reconfiguration. First, the case did not become moot just because the General Assembly redrew the districts; "it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims." Second, although the General Assembly "did not look at racial data in drawing remedial districts," that alone did not foreclose plaintiffs' challenges, as the shape of the districts provided "sufficient circumstantial evidence that race was the predominate factor" controlling their shape. Third, the district court did not abuse its discretion in appointing a special mater to redraw the districts, as opposed to giving the General Assembly yet another bite at the apple. For those reasons, the Court affirmed the district court's order insofar as it "provided a court-drawn remedy" for the four gerrymandered districts at issue. But the district court went too far in redrawing five additional districts that plaintiffs did *not* allege were racially gerrymandered. "[S]tate legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser*, 412 U.S. 783, 795 (1973). Thus, the district court was not free to override that legislative judgment absent a finding that judicial intervention was required to remedy a violation of federal law. Once the district court "had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end."

Pending Original Cases

1. ***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.

2. ***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

1. ***Weyerhauser 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.**

Gibson Dunn
Counsel for
Petitioner

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.**

9. ***United States v. Stitt*, No. 17-765 (6th Cir., 860 F.3d 854; cert. granted Apr. 23, 2018, consolidated with *United States v. Sims*, No. 17-766). Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act.**

10. ***Frank v. Gaos*, No. 17-961 (9th Cir., 869 F.3d 737; cert. granted Apr. 30, 2018). Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with Federal Rule of Civil Procedure 23's requirement that a class settlement be "fair, reasonable, and adequate."**

11. ***Lamps Plus, Inc. v. Varela*, No. 17-988 (9th Cir., 701 F. App'x 670; cert. granted Apr. 30, 2018). Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.**

12. ***Bucklew v. Precythe*, No. 17-8151 (8th Cir., 2018 WL 1163360; cert. granted Apr. 30, 2018). The Questions Presented are: (1) Whether a court evaluating an as-applied challenge to a State's method of execution based on an inmate's rare and severe medical condition may assume that medical personnel are competent to manage his condition and that the procedure will go as intended. (2) Must evidence comparing a State's method of execution to an alternative proposed by the inmate be offered by a single witness, or should a court on a motion for summary judgment look to the record as a whole to determine whether a factfinder could conclude that the methods significantly differ in the risks they pose to the defendant? (3) Does the Eighth Amendment require an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the State's proposed method of execution based on his rare and severe medical condition? (4) Whether the petitioner met his burden to prove what procedures would be used to administer his proposed alternative method of execution, the**

severity and duration of pain likely to be produced, and how they compare to the State's method of execution.

13. ***BNSF Railway Co. v. Loos*, No. 17-1042 (8th Cir., 865 F.3d 1106; cert. granted May 14, 2018). Whether a railroad's payment to an employee for time lost from work is taxable under the Railroad Retirement Tax Act.**

14. ***Air & Liquid Sys. v. Devries*, No. 17-1104 (3d Cir., 873 F.3d 232; cert. granted May 14, 2018). Whether products-liability defendants can be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute.**

15. ***Virginia Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018). Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining on nonfederal lands.**

16. ***Culbertson v. Berryhill*, No. 17-773 (11th Cir., 861 F.3d 1197; cert. granted May 21, 2018). Under 42 U.S.C. § 406(b), when a "court renders a judgment favorable" to a Social Security claimant "who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." The Question Presented is whether the 25-percent cap applies only to fees for representation in court, or also to fees for representation at the administrative level.**

17. ***Jam v. Int'l Fin. Corp.*, No. 17-1011 (D.C. Cir., 860 F.3d 703; cert. granted May 21, 2018). The Questions Presented are: (1) Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have—confers the same immunity on those organizations as foreign governments have under the Foreign Sovereign Immunities Act. (2) If not, what rules govern the immunity to which international organizations are entitled?**

18. ***Royal v. Murphy*, No. 17-1107 (10th Cir., 875 F.3d 896; cert. granted May 21, 2018). Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).**

19. ***Sturgeon v. Frost*, No. 17-949 (9th Cir., 872 F.3d 927; cert. granted June 18, 2018). Does the Alaska National Interest Lands Conservation Act prohibit the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska?**

Gibson Dunn
Counsel for
Amicus Curiae
Oklahoma
Independent
Petroleum
Association

20. ***Garza v. Idaho*, No. 17-1026 (Idaho, 405 P.3d 576; cert. granted June 18, 2018). For purposes of ineffective assistance of counsel, does a presumption of prejudice apply where a criminal defendant instructs his trial counsel to file a notice of appeal, but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?**

21. ***Lorenzo v. SEC*, No. 17-1077 (D.C. Cir., 872 F.3d 578; cert. granted June 18, 2018). Whether a misstatement, without more, can serve as the basis for a fraudulent-scheme claim under SEC Rule 10b-5(a).**

22. ***Timbs v. Indiana*, No. 17-1091 (Ind., 84 N.E.3d 1179; cert. granted June 18, 2018). Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.**

23. ***Apple, Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017; cert. supported May 8, 2018; cert. granted June 18, 2018). 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*?**

24. ***Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert. granted June 25, 2018). 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.**

25. ***Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wa., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018). 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?**

26. ***Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 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.**

27. ***Nutraceutical Corp. v. Lambert*, No. 17-1094 (9th Cir., 870 F.3d 1170; cert. granted June 25, 2018). Federal Rule of Procedure 23(f) sets a 14-day deadline to file a petition for permission to appeal an order granting or denying class certification. Is that deadline subject to equitable exceptions that would excuse a party's failure to timely file a petition for permission to appeal or a motion for reconsideration?**

28. ***Biestek v. Berryhill*, No. 17-1184 (6th Cir., 880 F.3d 778; cert. granted June 25, 2018). To determine whether an applicant is eligible for Social Security benefits, an administrative-law judge must determine whether the applicant "can make an adjustment to other work," 20 C.F.R. § 404.1520(a)(4)(v), and that determination must be supported by substantial evidence, 42 U.S.C. § 405(g). Does a vocational expert's testimony constitute substantial evidence of "other work" available to an applicant, when the expert does not provide the data underlying the testimony?**

29. ***Helsinn Healthcare v. Teva Pharms.*, No. 17-1229 (Fed. Cir., 855 F.3d 1356; cert. granted June 25, 2018). Whether, under the Leahy-Smith America Invents Act, an inventor's sale of an invention to a third party that is obligated to keep the invention confidential qualifies as prior art for purposes of determining the patentability of the invention.**

30. ***Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (5th Cir., 878 F.3d 488; cert. granted June 25, 2018). Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the claim of arbitrability is "wholly groundless."**

31. ***Herrera v. Wyoming*, No. 17-532 (Wyo., No. S-17-0129; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 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.**

32. ***Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 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?**

33. ***Gamble v. United States*, No. 17-646 (11th Cir., 694 F. App'x 750; cert. granted June 28, 2018). Whether the Court should overrule the "separate sovereigns" exception to the Double Jeopardy Clause.**

34. ***Nieves v. Bartlett*, No. 17-1174 (9th Cir., 712 F. App'x 613; cert. granted June 28, 2018). Does the existence of probable cause defeat a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983?**

35. ***Cal. Franchise Tax Bd. v. Hyatt*, No. 17-1299 (Nev., 407 P.3d 717; cert. granted June 28, 2018). Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled?**

36. ***Obduskey v. Holthus LLP*, No. 17-1307 (10th Cir., 879 F.3d 1216; cert. granted June 28, 2018). Whether the Fair Debt Collection Practices Act applies to non-judicial foreclosure proceedings.**

37. ***Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018). 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?**

Pending Cases Calling For The Views Of The Solicitor General

1. ***Pioneer Centres Holding v. Alerus Fin.*, No. 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.**

2. ***Missouri v. California*, No. 22O148 (Original Jurisdiction; CVSG Apr. 16, 2018). Whether a California law requiring farms raising egg-laying hens to let those hens move around freely violates the Commerce Clause.**

3. ***Indiana v. Massachusetts*, No. 22O149 (Original Jurisdiction; CVSG Apr. 16, 2018). Whether a Massachusetts law barring sales of eggs, pork, and veal from animals confined in a cruel manner violates the Commerce Clause.**

4. ***Kansas v. Garcia*, No. 17-834 (Kan., 401 P.3d 588; CVSG Apr. 16, 2018). Under regulations implementing the Immigration Reform and Control Act, all prospective employees, whether citizens or aliens, must fill out a so-called Form I-9. Although employers face civil and criminal penalties for violations of the Act, the statute's express preemption provision says that States are prohibited from imposing penalties on employers of unauthorized aliens. The Questions Presented are: (1) Whether a State may use information entered on a Form I-9 in a prosecution when the same information appears in other documents. (2) If the Act preempts any use of that information, whether Congress has the constitutional authority to preempt State authority so broadly.**

5. ***Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (9th Cir., 862 F.3d 890; CVSG Apr. 16, 2018). The False Claims Act creates a cause of action, which private parties may invoke on the Government's behalf, based on the submission of false claims to the Government for payment. A plaintiff must show that any misrepresentation was material to the Government's payment decision. The Question Presented is whether a misrepresentation is material if the Government pays a claim in full despite knowledge of the alleged misrepresentation and the pleadings do not otherwise suggest the misrepresentation was material.**

6. ***Eve-USA, Inc. v. Mentor Graphics Corp.*, No. 17-804 (Fed. Cir., 851 F.3d 1275; CVSG Apr. 23, 2018). The Questions Presented are: (1) Did the Federal Circuit correctly apply the doctrine of "assignor estoppel," which precludes an inventor who has assigned its patent from contesting the patent's validity in an infringement suit, given that the Patent Act contains no such express bar. (2) The Supreme Court has traditionally required apportionment of patent-infringement damages when a patent is not for an entire machine or contrivance between the patented feature and the unpatented features. Did the Federal Circuit err in allowing patentees to recover lost profits for an entire multicomponent product, without any apportionment, based on the patentee's showing that he would have made the sale "but for" the infringement?**

7. ***Osage Wind, LLC v. Osage Minerals Council*, No. 17-1237 (10th Cir., 871 F.3d 1078; CVSG May 14, 2018). The Questions Presented are: (1) Whether the court of appeals had jurisdiction over an appeal filed by a nonparty that did not participate in any capacity in the district court, but where the suit was filed by the United States as trustee for that nonparty. (2) Whether the court of appeals erred in applying the Indian canon of construction to interpret the term "mining" under the Osage Act to include the removal of dirt and rocks in order to construct a structure on the surface.**

8. ***City of Cibolo v. Green Valley Special Util. Dist.*, No. 17-938 (5th Cir., 866 F.3d 339; CVSG May 21, 2018). Under 7 U.S.C. § 1926(b), a rural utility association that receives a federal loan for water or wastewater infrastructure enjoys monopoly protection for "[t]he service provided or made available" by the association during the term of the loan. The Questions Presented are: (1) Whether the term "service" refers to the service funded by the loan or all services provided by the loan recipient. (2) Whether an association, to show it has "provided or made available" the service, must show that the service is or can promptly be furnished or whether the association must show that it had a legal duty under state law to provide the service.**

9. ***Airline Serv. Providers v. LA World Airports*, No. 17-1183 (9th Cir., 873 F.3d 1074; CVSG June 4, 2018). Although federal labor law and the Airline Deregulation Act generally preempt state and local regulations concerning labor-management relations and airline prices, an exception applies where the state or local government does not exercise its sovereign power to regulate, but instead purchases goods or services in the marketplace. The City of Los Angeles enacted a licensing rule barring companies from providing services to airlines at Los Angeles International Airport unless they enter into a "labor peace" agreement with any union that demands one. Does the "market participant" exception apply given that the City owns and operates the Airport?**

10. ***Sudan v. Owens*, No. 17-1236 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether plaintiffs suing a foreign state bear a lighter burden in establishing the facts necessary for jurisdiction than in proving a case on the merits. (2) Whether plaintiffs suing a foreign state**

can establish facts necessary for jurisdiction based solely on the opinion testimony of terrorism experts. (3) Whether a plaintiff's failure to prove that a foreign state specifically intended or directly advanced a terrorist attack is relevant to proximate cause and jurisdictional causation under the Foreign Sovereign Immunities Act's terrorism exception.

11. ***Opati v. Sudan*, No. 17-1268 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether a party who does not contest a nonjurisdictional legal issue before judgment may demonstrate extraordinary and exceptional circumstances warranting appellate review of the issue post-judgment. (2) Whether the Foreign Sovereign Immunities Act applies retroactively to permit punitive damages under 28 U.S.C. § 1605A(c) against foreign states for terrorist activities occurring before the current version of the statute was enacted.**

12. ***Sudan v. Opati*, No. 17-1406 (D.C. Cir., 864 F.3d 751; CVSG June 11, 2018). The Questions Presented are: (1) Whether the term "extrajudicial killing" under the Foreign Sovereign Immunities Act means a summary execution by state actors. (2) Whether foreign sovereign immunity may be withdrawn for emotional distress claims brought by family members of victims under the Act. (3) Whether 28 U.S.C. § 1605A(c) provides the exclusive remedy for actions brought under § 1605A(a), and thus forecloses state causes of action previously asserted through the "pass through" provision of 28 U.S.C. § 1606. (4) Whether the statute of limitations contained in § 1605A(b) is jurisdictional in nature, and if not, whether the D.C. Circuit should have heard Sudan's limitations defense asserted through a timely, direct appeal. (5) Whether the undisputed fact of civil war, internal strife, and partitioning of Sudan into two countries constitutes excusable neglect or extraordinary circumstances for vacatur under Federal Rule of Civil Procedure 60(b).**

13. ***Ass'n Des Eleveurs v. Becerra*, No. 17-1285 (9th Cir., 870 F.3d 1140; CVSG June 18, 2018). The Questions Presented are: (1) Whether a State's ban on the sale of federally approved poultry products based on the State's disapproval of the way in which the poultry product was produced imposes an "ingredient requirement" in addition to or different than those in the Poultry Products Inspection Act. (2) Whether Congress has preempted the field of poultry products regulation.**

14. ***Harvey v. Ute Indian Tribe*, No. 17-1301 (Utah, 2017 UT 75; CVSG June 25, 2018). The Questions Presented are: (1) Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well. (2) Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.**

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 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 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; argued 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; argued 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; argued 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?**

6. ***Virginia Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017; cert. supported Apr. 9, 2018; cert. granted May 21, 2018). Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining on nonfederal lands.**

7. ***Apple, Inc. v. Pepper*, No. 17-204 (9th Cir., 846 F.3d 313; CVSG Oct. 10, 2017; cert. supported May 8, 2018; cert. granted June 18, 2018). 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*?**

8. ***Dawson v. Steager*, No. 17-419 (W. Va., 2017 WL 2172006; CVSG Jan. 8, 2018; cert. supported May 15, 2018; cert. granted June 25, 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.**

9. ***Wash. State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wa., 392 P.3d 1014; CVSG Oct. 2, 2017; cert. supported May 15, 2018; cert. granted June 25, 2018). 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?**

10. ***Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571 (11th Cir., 856 F.3d 1338; CVSG Jan. 8, 2018; cert. supported May 16, 2018; cert. granted June 28, 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?**

11. ***Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290 (3d Cir., 852 F.3d 268; CVSG Dec. 4, 2017; cert. supported May 22, 2018; cert. granted June 28, 2018). 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?**

12. ***Herrera v. Wyoming*, No. 17-532 (Wyo., No. S-17-0129; CVSG Jan. 8, 2018; cert. supported May 22, 2018; cert. granted June 28, 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.**

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?**

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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?**

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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.**

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.**

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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.**

10. ***Sterba v. PNC Bank*, No. 17-423 (9th Cir., 852 F.3d 1175; CVSG Jan. 22, 2018; cert. opposed May 17, 2018; cert. denied June 25, 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.**

11. ***Strang v. Ford Motor Co.*, No. 17-528 (6th Cir., 693 F. App'x 400; CVSG Jan. 22, 2018; cert. opposed May 22, 2018; cert. denied June 25, 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.**

12. ***Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017; cert. petition should be held in abeyance May 22, 2018; cert. granted June 25, 2018). 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.**

13. ***United States ex rel. Carter v. Halliburton Co.*, No. 17-1060 (4th Cir., 866 F.3d 199; CVSG Mar. 5, 2018; cert. opposed May 22, 2018; cert. denied June 25, 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?**

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.**

2. ***City of Hays, Kansas v. Vogt*, No. 16-1495 (10th Cir., 844 F.3d 1235; cert. granted Sept. 28, 2017; argued Feb. 20, 2018; cert. dismissed as improvidently granted May 29, 2018). Is the Fifth Amendment violated when the prosecution uses compelled statements in pre-trial proceedings, such as probable cause hearings, or is it violated only when such statements are used at a criminal trial?**

3. ***Dalmazzi v. United States*, No. 16-961 (C.A.A.F., 76 M.J. 1; consolidated with *Cox v. United States*, No. 16-1017; cert. granted Sept. 28, 2017; argued Jan. 16, 2018; cert. dismissed as improvidently granted June 22, 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 and *Cox v. United States*.**

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?**

2. ***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; cert. dismissed June 18, 2018). Under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, an omission is actionable only if the omitted**

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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?

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 21 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.

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