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SUPREME COURT RESCHEDULES HALF OF REMAINING CASES FOR ARGUMENT IN FALL 2020

To Our Clients and Friends:

On April 13, the Supreme Court announced that for the remainder of this Term, it will hear (by telephone) only 10 of the 20 cases that were previously scheduled for oral argument in March and April 2020.[1] The remaining cases apparently "will be carried over and the arguments will be conducted early in the 2020 term."[2]

Much has been made of the 10 cases the Court has scheduled for extraordinary telephonic arguments in May.[3] The 10 cases that were carried over, however, have thus far received less attention. They are:

- *Google LLC v. Oracle America, Inc.*, No. 18-956 (U.S.);
- *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368 (U.S.), and *Ford Motor Co. v. Bandemer*, No. 19-369 (U.S.);
- *City of Chicago v. Fulton*, No. 19-357 (U.S.);
- *Rutledge v. Pharmaceutical Care Management Association*, No. 18-540 (U.S.);
- *Tanzin v. Tanvir*, No. 19-71 (U.S.);
- *Carney v. Adams*, No. 19-309 (U.S.);
- *Texas v. New Mexico*, No. 65, Original (U.S.);
- *United States v. Briggs*, No. 19-108 (U.S.), and *United States v. Collins*, No. 19-184 (U.S.);
- *Pereida v. Barr*, No. 19-438 (U.S.); and
- *Torres v. Madrid*, No. 19-292 (U.S.).

Those 10 cases (including consolidated cases) include several of significant importance to the business community. We summarize them below.

I. The Supreme Court's Actions in Response to the COVID-19 Pandemic

The Supreme Court's latest rescheduling decision comes on the heels of several other accommodations the Court has made to minimize the spread of COVID-19 and ease the burden of its docket on

litigants. On March 19, 2020, the Court extended the filing deadline for petitions for certiorari and expressed its willingness to grant motions for extensions of time, including motions to delay distribution to permit the filing of a reply brief in support of a petition for certiorari.[4] Then, on March 16 and April 3, 2020, the Court indefinitely postponed the oral arguments originally scheduled for its March and April sessions.[5]

On April 13, the Court clarified when it will consider the remaining cases scheduled for argument this Term. It will resolve only half of the 20 cases that were scheduled for oral argument in March and April. Ten cases will be heard telephonically on May 4, 5, 6, 11, 12, and 13 depending on the availability of counsel, and the Court will provide the news media with a live audio feed for those arguments.[6] The Court will not hear or resolve the remaining cases until the start of the October 2020 Term.

II. The Cases That Will Be Carried Over to Next Term

Seven of the carried-over cases are civil.

In *Google LLC v. Oracle America, Inc.*, No. 19-956—a highly anticipated case potentially worth billions of dollars—the Court will consider whether and to what extent the copyright laws apply to application program interfaces, specifically, lines of Oracle's Java code. Google used lines of Oracle's Java code to build the Android smartphone platform so that applications developed using Java coding could run on its smartphones. Oracle argues that Google infringed its valid copyrights. Google argues that copyright protection does not extend to the specific lines of Java code at issue and, even if it did, Google's reuse of the lines of code was fair use. Gibson Dunn filed an amicus brief on behalf of Rimini Street, Inc. in support of Google.

The consolidated cases of *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368, and *Ford Motor Co. v. Bandemer*, No. 19-369, concern the exercise of specific personal jurisdiction over out-of-state corporations. The Montana and Minnesota state courts exercised personal jurisdiction over Ford in two product liability actions even though the cars at issue were designed, made, and sold outside the two states and were brought into the states by another party. The courts reasoned that they had personal jurisdiction over Ford largely because the company sells other cars in each state and its cars caused injury in each state. Ford argues that these contacts are insufficient to permit the exercise of specific personal jurisdiction.

In *City of Chicago v. Fulton*, No. 19-357, the Court will decide whether an entity retaining possession of bankruptcy-estate property must immediately return the property to a debtor or trustee upon the filing of a bankruptcy petition. The City of Chicago impounded several debtors' cars and refused to turn over the cars when the debtors filed for bankruptcy. The debtors argue that the City violated the Bankruptcy Code's automatic-stay provision by refusing to return the cars.

Rutledge v. Pharmaceutical Care Management Association, No. 18-540, presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts state regulation of the rates at which pharmacy benefits managers reimburse pharmacies. An Arkansas statute effectively establishes minimum prices that pharmacy benefit managers—including pharmacy benefit managers acting on behalf of ERISA plans—must pay and the procedures they must follow to reimburse pharmacies for

drugs dispensed to ERISA plan participants and beneficiaries. The Pharmaceutical Care Management Association argues that ERISA expressly preempts this state law. Gibson Dunn filed an amicus brief on behalf of the U.S. Chamber of Commerce in support of the Pharmaceutical Care Management Association.

In *Tanzin v. Tanvir*, No. 19-71, the Court will decide whether the Religious Freedom Restoration Act of 1993 permits suits seeking money damages against federal employees in their personal capacities. The case specifically involves three Muslim men who seek to recover money damages against federal agents who allegedly placed them on the No Fly List in retaliation after they refused to serve as informants for the government.

Carney v. Adams, No. 19-309, presents several questions related to the validity of a Delaware state constitutional provision that both limits judges affiliated with any one political party to no more than a "bare majority" on Delaware's three highest courts and reserves the other seats for judges affiliated with the "other major political party." Together, the provisions effectively require membership in one of the two major political parties to serve on the three highest courts. The parties dispute (1) whether respondent James Adams, a political independent, has standing to challenge the constitutional provision; (2) whether the constitutional provision violates the First Amendment; and (3) whether the "bare majority" requirement is severable and should continue in effect if the Court invalidates the provision reserving the remaining seats for members of the "other major political party."

Finally, in *Texas v. New Mexico*, No. 65, Original, the Court will consider whether the "River Master"—a technical expert appointed by the Court—clearly erred when he calculated New Mexico's water-delivery obligations under the Pecos River Compact between Texas and New Mexico.

The remaining three carried-over cases are criminal.

In the consolidated cases of *United States v. Briggs*, No. 19-108, and *United States v. Collins*, No. 19-184, the Court will decide whether a five-year statute of limitations applies to rape prosecutions under the Uniform Code of Military Justice (UCMJ). Each of the three respondents were convicted of rape following courts-martial that took place more than five years after the offenses were committed. The United States primarily argues that the prosecutions were permissible because at the time the rapes were committed, the UCMJ included a five-year statute of limitations unless a crime was "punishable by death," and rape was "punishable by death." Briggs responds that the default five-year statute of limitations applies because the death penalty could not be lawfully imposed on individuals convicted of rape. Gibson Dunn filed an amicus brief on behalf of Members of Congress in support of the United States.

Pereida v. Barr, No. 19-438, turns on the proper application of the modified categorical approach and the allocation of the burden of proof when deciding whether a noncitizen may seek relief from removal. The Immigration and Nationality Act provides a list of offenses that disqualify a noncitizen from applying for relief from removal. A state conviction is disqualifying if the conviction necessarily establishes all elements of the potentially corresponding federal offense. The question presented is whether a state conviction bars a noncitizen from applying for relief from removal when he was

convicted under a statute defining multiple crimes and the record is inconclusive as to which crime formed the basis of the conviction.

The final criminal case—*Torres v. Madrid*, No. 19-292—considers whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment. Roxanne Torres, the petitioner, was shot twice by two police officers while she was fleeing. She argues that the application of physical force, even if it failed to prevent her escape, was a seizure for purposes of determining its constitutionality.

III. Conclusion

As explained in previous guidance, the Supreme Court will "continue to proceed with the resolution of all cases argued this Term."[7] Thus, before the summer Recess we can expect decisions in the 29 cases that, as of April 13, had been argued but not yet decided. In light of this week's developments, we can also expect decisions in the 10 cases that will be argued telephonically in May. The other 10 cases, summarized above, will be argued when the Court returns to work in October 2020. It remains to be seen whether or not "business as usual" in our judicial system will have resumed by then.

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[1] Press Release, U.S. Supreme Court, *Press Release Regarding May Teleconference Oral Arguments* (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20.

[2] Jimmy Hoover, *Supreme Court to Hold Arguments by Teleconference*, Law360 (Apr. 13, 2020), https://www.law360.com/articles/1262483/supreme-court-to-hold-arguments-by-teleconference.

[3] *See id.*; Amy Howe, *Court Sets Cases for May Telephone Arguments, Will Make Live Audio Available*, SCOTUSblog (Apr. 13, 2020), https://www.scotusblog.com/2020/04/court-sets-cases-for-may-telephone-arguments-will-make-live-audio-available/; Jess Bravin & Brent Kendall, *Supreme Court to Break Tradition, Hold Oral Arguments by Teleconference*, Wall St. J. (Apr. 13, 2020), https://www.wsj.com/articles/supreme-court-to-break-tradition-hold-oral-arguments-by-teleconference-11586789676.

[4] Order (Mar. 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

[5] Press Release, U.S. Supreme Court, *Press Release Regarding Postponement of April Oral Arguments* (Apr. 3, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20; Press Release, U.S. Supreme Court, *Press Release Regarding Postponement of March Oral Arguments* (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

[6] Press Release, U.S. Supreme Court, *Press Release Regarding May Teleconference Oral Arguments*, *supra* note 1.

[7] Press Release, U.S. Supreme Court, *Press Release Regarding Postponement of April Oral Arguments*, *supra* note 5.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact your usual contacts or any member of the Firm's Coronavirus (COVID-19) Response Team or the following authors:

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