GIBSON DUNN

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THE JURISPRUDENCE OF SUPREME COURT NOMINEE AMY CONEY BARRETT

To Our Clients and Friends:

Today, a majority of the Senate Judiciary Committee voted to approve Judge Amy Coney Barrett to fill the seat on the Supreme Court of the United States vacated by the passing of Justice Ruth Bader Ginsburg. If confirmed by the full Senate, Judge Barrett would become the third female Justice to serve on the current Supreme Court, and the fifth female Justice in history.

To assess Judge Barrett's likely impact on the Supreme Court, our Appellate and Constitutional Law Practice Group has analyzed a sample of her written opinions in her three years as a Judge on the United States Court of Appeals for the Seventh Circuit. As of the date she was nominated for the Supreme Court (September 29, 2020), Judge Barret had written 92 judicial opinions, including 81 majority opinions, 4 concurrences, and 7 dissents. In her responses to the Senate Judiciary Committee's questionnaire, Judge Barrett identified ten of these, as well as a per curiam decision, as her "most significant" opinions.[*]

Below, we briefly summarize a number of Judge Barrett's opinions, and a couple of her law review articles, that may provide insights to her approach to several key areas of law, including (1) administrative law, (2) arbitration, (3) class actions and collective actions, (4) constitutional and statutory interpretation, (5) due process, (6) First Amendment, (7) Fourth Amendment, (8) immigration, (9) intellectual property, (10) labor and employment, (11) personal jurisdiction, (12) Second Amendment, (13) standing, (14) stare decisis, and (15) subject-matter jurisdiction.

(1) Administrative Law

- *Meza Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020). Writing for a unanimous panel, Judge Barrett held that immigration judges have the authority to administratively close cases—a procedural device that temporarily takes a removal case off of an immigration judge's calendar, preventing the case from moving forward. In doing so, she embraced the Supreme Court's admonition that courts should not "leap too quickly to the conclusion that a rule is ambiguous." Applying the "traditional tools of construction," Judge Barrett rejected the Attorney General's interpretation of the "thorny but not ambiguous" immigration regulation.

- *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828 (7th Cir. 2020). In a concurring opinion, Judge Barrett argued that an inmate had failed to exhaust his administrative remedies before filing a civil rights action under 42 U.S.C. § 1983, as required by the Prison Litigation Reform Act. Because the inmate could have filed a "standard grievance" after the prison had determined that his "emergency grievance" did not warrant fast-track treatment, there were still additional remedies available to him.

(2) Arbitration

- *Wallace v. GrubHub*, 970 F.3d 798 (7th Cir. 2020).* In a unanimous opinion written by Judge Barrett, a Seventh Circuit panel adopted a narrow view of the Section 1 exemption to the Federal Arbitration Act for transportation workers engaged in interstate commerce, holding that certain food delivery drivers were required to arbitrate their claims. The drivers argued that they engaged in interstate commerce by carrying goods that had moved across state lines. But the panel rejected that argument because "to fall within the exemption," a class of workers "must be connected not simply to the goods, but to the act of moving those goods across state or national borders." The panel observed that the drivers' interpretation would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—a reading inconsistent with the "stringent" requirement that the class of workers "'actually'" is engaged in interstate commerce.

(3) Class Actions and Collective Actions

- *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502 (7th Cir. 2018). Writing for a unanimous panel, Judge Barrett held that the availability of class or collective arbitration is a threshold question of arbitrability that the court must decide unless the parties have clearly and unmistakably delegated the question to an arbitrator. Although the Supreme Court held that waivers of class arbitration for employment claims are enforceable in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), it did not determine who should interpret an arbitration agreement to decide whether it waived or authorized that procedure. Following the reasoning of "every federal court of appeals to reach the question," Judge Barrett held that the availability of class or collective arbitration was so "fundamental" an issue as to belong in the category of "gateway" questions presumptively reserved to the court to decide.

- *Weil v. Metal Techs., Inc.*, 925 F.3d 352 (7th Cir. 2019). In a unanimous opinion by Judge Barrett, the panel affirmed the decertification of class and collective actions under the Fair Labor Standards Act (FLSA) and Indiana wage laws. After the district court's initial certification order, the plaintiffs failed to provide classwide evidence that the employees in the class "were actually *working* without compensation." The plaintiffs therefore lacked "both a theory of liability and proof of any injury" to support certification. Judge Barrett emphasized the Seventh Circuit's "repeated assertions that district courts have wide discretion in managing class and collective actions" under Rule 23 and the Fair Labor Standards Act, including revisiting prior certification rulings.

(4) Constitutional and Statutory Interpretation

- In her nomination speech, Judge Barrett stated that the textualist judicial philosophy of Justice Scalia—for whom she clerked—is "mine too." She echoed this sentiment at her confirmation hearings, emphasizing that a judge tasked with interpretation must set aside her policy views and apply the law as written. On the Seventh Circuit, Judge Barrett has shown a willingness to engage in "intense grammatical parsing" when necessary to determine textual meaning. *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020). She also has indicated

discomfort with arguments from extratextual considerations, such as legislative history or congressional inaction. *Cook Cty., Illinois v. Wolf*, 962 F.3d 208, 250 (7th Cir. 2020) (Barrett, J., dissenting).

(5) Due Process

- *A.F. Moore & Assocs., Inc. v. Pappas*, 948 F.3d 889 (7th Cir. 2020).* Writing for a unanimous panel, Judge Barrett held that the Tax Injunction Act, which generally strips federal courts of jurisdiction over challenges to state and local taxes, did not prohibit taxpayers from bringing equal protection and due process claims in federal court. This is because, as Judge Barrett explained, Illinois state courts do not offer an adequate forum for taxpayers' constitutional claims, since Illinois tax-objection procedures do not allow taxpayers to challenge anything other than the correctness of the assessor's valuation. Because these procedures provide "no remedy at all" for the taxpayers' claims, the Tax Injunction Act did not apply.

- *Cleven v. Soglin*, 903 F.3d 614 (7th Cir. 2018). Judge Barrett, writing for a unanimous panel, rejected a city employee's procedural due process challenge against the city based on an alleged deprivation of his retirement funds. Assuming without deciding that the temporary loss of these funds qualified as a lost property right, Judge Barrett reasoned that the plaintiff still could not show inadequate process, because the state offered a procedure—a writ of mandamus—to challenge any violation of state law. Since the writ provided a meaningful post-deprivation remedy for redressing property deprivation, the panel concluded that petitioner's due process rights had been satisfied.

- *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).* Writing for a unanimous panel, Judge Barrett held that a student, John Doe, adequately alleged that a university violated due process by using constitutionally flawed procedures to find him guilty of sexual violence. Judge Barrett first analyzed whether John had lost a liberty or property interest when he was found guilty and punished. While agreeing with the university that John could establish no property interest in continuing his education, Judge Barrett concluded that he was deprived of a protected liberty interest: By finding John guilty of sexual violence—causing his expulsion from the Navy ROTC program—and telling the Navy about this finding, the university denied John "his freedom to pursue naval service, his occupation of choice." Judge Barrett next evaluated the procedures the university used to determine John's guilt, finding them far short of what was required under the Due Process Clause. Because John alleged that the university withheld evidence on which it relied, failed to investigate evidence that would support John's case, and conducted a deficient hearing, Judge Barrett held that he had pleaded facts sufficient to state a claim under the Fourteenth Amendment.

- *Green v. Howser*, 942 F.3d 772 (7th Cir. 2019). In an opinion by Judge Barrett, a unanimous panel held that sufficient evidence existed to support a jury verdict in favor of a mother who had sued her parents under 42 U.S.C. § 1983 for conspiring with state law enforcement officials to violate her due process right to make decisions regarding the care, custody, and control of her child. Finding "plenty of evidence" from which a jury could conclude that the mother's parents

conspired with law enforcement officials to forcibly gain custody of her child, Judge Barrett rejected the argument that no reasonable jury could find a violation of the mother's due process rights.

(6) First Amendment

- *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (per curiam).* Judge Barrett joined a panel concluding that a teacher at a Jewish school was a "minister" under the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), and thus the teacher's Americans with Disabilities Act claim was barred by the First Amendment's ministerial exception to employment-discrimination laws. The ministerial exception "allow[s] religious employers the freedom to hire and fire those with the ability to shape the practice of their faith." To determine whether an employee was a "minister" covered by the exception, the Supreme Court in *Hosanna-Tabor* looked to the employee's title, the substance reflected in that title, the employee's use of that title, and "the important religious functions she performed for the Church." *Hosanna-Tabor*, 565 U.S. at 192. The panel in *Grussgott* emphasized that the Supreme Court had "expressly declined" to adopt a "rigid formula" for the ministerial-exception test. In *Grussgott*, the teacher's title and use of that title "cut[] against applying the ministerial exception" while the substance reflected in her title and her performing important religious functions—such as her "integral role in teaching her students about Judaism"—supported applying the ministerial exception. Explaining that "it would be overly formalistic to call th[e] case a draw simply because two 'factors' point[ed] each way" while cautioning that "all facts must be taken into account and weighed on a case-by-case basis," the panel concluded that the "duties and functions" of the teacher's position were enough to apply the ministerial exception. The Supreme Court's later decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), was consistent with this non-formulaic approach to the ministerial exception.

(7) Fourth Amendment

- *Rainsberger v. Bennett*, 913 F.3d 640 (7th Cir. 2019).* In a unanimous opinion by Judge Barrett, a panel denied qualified immunity to a police detective who allegedly lied in a probable-cause affidavit that led prosecutors to charge the plaintiff with murdering his mother. The affidavit stated, for example, that the plaintiff placed a call from his mother's home an hour before he claimed to have found her dead, but the call actually occurred a few minutes after he said he arrived. The detective argued that the alleged misrepresentations were immaterial because probable cause existed even without them, but the panel determined that the remaining evidence did not support a finding of probable cause. And because it is clearly established that it violates the Fourth Amendment to use deliberately falsified allegations to demonstrate probable cause, the panel concluded, the detective was not entitled to qualified immunity.

- *Torry v. City of Chicago*, 932 F.3d 579 (7th Cir. 2019). Writing for a unanimous panel, Judge Barrett rejected the plaintiffs' argument that proving reasonable suspicion for a *Terry* stop required police officers to have some independent memory of what they knew at the time. Rather,

as Judge Barrett explained, "the Fourth Amendment does not govern *how* an officer proves that he had reasonable suspicion for a *Terry* stop; he can rely on evidence other than his memory to establish what he knew when the stop occurred." Judge Barrett also affirmed the lower court's finding that the officers were entitled to qualified immunity. Because the *Terry* stop did not violate clearly established law, qualified immunity applied regardless of whether the stop violated the Fourth Amendment, which the panel concluded they "need not consider."

- *United States v. Kienast*, 907 F.3d 522 (7th Cir. 2018). Judge Barrett, writing for a unanimous panel, held that the district courts did not err by declining to suppress the evidence obtained by searches that the defendants alleged were unlawful, because the good-faith exception to the exclusionary rule applied. Reasoning that suppression of evidence "is not a personal constitutional right" but rather "a judge-made rule meant to deter future Fourth Amendment violations," Judge Barrett concluded that suppression was not justified because it would have no deterrent effect on FBI agents' reliance on a warrant that the magistrate judge allegedly had no authority to issue. Judge Barrett also rejected the defendants' argument that FBI agents acted in bad faith, concluding instead that "[t]he record establishes that the FBI acted reasonably" in preparing the affidavits and executing the warrants. Because the good-faith exception applied, the panel declined to consider whether the searches violated the Fourth Amendment.

- *United States v. Vaccaro*, 915 F.3d 431 (7th Cir. 2019). In an opinion by Judge Barrett, a unanimous panel held that a *Terry* pat-down frisk and the search of the defendant's car were lawful. Judge Barrett first rejected the defendant's argument that the *Terry* frisk was unreasonable. Because the record admitted of more than one permissible reading of the evidence, the district court did not clearly err in finding that the defendant "made furtive movements before leaving the car," which aroused reasonable suspicion to justify a pat-down search. Judge Barrett next evaluated whether the sweep of the defendant's car was lawful. While admitting that the sweep was "a closer call," Judge Barrett concluded that it, too, was permissible because the officers reasonably suspected that the defendant was dangerous and could gain "immediate control" of weapons in his car, notwithstanding that he was handcuffed in the back of a squad car. On this last point, Judge Barrett explained that because the defendant's detention was a *Terry* stop, and did not amount to an arrest, he "admitt[ed] that he would have been allowed to return to his car, … [where] he could have gained 'immediate control of weapons.'"

(8) Immigration

- *Cook Cty., Illinois v. Wolf*, 962 F.3d 208 (7th Cir. 2020).* Judge Barrett, dissenting from the panel opinion, contended that the definition of "public charge" adopted by the Department of Homeland Security was a reasonable interpretation of the statutory language, which provides that a noncitizen may be denied admission or adjustment of status if he or she "is likely at any time to become a public charge." The government defined "public charge" as any noncitizen who receives certain cash or noncash government benefits for more than 12 months in the aggregate in a 36-month period. The majority, over Judge Barrett's dissent, concluded that the term "public charge" necessarily required a higher degree of government dependence. Judge Barrett, in contrast, would have held that under *Chevron* step two, the government's broad definition was

reasonable. Judge Barrett engaged in a detailed discussion of statutory framework and, citing Justice Scalia, expressed skepticism of plaintiffs' legislative-inaction arguments. "At bottom," she explained, "the plaintiffs' objections reflect disagreement with [a] policy choice and … [l]itigation is not the vehicle for resolving policy disputes." Judge Barrett declined to address plaintiffs' other challenges because the district court did not reach them and the plaintiffs barely briefed them.

- *Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir. 2019).* Judge Barrett, over a dissent, affirmed the district court's dismissal under the doctrine of consular nonreviewability of a Yemeni husband and wife's claims that a consular officer improperly denied the wife's application for an immigrant visa. Observing that Congress has delegated the power to determine who may enter the country to the Executive Branch and that courts generally have no authority to second-guess the Executive's decisions, Judge Barrett concluded that the consular officer provided a facially legitimate and bona fide reason for denying the wife's application. The officer cited a valid statutory basis and provided the factual predicate for his decision and, Judge Barrett stressed, under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the court cannot "look behind the exercise of that discretion." Judge Barrett also concluded that the "bad faith" exception to *Mandel* did not apply because plaintiffs failed to make "an affirmative showing" that the officer denied the wife's visa in bad faith. The dissent maintained that the majority's "view of the doctrine sweeps more broadly than required by the Supreme Court and [the Seventh Circuit's] own precedent."

- *Alvarenga-Flores v. Sessions*, 901 F.3d 922 (7th Cir. 2018). Judge Barrett, over a dissent, held that substantial evidence supported the immigration judge's adverse credibility finding. Judge Barrett noted that the court "afford[s] significant deference to an agency's adverse credibility determination," and may reverse such determinations only "if the facts *compel* an opposite conclusion."

(9) Intellectual Property

- *J.S.T. Corp. v. Foxconn Interconnect Tech. Ltd.*, 965 F.3d 571 (7th Cir. 2020). In a unanimous opinion by Judge Barrett, the panel affirmed the dismissal for lack of personal jurisdiction of a suit for misappropriation of trade secrets. In so ruling, Judge Barrett analyzed the distinctions between different forms of intellectual property law. She distinguished trade secret law, which focuses on the defendants' alleged acts, from both "trademark law, in which consumer confusion can be at the heart of the underlying claim," and "patent law, in which the sale of a patented invention to a consumer can be an act of infringement, even if the seller is unaware of the patent." Because the defendants' alleged acts of trade secret misappropriation were all completed outside of the forum state, Judge Barrett concluded that the court lacked personal jurisdiction over those claims on these facts. This decision is also an example of Judge Barrett's jurisprudence on personal jurisdiction.

- *PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.*, 941 F.3d 325 (7th Cir. 2019). In a unanimous opinion by Judge Barrett, the panel affirmed the entry of summary judgment against a plaintiff suing under Wisconsin's Fair Dealership Law. That state law provides contractual protections to

"dealerships," which it defines to include agreements granting persons the right to "use a trade name [or] trademark." Judge Barrett reasoned that the mere inclusion of another party's logos on the plaintiff's website did not qualify as "use" of those trademarks sufficient to establish it as a "dealership" entitled to protection under the Wisconsin law.

(10) Labor and Employment

- *Smith v. Rosebud Farm, Inc.*, 898 F.3d 747 (7th Cir. 2018). Writing for a unanimous court, Judge Barrett held that the district court properly denied an employer's post-trial motion for judgment as a matter of law on a male employee's Title VII sex discrimination claim. Judge Barrett reasoned that the evidence supported the jury's finding that the employee's coworkers harassed the plaintiff because he was male, rather than engaging in across-the-board and nondiscriminatory "sexual horseplay," because the shop was a mixed-sex workplace and only men were groped and taunted.

- *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018).* Writing for a unanimous court, Judge Barrett held that the district court properly denied Costco's post-trial motion for judgment as a matter of law on a Title VII hostile work environment claim, because sufficient evidence supported the jury's finding that a customer's year-long stalking of a Costco employee was severe or pervasive enough to render the work environment hostile. Judge Barrett explained that harassment does not need to be "overtly sexual to be actionable under Title VII," but instead "can take other forms, such as demeaning, ostracizing, or even terrorizing the victim because of her sex." Judge Barrett also held that the district court was correct that the employee could not recover backpay for the period of time after Costco fired her, because the employee did not return to work after a year-long medical leave and thus was not constructively discharged. But Judge Barrett held that the employee may be entitled to backpay for some or all of her time on unpaid medical leave that she took after being traumatized by the customer's stalking. Judge Barrett remanded for the district court to consider the unpaid-leave issue in the first instance.

- *Fessenden v. Reliance Std. Life Ins. Co.*, 927 F.3d 998 (7th Cir. 2019). Writing for a unanimous panel, Judge Barrett held that a court owes no deference to a benefits plan administrator that, in issuing a benefits decision, misses a deadline imposed by regulations governing the Employee Retirement Income Security Act (ERISA). Although a court may apply an "arbitrary and capricious" standard of review to a plan administrator's decision that "substantially complies" with other procedural requirements, a "deadline is a bright line," and a court must apply a de novo standard of review if a plan administrator misses a regulatory deadline. Judge Barrett reasoned that adopting a "substantial compliance" exception under the common law would contravene the regulations' plain text, which provide that "in no event shall" an extension of time exceed the allotted period. Judge Barrett also explained that a substantial compliance exception would be incompatible with the doctrine itself because a party seeking benefits has exhausted remedies when the regulatory deadlines for a benefits determination lapse, and thus can file suit—and yet, in that circumstance, the district court would have no administrative decision to review. In reaching this conclusion, Judge Barrett expressly disagreed with several other circuits that have applied the substantial compliance exception to missed ERISA deadlines.

(11) Personal Jurisdiction

- *Lexington Ins. Co. v. Hotai Ins. Co.*, 938 F.3d 874 (7th Cir. 2019). Judge Barrett held for a unanimous panel that a district court in Wisconsin lacked personal jurisdiction over two Taiwanese insurance companies that had contracted with the suppliers of the plaintiff bike retailer to provide worldwide insurance coverage for both the suppliers and the bike distributor. Judge Barrett stated that the plaintiff had "failed to demonstrate that either [of the insurance companies] made any purposeful contact with Wisconsin before, during, or after the formation of the insurance contracts." The fact that the insurance companies had agreed to indemnify the bike distributor, who did business out of Wisconsin, was insufficient, because "it is a defendant's contacts with the forum state, not with the plaintiff, that count." Judge Barrett further rejected that any "collateral financial benefits" of the insurance companies' arrangement gave rise to personal jurisdiction.

(12) Second Amendment

- *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019).* Judge Barrett dissented from a panel decision holding that felon dispossession statutes prohibiting firearm possession by persons convicted of felonies did not violate the Second Amendment. The panel majority applied intermediate scrutiny and concluded that the statutes were substantially related to the important government interest of "keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them." In her dissent, Judge Barrett adopted an originalist framework for analyzing the Second Amendment in which "all people have the right to keep and bear arms" unless "history and tradition" support a legislature's "power to strip certain groups of that right." Applying that framework, Judge Barrett explained that historically, legislatures have had the power to prohibit dangerous people from possessing guns, but not the power to strip felons—both violent and nonviolent—of their right to bear arms simply because of their status as felons. After noting the government's "undeniably compelling interest in protecting the public from gun violence," Judge Barrett concluded the dispossession statutes were "unconstitutional as applied to" the plaintiff, who did not belong to "a dangerous category" of felons—he was convicted of mail fraud—and did not have any "individual markers of risk," such as a history showing a proclivity for violence.

(13) Standing

- *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019).* Judge Barrett held for a unanimous panel that the plaintiff lacked standing under Article III to sue a debt collector for failure to include all statutorily required information in a debt-collection letter. The omitted information related to the requirement that any objection to the asserted debt be made in writing, but Judge Barrett observed that the plaintiff "did not allege that [the debt collector's] actions harmed or posed any real risk of harm to her interests under the [Fair Debt Collection Practices] Act." The plaintiff, Judge Barrett noted, "did not allege that she tried to dispute or verify her debt orally and therefore lost or risked losing the statutory protections," nor did she "allege that she ever even considered contacting [the debt collector]." Judge Barrett also rejected the plaintiff's

alternative argument that she had suffered an "informational injury," explaining that "the bare harm of receiving inaccurate or incomplete information" is not a cognizable harm for Article III standing purposes.

- *Protect Our Parks Inc. v. Chicago Park Dist.*, 971 F.3d 722 (7th Cir. 2020). Writing for a unanimous panel, Judge Barrett held that plaintiffs challenging Chicago's plan to transfer control of public land to the Barack Obama Foundation to construct a presidential memorial center lacked standing to pursue their state-law claims. The plaintiffs claimed that Chicago breached Illinois' public trust doctrine by transferring control of public lands for private use. Judge Barrett held that the plaintiffs lacked standing to pursue the state-law claims, explaining that the fact that Illinois state courts have heard similar cases does not control the standing inquiry in federal court, and that a desire that the government follow the law is not sufficient. Judge Barrett also affirmed the district court's dismissal of the federal takings claims on the ground that the plaintiffs lacked a cognizable property interest in the public land.

- *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019). Judge Barrett held for a unanimous panel that a plaintiff lacked standing to sue a credit union under the Americans with Disabilities Act for failing to offer a website that could be read aloud by a screen reader, because the plaintiff was legally ineligible to become a member in the credit union. Judge Barrett explained that "[b]ecause Illinois has erected a neutral legal barrier to [the plaintiff's] use of the Credit Union's service, the Credit Union's failure to accommodate the visually impaired in the provision of its services cannot affect him personally." Judge Barrett further rejected the plaintiff's theory that he had suffered an "informational injury," because the case was "about accessibility accommodations, not disclosure."

- *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), *cert. filed*, No. 20-209 (U.S. Aug. 21, 2020). Before addressing the merits of this case arising under the Telephone Consumer Protection Act (TCPA), Judge Barrett first considered whether the plaintiff had standing, even though no party had raised the issue. She concluded for the unanimous panel that a plaintiff who receives unwanted marketing text messages has suffered a sufficiently "concrete" injury for Article III purposes, because "[t]he common law has long recognized actions at law against defendants who invaded the private solitude of another by committing the tort of 'intrusion upon seclusion.'" Moreover, in enacting the TCPA, "Congress decided that automated telemarketing can pose this same type of harm to privacy interests." Judge Barrett therefore broke with the Eleventh Circuit, instead siding with the Second and Ninth Circuits holding that the receipt of "unwanted text messages can constitute a concrete injury-in-fact for Article III purposes."

(14) Stare Decisis

- *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003). As a professor, Judge Barrett has questioned whether an inflexible view of stare decisis—which "effectively forecloses a litigant from meaningfully urging error-correction" in future cases—"unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims." "Generally speaking," then-Professor Barrett wrote, "if a litigant demonstrates that a prior decision clearly misinterprets the

statutory or constitutional provision it purports to interpret, the court should overrule the precedent."

- *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317 (2005). The Supreme Court has long afforded "special force" to stare decisis in the realm of statutory interpretation. As a professor, however, Judge Barrett has questioned whether the courts of appeals should apply the same "super-strong stare decisis" to their own statutory interpretations. "It is one thing," for example, "to claim that congressional silence signals approval of a decision from the Supreme Court; it is another thing to claim that congressional silence signals approval of a decision from any of the courts of appeals." Then-Professor Barrett wrote that it is "hard to see why the precedential effect of statutory interpretations in the courts of appeals should be anything more than the simple presumption against overruling that all opinions enjoy."

(15) Subject-Matter Jurisdiction

- *Groves v. United States*, 941 F.3d 315 (7th Cir. 2019). In an opinion authored by Judge Barrett, a unanimous panel overruled Seventh Circuit precedent that permitted district courts to recertify their decisions for interlocutory appeal after the expiration of the 10-day filing window in order to give the appealing party more time to file a petition to appeal with the court of appeals. Judge Barrett explained that the Supreme Court's more recent decisions had made clear that courts lack discretion to either directly or indirectly extend jurisdictional deadlines, such as the 10-day deadline for filing a petition for interlocutory review. Judge Barrett also rejected the appealing party's argument that the 10-day limitation was not jurisdictional, holding that the statute setting the deadline "speak[s] to the power of the court rather than to the rights or obligations of the parties."

- *Webb v. FINRA*, 889 F.3d 853 (7th Cir. 2018). Judge Barrett held, over a partial dissent, that the federal courts lacked diversity jurisdiction because the amount in controversy did not exceed the statutory threshold of $75,000. The plaintiffs sued the Financial Industry Regulatory Authority, Inc. (FINRA), arguing that FINRA had breached its contract to arbitrate the plaintiffs' underlying dispute with their former employer, and seeking to obtain their fees for attempting to arbitrate the dispute and for the litigation. Although no party raised a jurisdictional challenge, the court *sua sponte* ordered supplemental briefing on jurisdiction. Judge Barrett held that the law recognized no right to recover expenses and fees the plaintiffs incurred in either arbitration or in litigation, and that the amount in controversy therefore did not exceed $75,000. Judge Barrett also rejected the alternative theory, offered by FINRA, that the claims arose under federal securities law, explaining that the case presented no questions requiring interpretation of a federal law.

- *Wisconsin Cent. Ltd. v. TiEnergy LLC*, 894 F.3d 851 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 918 (2019). Judge Barrett held for a unanimous panel that the court of appeals and district court below had jurisdiction over this dispute involving fees owed for the delayed return of rail cars. The panel had *sua sponte* raised two issues of jurisdiction and solicited supplemental briefing. On the first, Judge Barrett held that the absence of a separate document setting forth the final judgment

with respect to a third-party claim did not divest the appellate court of jurisdiction, because the district court "clearly signaled in its opinion that it was finished with the case." On the second, Judge Barrett concluded that the district court had federal question jurisdiction over the case, because the plaintiff had brought suit pursuant to a federal law assigning liability for the payment of transportation rates, including fees for the delayed return of rail cars.

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[*] Decisions denoted with an asterisk (*) are decisions that Judge Barrett identified as her "most significant" decisions.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Appellate and Constitutional Law practice group, or the following:

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