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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.

October Term 2020

Argued Cases

1. ***Brnovich v. Democratic National Committee*, No. 19-1257, consolidated with *Arizona Republican Party v. Democratic National Committee*, No. 19-1258 (9th Cir., 948 F.3d 989; cert. granted Oct. 2, 2020; argued Mar. 2, 2021). The Questions Presented are: (1) Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act ("VRA")? (2) Does Arizona's ballot-collection law violate Section 2 of the VRA or the Fifteenth Amendment?**

   Decided July 1, 2021 (594 U.S.). Ninth Circuit/Reversed and remanded. Justice Alito for a 6–3 Court (Gorsuch, J., joined by Thomas, J., concurring; Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that Arizona's challenged election requirements did not violate Section 2 of the VRA or the Fifteenth Amendment. As amended in 1982, Section 2 of the VRA prohibits election laws that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). And it provides that such a violation "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). The "core of § 2(b)," the Court reasoned, "is the requirement that voting be 'equally open.'" In determining whether that requirement is satisfied, courts should consider a variety of factors, including: (1) "the size of the burden imposed by a challenged voting rule"; (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982"; (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups"; (4) "the opportunities provided by a State's entire system of voting"; and (5) "the strength of the state interests served by a challenged voting


Theodore B. Olson
202.955.8500
tolson@gibsondunn.com


Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com


Jacob T. Spencer
202.887.3792
jspencer@gibsondunn.com


Joshua M. Wesneski
202.887.3598
jwesneski@gibsondunn.com

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Appellate Firm of the Year

Gibson Dunn
Counsel for *Amicus*
Center for Equal
Opportunity

Partners
Thomas G. Hungar
Douglas R. Cox
Jason J. Mendro

rule." The Court explained that "prevention of fraud" is a strong interest. Courts should not consider the "disparate impact" of a challenged voting rule in isolation or require States to show that their voting rules are necessary to serve particular state interests. Applying those factors, the Court concluded that Arizona's out-of-precinct policy imposed "modest burdens," resulted in a "small" disparate impact, and was justified by the State's interest in the "orderly administration" of elections. Similarly, the Court concluded that Arizona's restrictions on ballot collection were justified by the State's interests in preventing fraud and minimizing "pressure and intimidation" and that there was no "statistical evidence" showing that those restrictions "had a disparate impact on minority voters." Finally, the Court concluded that the district court did not clearly err in concluding that the ballot-collection restrictions were not enacted with a discriminatory purpose. Although the Ninth Circuit has accepted a "cat's paw" theory—treating the Arizona legislature as a "dupe" used by one legislator motivated by discriminatory purposes—the Court explained that the "'cat's paw' theory has no application to legislative bodies." "[T]the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents," and "[i]t is insulting to suggest that they are mere dupes or tools."

2. ***Americans for Prosperity v. Bonta*, No. 19-251, consolidated with *Thomas More Law Center v. Becerra*, No. 19-255 (9th Cir., 903 F.3d 1000; cert. granted Jan. 8, 2021; argued Apr. 26, 2021). Whether the exacting scrutiny the Supreme Court has long required of laws that abridge the freedoms of speech and association outside the election context can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.**

Decided July 1, 2021 (594 U.S.). Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a 6–3 Court (Thomas, J., concurring in part and in the judgment; Alito, J., joined by Gorsuch, J., concurring in part and in the judgment; Sotomayor, J., joined by Breyer and Kagan, J.J., dissenting). The Court held that California Attorney General's donor-disclosure requirement was facially unconstitutional. The California Attorney General requires nonprofit organizations to disclose the names and addresses of persons who have donated more than $5,000 in a particular tax year. The Court explained that under its precedent, compelled disclosure of donor information or membership can violate the First Amendment right of association. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Compelled disclosure requirements, the Court reasoned, must be narrowly tailored to a sufficiently important government interest. But the California Attorney General's requirement was not. Although the California Attorney General has an important interest in preventing fraud, there was "a dramatic mismatch" between that interest and the requirement for all charities to disclose information about their large donors. The Attorney General had not, in fact, used such information to detect fraud. Nor had the Attorney General explained why he could not use alternative means, such as subpoenas or audit letters, to serve the same goal. That mismatch rendered the disclosure requirement fatally overbroad: "The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's

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interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny." The Court reasoned that it made no difference that the Attorney General promised to keep the information confidential, that some organizations might favor the disclosure requirement, or that charitable organizations are required to disclose the same information to the IRS.

3. ***Johnson v. Guzman Chavez*, No. 19-897 (4th Cir., 940 F.3d 867; cert. granted June 15, 2020; argued Jan. 11, 2021). Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. § 1231, or instead by 8 U.S.C. § 1226.**

Decided June 29, 2021 (594 U.S.). Fourth Circuit/Reversed. Justice Alito for a 6–3 Court (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment; Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that Section 1231, rather than Section 1226 "governs the detention of aliens subject to reinstated orders of removal, meaning those aliens are not entitled to a bond hearing while they pursue withholding of removal." Section 1226 provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Section 1231 authorizes detention "when an alien is ordered removed" and enters the "removal period," which begins on "[t]he date the order of removal becomes administratively final." *Id.* § 1231. It also provides that when an alien reenters the country after removal, "the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed." *Id.* § 1231(a)(5). In addition, the alien is ineligible for any relief other than withholding of removal to a specific country. Because respondents had been "ordered removed" and those orders had become "administratively final," the key question, according to the Court, is what Section governs when an alien seeks withholding of removal. Based on the text and structure of the Immigration and Nationality Act ("INA"), the Court concluded that Section 1231 still applies. As a result, even previously removed aliens seeking withholding of removal are not entitled to a bond hearing.

4. ***Minerva Surgical, Inc. v. Hologic, Inc.*, No. 20-440 (Fed. Cir., 957 F.3d 1256; cert. granted Jan. 8, 2021; argued Apr. 21, 2021). Whether a defendant in a patent infringement action who assigned the patent, or is in privity with an assignor of the patent, may have a defense of invalidity heard on the merits.**

Decided June 29, 2021 (594 U.S.). Federal Circuit/Vacated and remanded. Justice Kagan for a 5–4 Court (Alito, J., dissenting; Barrett, J., joined by Thomas and Gorsuch, J.J., dissenting). The Court held that the doctrine of assignor estoppel "is well grounded in centuries-old fairness principles," but "applies only when an inventor says one thing (explicitly or implicitly) in assigning a patent and the opposite in litigating against the patent's owner." Assignor estoppel prevents a patent owner from conveying a patent while explicitly or implicitly warranting its validity and then defending against an infringement suit by arguing that the patent is invalid. The doctrine, the Court explained, has a long history at common law, reflects basic fairness principles, and was endorsed by the Court in *Westinghouse Electrical & Manufacturing Co. v. Formica Insulation Co.*, 266 U.S. 342 (1924). The Court rejected petitioner's argument that Congress

abrogated the doctrine in the Patent Act of 1952—to the contrary, Congress is presumed to regulate against the backdrop of common-law principles. Nor had the Court's prior cases rejected the doctrine; they had instead limited it to its proper scope. The Court next explained that the doctrine does not apply when, for example, an employee assigns patent rights to future inventions or when a subsequent legal development renders the patent invalid. Most importantly, modified patent claims "can remove the rationale for applying assignor estoppel." Thus, the doctrine will not prevent the assignor from arguing that new claims asserted by the assignee after the transfer are invalid. Because the Federal Circuit applied the doctrine to prevent petitioner from contesting the validity of new, post-transfer claims, the Court vacated and remanded.

5. ***PennEast Pipeline Co. LLC v. New Jersey*, No. 19-1039 (3d Cir., 938 F.3d 96; cert. granted Feb. 3, 2021; argued Apr. 28, 2021). The Questions Presented are: (1) Whether the Natural Gas Act delegates to Federal Energy Regulatory Commission certificate-holders the authority to exercise the federal government's eminent-domain power to condemn land in which a state claims an interest. (2) Whether the U.S. Court of Appeals for the 3rd Circuit properly exercised jurisdiction over the case.**

   Decided June 29, 2021 (594 U.S.). Third Circuit/Reversed and remanded. Chief Justice Roberts for a 5–4 Court (Gorsuch, J., joined by Thomas, J., dissenting; Barrett, J., joined by Thomas, Kagan, and, Gorsuch, J.J., dissenting). The Court held that the federal government "can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest." States, the Court explained, "surrendered their [sovereign] immunity from the exercise of the federal eminent domain power," which includes the power to bring condemnation suits, "when they ratified the Constitution." Surveying historical practice dating back to the founding, the Court reasoned that the federal government "has exercised its eminent domain authority through both its own officers and private delegates. And it has used that power to take property interests held by both individuals and States." The Court's precedents too confirmed that the federal government could condemn property owned by the States, and that it could authorize private parties to exercise its eminent domain power, either back taking possession of property or by instituting condemnation proceedings. "Section 717(h)" of the National Gas Act "follows that path" by categorically delegating the federal government's eminent domain authority to pipeline builders. State sovereign immunity, the Court concluded, does not restrict that delegation of authority. Under the Court's precedent, "the States consented in the plan of the [Constitutional] Convention to the exercise of the federal eminent domain power, including condemnation proceedings brought by private delegates." Although there are no founding-era suits of that kind, the power to exercise the federal government's eminent domain authority cannot be separated from the ability to bring condemnation suits. Finally, the Court concluded that the National Gas Act clearly delegated eminent domain authority to private parties; there was no need for an express delegation to exercise that authority specifically with respect to State property.

6. ***TransUnion LLC v. Ramirez*, No. 20-297 (9th Cir., 951 F.3d 1008; cert. granted Dec. 16, 2020; argued Mar. 30, 2021). Whether either Article III or Federal Rule of Civil Procedure 23 permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.**

   Decided June 25, 2021 (594 U.S.). Ninth Circuit/Reversed and remanded. Justice Kavanaugh for a 5–4 Court (Thomas, J., joined by Breyer, Sotomayor, and Kagan, J.J., dissenting; Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that the majority of the class suffered no concrete harm from, and therefore lacked standing to challenge, petitioner's statutory violations. The district court certified a class of 8,185 persons who alleged that petitioner violated the Fair Credit Reporting Act by (1) failing to follow reasonable procedures with respect to information in their credit files; (2) failing to provide them with all requested information; and (3) failing to include a summary of rights in all mailings. The Court explained that a plaintiff must suffer a "concrete" harm to have Article III standing. Although Congress has some leeway to elevate injuries that were previously inadequate to the status of legally cognizable injuries, it cannot do away with the concrete-harm requirement merely by providing a private cause of action based on a statutory violation. Applying that principle, the Court determined that only a subset of the class suffered concrete harm. Specifically, with respect to petitioner's failure to follow reasonable procedures, only those 1,853 class members whose reports were disseminated to third parties suffered concrete harm—similar to "the reputational harm associated with the tort of defamation." But the mere existence of inaccurate reports for the other class members did not inflict concrete harm on them. Nor did petitioner's failure to provide information or a summary of rights inflict concrete harm on any class member other than the named plaintiff. Because the Court reversed the Ninth Circuit's judgment with respect to Article III, it remanded for consideration whether class certification was appropriate.

7. ***Yellen v. Confederated Tribes*, No. 20-543, consolidated with *Alaska Native Village Corp. v. Confederated Tribes*, No. 20-544 (D.C. Cir., 976 F.3d 15; cert. granted Jan. 8, 2021; argued Apr. 19, 2021). Whether Alaska Native Corporations ("ANCs") established pursuant to the Alaska Native Claims Settlement Act are "Indian tribe[s]" for purposes of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act.**

   Decided June 25, 2021 (594 U.S.). D.C. Circuit/Reversed and remanded. Justice Sotomayor for a 6–3 Court (Gorsuch, J., joined by Thomas and Kagan, J.J., dissenting). The Court held that ANCs are "Indian tribe[s]" eligible for relief under the CARES Act. In the CARES Act, Congress reserved $8 billion for "Tribal governments," defined as the "recognized governing body of an Indian tribe," as the Indian Self-Determination Act ("ISDA") defines that term. 42 U.S.C. § 801(a)(2)(B), (g)(5), (1). ISDA, in turn, defines an "Indian tribe" to mean a "tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [the Alaska Native Claims Settlement Act ("ANCSA")],

which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). The Treasury Department determined that ANCs qualify as Indian tribes under ISDA and set aside $500 million for them. The Court reasoned that ACNs are "established pursuant to" ANCSA and that "eligibility for the benefits of ANCSA counts as eligibility for 'the special programs and services provided by the United States to Indians because of their status as Indians.'" Among other things, ANCSA made ACNs eligible for substantial land and monetary grants. The Court rejected respondents' view that "the" special programs referred to in ISDA include only those available to the members of federally recognized tribes. The Court also rejected respondents' view that ISDA's definition is a "term of art" meaning federally recognized tribe. Finally, the Court rejected the argument of one respondent that ACNs are not eligible for relief under the CARES Act because, as non-federally recognized tribes, they do not have a "recognized governing body."

8. ***HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, No. 20-472 (10th Cir., 948 F.3d 1206; cert. granted Jan. 8, 2021; argued Apr. 27, 2021). Whether, in order to qualify for a hardship exemption under Section 7545(o)(9)(B)(i) of the Renewable Fuel Standards, a small refinery needs to receive uninterrupted, continuous hardship exemptions for every year since 2011.**

   Decided June 25, 2021 (594 U.S.). Tenth Circuit/Reversed. Justice Gorsuch for a 6–3 Court (Barrett, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that a small refinery does not need to have received uninterrupted hardship exemptions every year to qualify for a hardship exemption in a future year. In imposing its renewable fuel mandate, Congress provided, "A small refinery may at any time petition the Administrator for an extension of the exception [provided categorically until 2011] for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(*o*)(9)(B)(i). The question before the Court turned on the meaning of "extension," which the Court determined was used "in its temporal sense." But even in that sense, the Court explained, "[i]t is entirely natural—and consistent with ordinary usage—to seek an 'extension' of time even after some lapse." For example, "the forgetful student who asks for an 'extension' for a term paper after the deadline has passed." And many other federal laws use "extension" to include a resumption after a lapse. The Court also relied on the phrase "at any time" and surrounding provisions, both of which suggested that continuity was not required. But the Court declined to consider whether to defer to a regulation interpreting the statute, because the government did not request *Chevron* deference. And although the Court recited both sides' "accounts of legislative purpose and sound public policy," it explained that its analysis could "be guided only by the statute's text."

9. ***Collins v. Yellen*, No. 19-422, consolidated with *Yellen v. Collins*, No. 19-563 (5th Cir., 938 F.3d 553; cert. granted July 9, 2020; argued Dec. 9, 2020). The Questions Presented are: (1) Whether the Federal Housing Finance Agency's ("FHFA") structure violates the separation of powers. (2) Whether the courts must set aside a final agency action that FHFA took when it was**

unconstitutionally structured and strike down the statutory provisions that make FHFA independent. (3) Whether the statute's anti-injunction clause, which precludes courts from taking any action that would "restrain or affect the exercise of powers or functions of the Agency as a conservator," 12 U.S.C. § 4617(f), precludes a federal court from setting aside the Third Amendment to agreements between FHFA and the Department of the Treasury. (4) Whether the statute's succession clause—under which FHFA, as conservator, inherits the shareholders' rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment.

Decided June 23, 2021 (594 U.S.). Fifth Circuit/Affirmed in part, reversed in part, vacated in part, and remanded. Justice Alito for a 7–2 Court (Thomas, J., concurring; Kagan, J., joined in part by Breyer and Sotomayor, J.J., concurring in part and concurring in the judgment; Gorsuch, J., concurring in part; Sotomayor, J., joined by Breyer, J., concurring in part and dissenting in part). The Court held that petitioners' statutory claim was barred by the anti-injunction clause of the Recovery Act, 12 U.S.C. § 4501 *et seq.*, that FHFA's structure was unconstitutional, and that FHFA's actions taken while it was unconstitutionally structured were not necessarily void. Congress established the FHFA to regulate Fannie Mae and Freddie Mac after the housing crisis of 2008. It provided that the FHFA would be headed by a single Director, who would be removable only for cause. Shortly after the FHFA was established, it placed Fannie Mae and Freddie Mac into conservatorship and negotiated a series of agreements with the Treasury Department. The third amendment, entered into while the FHFA was headed by an Acting Director, "caused the companies to transfer enormous amounts of wealth to Treasury." The Court first concluded that petitioners' statutory challenge to the third amendment was barred by the Recovery Act's limitation on judicial review. According to the Court, the Act bars judicial review of actions "within the scope of the Agency's authority as a conservator," and the third amendment fell within that scope because "the FHFA could have reasonably concluded that it was in the best interests of members of the public who rely on a stable secondary mortgage market." Turning to the petitioners' constitutional argument, the Court concluded that the FHFA's structure was indistinguishable from the structure of the Bureau of Consumer Financial Protection ("CFPB"), which the Court held unconstitutional in *Seila Law LLC v. CFPB*, 591 U.S. __ (2020). Like the CFPB, the FHFA is led by a single Director who can be removed by the President only for cause and exercises significant executive power. Finally, the Court considered the appropriate remedy. Petitioners were not entitled to prospective relief, because the FHFA had entered into a fourth amendment that abrogated the third amendment. With respect to retrospective relief, the Court reasoned that the third amendment was not necessarily void—it was adopted by an Acting Director, who was removable at will, and the mere fact that the Directors who implemented the third amendment were unconstitutionally implemented from removal did not mean that the FHFA lacked authority to take those implementing actions. Nonetheless, petitioners might be entitled to relief if, for example, the President had attempted or desired to remove those Directors but was prevented from doing so. The Court remanded for the Fifth Circuit to consider the remedial question in the first instance.

10. ***Lange v. California*, No. 20-18 (Cal. Ct. App., 2019 WL 5654385; cert. granted Oct. 19, 2020; argued Feb. 24, 2021). Whether pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualifies as an exigent circumstance sufficient to allow the officer to enter a home without a warrant.**

    Decided June 23, 2021 (594 U.S.). California Court of Appeal/Vacated and remanded. Justice Kagan for a unanimous Court (Kavanaugh, J., concurring; Thomas, J., joined in part by Kavanaugh, J., concurring in part and in the judgment; Roberts, C.J., joined by Alito, J., concurring in the judgment). The Court held that the "pursuit of a fleeing misdemeanor suspect" does not qualify categorically "as an exigent circumstance." When confronted by exigent circumstances, law enforcement does not need to obtain a warrant before engaging in a search. The Court declined to depart from its usual case-specific approach to determining whether exigent circumstances exist and thus rejected a "rule finding exigency in every case of misdemeanor pursuit." Assuming that the Court's prior case law had created such a categorical rule for felony pursuit, the Court declined to extend that rule to misdemeanors, which vary widely and might be minor. And although misdemeanor pursuit might constitute an exigent circumstance in some instances, such as where the suspect might discard evidence or flee again, it does not always. "When it came to misdemeanors," both under the Court's precedent and in historical practice, "flight alone was not enough." Rather, "[a]n officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency."

11. ***Cedar Point Nursey v. Hassid*, No. 20-107 (9th Cir., 923 F.3d 524; cert. granted Nov. 13, 2020; argued Mar. 22, 2021). Whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment.**

    Decided June 23, 2021 (594 U.S.). Ninth Circuit/Reversed and remanded. Chief Justice Roberts for a 6–3 Court (Kavanaugh, J., concurring; Breyer, joined by Sotomayor and Kagan, J.J., dissenting). The Court held that California's access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments. California law permits labor organizers access to an agricultural employer's property for up to 3 hours per day, 120 days per year. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." By contrast, when the government "imposes regulations that restrict an owner's ability to use his own property," the Takings Clause requires compensation only when the regulation goes "too far." The key distinction, the Court explained, is not "whether the government action comes garbed as a regulation." Rather, "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred." Under that test, California's regulation constitutes a *per se* taking, because it "appropriates for the enjoyment of third parties the owners' right to exclude"—one of the most

important property rights. The Court reasoned that it makes no difference whether a regulation requires access "24 hours a day, 365 days a year" or something short of that; the duration and extent of a physical appropriation may affect the amount of compensation required, but not whether a physical taking has occurred. Nor does it matter whether an access regulation constitutes an easement under state law. And although the government can require access to private property in a variety of situations, for example, for health and safety inspections, without paying compensation, California's "access regulation amounts to simple appropriation of private property."

Gibson Dunn
Counsel for *Amici* School Discipline Professors

Partners
Richard W. Mark
Anne Champion

12. ***Mahanoy Area School District v. B.L.*, No. 20-255 (3d Cir., 964 F.3d 170; cert. granted Jan. 8, 2021; argued Apr. 28, 2021). Whether *Tinker v. Des Moines Independent Community School District*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.**

Decided June 23, 2021 (594 U.S.). Third Circuit/Affirmed. Justice Breyer for an 8–1 Court (Alito, J., joined by Gorsuch, J., concurring; Thomas, J. dissenting). The Court held that the school's disciplinary action—suspending respondent from the cheerleading team based on her vulgar social media messages—violated respondent's First Amendment rights. The Court declined to set forth a bright-line rule governing when a school may regulate student speech that takes place off campus. Rather, the Court set forth "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech" and that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." First, schools do not generally stand in the place of parents where off-campus speech is concerned. Second, permitting schools to regulate off-campus speech would subject students to restrictions at all times, with particular costs for political and religious speech. Third, schools have an interest in protecting unpopular expression, especially when it occurs off campus. Considering those factors, the Court concluded that the school did not have a sufficient interest in regulating respondent's speech, which would have been fully protected were she an adult: The school did not stand in the place of respondent's parents at the relevant time; respondent's speech did not cause significant disruption at the school; and respondent's speech had little effect on team morale.

Gibson Dunn
Counsel for Petitioners-Respondents Smith & Nephew, Inc. and Arthrocare Corp..

Partner
Mark A. Perry

13. ***United States v. Arthrex Inc.*, No. 19-1434, consolidated with *Smith & Nephew Inc. v. Arthrex Inc.*, No. 19-1452, *Arthrex Inc. v. Smith & Nephew Inc.*, No. 19-1458 (Fed Cir., 941 F.3d 1320; cert. granted Oct. 13, 2020; argued Mar. 1, 2021). The Questions Presented are: (1) Whether, for purposes of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, administrative patent judges ("APJs") of the U.S. Patent and Trademark Office ("PTO") are principal officers who must be appointed by the President with the Senate's advice and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head. (2) Whether, if administrative patent judges are principal officers, the court of appeals properly cured any**

Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. § 7513(a) to those judges.

Decided June 21, 2021 (594 U.S.). Federal Circuit/Vacated and remanded. Chief Justice Roberts for a 5–4 Court with respect to the merits and a 7–2 Court with respect to the remedy. (Gorsuch, J., concurring in part and dissenting in part; Breyer, J., joined by Sotomayor and Kagan, J.J., concurring in the judgment in part and dissenting in part; Thomas, J., joined in part by Breyer, Sotomayor, and Kagan, J.J., dissenting). With respect to the merits, the Court held that the PTO's APJs exercise unreviewable authority that is inconsistent with appointment as "inferior officers" by the head of a department. "Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department." But APJs, the Court reasoned, are not directed and supervised by a principal officer in the manner required under the Court's decision in *Edmond v. United States*, 520 U.S. 651 (1997). In particular, although the PTO Director exercises administrative oversight by, among other things, fixing the APJs' rate of pay and selecting the APJs to reconsider patent validity, the Director cannot directly review an APJ decision on patent validity. Such decisions are reviewable only by the Patent Trial and Appeal Board ("PTAB"). To be sure, the Director can indirectly affect the decisionmaking process—he can select APJs who are inclined toward his views, curtail the patent reconsideration process, and stack the PTAB panel reviewing the decision. But that indirect influence "is not the solution. It is the problem." "Even if the Director succeeds in procuring his preferred outcome, such machinations blur the lines of accountability demanded by the Appointments Clause." Moreover, the Court explained, the Director's ability to respond to decisions with which he disagrees after the fact "gives the Director no means of countermanding the final decision already on the books." The Court surveyed historical practice and concluded that it was inconsistent with permitting "inferior officers" to exercise unreviewable executive power. With respect to the appropriate remedy, the plurality decided that the regulatory scheme was "unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own," and thus remanded for the Acting Director to decide whether to rehear Smith & Nephew's petition. Although Justice Breyer dissented with respect to the merits, he agreed with the plurality's remedy.

14. ***Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, No. 20-222 (2d Cir., 955 F.3d 254; cert. granted Dec. 11, 2020; argued Mar. 29, 2021). The Questions Presented are: (1) Whether a defendant in a securities class action may rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson* by pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality. (2) Whether a defendant seeking to rebut the *Basic* presumption has only a burden of production or also the ultimate burden of persuasion.**

Decided June 21, 2021 (594 U.S.). Second Circuit/Vacated and remanded. Justice Barrett for a 5–4 Court (Sotomayor, J., concurring in part and dissenting

in part; Gorsuch, J., joined by Thomas and Alito, J.J., concurring in part and dissenting in part). The Court held "that the Second Circuit may not have properly considered the generic nature of [petitioner's] alleged misrepresentations" and that the defendant "bear[s] the burden of persuasion to prove a lack of price impact by a preponderance of the evidence." Under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the plaintiff in a securities-fraud suit may invoke a "rebuttable presumption of reliance based on the fraud-on-the-market theory." Even at the class-certification stage, however, a defendant can rebut that presumption by showing that its alleged misrepresentations had no effect on its stock price. Petitioner sought to do so by arguing that its alleged misrepresentations were too generic to have had an impact on its stock price. Agreeing with the parties, the Court first concluded that the generic nature of alleged misrepresentations often will be important evidence for courts to consider in deciding whether to certify a class. That is especially true, the Court explained, in "inflation-maintenance" suits, where the alleged misrepresentations purportedly prevented a stock from dropping in price. Because it was unclear whether the Second Circuit properly considered this evidence, the Court remanded for further consideration. The Court next concluded that the defendant bears the burden of persuasion in rebutting the *Basic* presumption at the class-certification stage. The Court's prior opinions, it explained, had already placed that burden on defendants—although "the allocation of burden is unlikely to make much difference on the ground."

Gibson Dunn
Counsel for *Amici* The Players Association of the National Football League, et al.

Partners
Andrew S. Tulumello (former)
Kristen C. Limarzi

15. ***NCAA v. Alston*, No. 20-512, consolidated with *American Athletic Conference v. Alston*, No. 20-520 (9th Cir., 958 F.3d 1239; cert. granted Dec. 16, 2020; argued Mar. 31, 2021). Whether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association ("NCAA") eligibility rules regarding compensation of student-athletes violate federal antitrust law.**

Decided June 21, 2021 (594 U.S.). Ninth Circuit/Affirmed. Justice Gorsuch for a unanimous Court (Kavanaugh, J., concurring). The Court held that the district court acted within lawful bounds by enjoining the NCAA's prohibition on offering enhanced education-related benefits. Neither party disputed the district court's market definition, that the NCAA enjoys monopsony control in the market for student-athlete labor, or that the NCAA's restrictions decreased student-athlete compensation below what a competitive market would yield. With respect to the disputed issues, the Court first concluded that the district court properly subjected the NCAA's restraints to a full rule of reason analysis, as opposed to "quick look" review. Even if the NCAA operates as a joint venture, its monopsony control and competition-harming rules could not be approved based on a quick look. Similarly, the fact that the NCAA must make some rules for athletic competition does not justify every such rule. And the Court's prior statement in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), about the value of amateurism was not only dicta but made when market conditions were far different from today. Additionally, any argument that the NCAA should be exempted from normal antitrust law was both inconsistent with precedent and properly directed to Congress, not the Court. The Court next concluded that the district court properly analyzed the NCAA's restraints under the rule of reason.

Not only was the NCAA's proffered procompetitive justification for its restraints unpersuasive, but those restraints were substantially more restrictive than necessary. Nor could the NCAA offer a procompetitive justification by defining its product according to its own (inconsistent) definition of "amateurism." Finally, the Court concluded that the district court's injunction was sufficiently flexible and cautious.

16. ***Fulton v. City of Philadelphia*, No. 19-123 (3d Cir., 922 F.3d 140; cert. granted Feb. 24, 2020; argued Nov. 4, 2020). The Questions Presented are: (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held. (2) Whether *Employment Division v. Smith*, 494 U.S. 872 (1990), should be revisited. (3) Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.**

Decided June 17, 2021 (593 U.S.). Third Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court (Barrett, J., joined by Kavanaugh, J. and in part by Breyer, J., concurring; Alito, J., joined by Thomas and Gorsuch, J.J., concurring in the judgment; Gorsuch, J., joined by Thomas and Alito, J.J., concurring in the judgment). The Court held that Philadelphia's refusal "to contract with [Catholic Social Services ("CSS")] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the" Free Exercise Clause. Under *Smith*, laws burdening religious exercise that are not neutral and generally applicable must satisfy strict scrutiny. The Court first concluded that Philadelphia's actions "burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." But the Court did not need to consider whether to overrule *Smith*, because it concluded that Philadelphia's actions were not taken pursuant to generally applicable policies and thus were subject to strict scrutiny even under *Smith*. The non-discrimination provisions in Philadelphia's contract with CSS, the Court reasoned, "incorporate[d] a system of individual exemptions, made available . . . at the 'sole discretion' of the Commissioner." That system of exemptions made the provisions not generally applicable, even though they were contained in a government contract and the Commissioner had never granted an exemption. Nor could Philadelphia rely on its ordinance prohibiting discrimination in places of public accommodation, "because foster care agencies do not act as public accommodations in performing certifications." Next, the Court concluded that Philadelphia's actions could not survive strict scrutiny. Denying an exception to CSS was unlikely to advance Philadelphia's goals of maximizing the number of foster families and minimizing liability. And the "creation of a system of exceptions under the contract" undermined Philadelphia's "weighty" interest "in the equal treatment of prospective foster parents and foster children." Because

Gibson Dunn
Counsel for *Amici* First Focus on Children and The Children's Partnership

Partner
Stuart F. Delery (former)

the Court concluded that Philadelphia's actions violated the Free Exercise Clause, it did not consider whether they violated the Free Speech Clause.

17. ***California v. Texas*, No. 19-840, consolidated with *Texas v. California*, No. 19-1019 (5th Cir., 945 F.3d 355; cert. granted Mar. 2, 2020; argued Nov. 10, 2020). The Questions Presented are: (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in 26 U.S.C. § 5000A(a). (2) Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional. (3) Whether the minimum coverage provision is severable from the rest of the Affordable Care Act ("ACA"). (4) Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.**

Decided June 17, 2021 (593 U.S.). Fifth Circuit/Reversed and remanded. Justice Breyer for a 7–2 Court (Thomas, J., concurring; Alito, J., joined by Gorsuch, J., dissenting). The Court held that the plaintiffs lacked Article III standing to challenge the ACA's minimum coverage provision. With respect to the individual plaintiffs, the Court reasoned that their "pocketbook injury" of purchasing minimum coverage was not traceable to any government action. "With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply," and no other government actor could enforce the minimum coverage provision either. Moreover, the Court concluded, the individual plaintiffs' injury is not redressable. They cannot enjoin any government official, because the provision is unenforceable. And any declaratory remedy would amount to an impermissible advisory opinion. The Court declined to consider the United States' "novel alternative theory of standing" that the individual plaintiffs could sue to enjoin other ACA provisions that were purportedly not severable from the minimum coverage provision. With respect to the state plaintiffs, the Court reasoned that their purported injuries were similarly not traceable to any federal government action, because the minimum coverage provision is unenforceable. And, as a factual matter, the state plaintiffs had not shown that they suffered any financial injury as a result of that provision, as opposed to other, independent provisions of the ACA. As a result, the Court reversed the Fifth Circuit's judgment with respect to standing, vacated the judgment, and remanded "with instructions to dismiss."

Gibson Dunn
Co-counsel for Petitioner Nestlé USA, Inc.

Partners
Theodore J. Boutrous, Jr.
Perlette Michèle Jura

18. ***Nestlé USA, Inc. v. Doe I*, No. 19-416, consolidated with *Cargill, Inc. v. Doe I*, No. 19-453 (9th Cir., 929 F.3d 623; CVSG Jan. 13, 2020; cert. supported May 26, 2020, limited to No. 19-453, with a Question 3 proposed by the SG; cert. granted July 2, 2020; argued Dec. 1, 2020). The Questions Presented are: (1) Whether an aiding-and-abetting claim against a domestic corporation brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. (2) Whether the Judiciary has the authority under the ATS to impose liability on domestic corporations.**

Decided June 17, 2021 (593 U.S.). Ninth Circuit/Reversed and remanded. Justice Thomas for an 8–1 Court (Gorsuch, J., joined in parts by Alito, J., and Kavanaugh, J., concurring; Sotomayor, J., joined by Breyer and Kagan, J.J., concurring in part and in the judgment; Alito, J., dissenting). The Court held that respondents improperly sought extraterritorial application of the ATS. Under the Court's two-step test for analyzing extraterritoriality issues, courts first ask whether Congress gave a clear and affirmative indication of its intent to regulate conduct abroad and, second, if not, whether the conduct relevant to the statute's focus occurred domestically. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Court held that the ATS does not provide a clear and affirmative indication of Congress' intent to regulate extraterritorially. Thus, the sole question for the Court was whether respondents' suit targeted domestic conduct. The Court concluded that it did not. "Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast." And mere "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS." Because respondents did not allege any domestic conduct other than corporate decisionmaking, their suit impermissibly sought extraterritorial application of the ATS.

19. ***Greer v. United States*, No. 19-8709 (11th Cir., 798 F. App'x 483; cert. granted Jan. 8, 2021; argued Apr. 20, 2021; consolidated with *United States v. Gary*, No. 20-444 (4th Cir., 954 F.3d 194). (1) Whether, when applying plain-error review based on an intervening United States Supreme Court decision, circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial; (2) Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.**

Decided June 14, 2021 (593 U.S.). Eleventh Circuit/Affirmed; Fourth Circuit/Reversed. Justice Kavanaugh for a unanimous Court with respect to *Greer* and for an 8–1 Court with respect to *Gary* (Sotomayor, J., concurring in part, dissenting in part, and dissenting from the judgment as to *Gary*). The Court held that neither Greer nor Gary was entitled to plain-error relief for their unpreserved claims based on *Rehaif v. United States*, 588 U.S. (2019). In *Rehaif*, the Court held that the government "must prove not only that the defendant knew he possessed a firearm, but also that *he knew he was a felon* when he possessed the firearm." Both Greer and Gary were convicted of felon-in-possession offenses before *Rehaif*, and both raised new *mens rea* arguments based on *Rehaif* on appeal. But neither was entitled to plain-error relief, the Court reasoned, because neither showed that the result would have been different but for the district courts' *Rehaif* errors. "If a person is a felon, he ordinarily knows he is a felon." Thus, the jury likely would still have convicted Greer had it been

instructed on that element of his offense. And Gary likely would still have pleaded guilty if he had known that was an element of his offense. Both had been convicted of multiple prior felonies, and neither argued on appeal that they did not in fact know that they were felons. Moreover, courts of appeals on plain-error review can consider evidence outside the trial record (such as the facts of Greer's multiple prior felonies). And *Rehaif* errors are subject to ordinary plain-error review; they are not subject to a "futility" exception, and they are not "structural" errors that do not require a showing a prejudice.

20. ***Terry v. United States*, No. 20-5904 (11th Cir., 828 F. App'x 563; cert. granted Jan. 8, 2021; argument scheduled Apr. 20, 2021; argument date vacated Mar. 19, 2021; argued May 4, 2021). Whether pre-August 3, 2010, crack offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense" under Section 404 of the First Step Act.**

Decided June 14, 2021 (593 U.S.). Eleventh Circuit/Affirmed. Justice Thomas for a unanimous Court (Sotomayor, J., concurring in part and in the judgment). The Court held that "crack offenders who did *not* trigger a mandatory minimum" do not qualify for relief under the First Step Act. Under Section 404(b) of the First Step Act, offenders are eligible for a sentence reduction only if they received "a sentence for a covered offense." A "covered offense" is "a violation of Federal criminal statute, the statutory penalties for which were modified by" specific provisions of the Fair Sentencing Act. The Fair Sentencing Act modified the statutory penalties for two offenses involving crack cocaine—one that set a mandatory minimum of 10 years for possession with intent to distribute of at least 50 grams and another that set a mandatory minimum of 5 years for possession with intent to distribute of at least 5 grams. But it did not modify the statutory penalties for possession with intent to distribute an unspecified amount of crack—the offense for which petitioner was convicted. Because the First Step Act's text is clear, the Court reasoned, petitioner is not entitled to relief.

21. ***Borden v. United States*, No. 19-5410 (6th Cir., 769 F. App'x 266; cert. granted Mar. 2, 2020, limited to Question 1; argued Nov. 3, 2020). Whether the "use of force" clause in the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), encompasses crimes with a *mens rea* of mere recklessness.**

Decided June 10, 2021 (593 U.S.). Sixth Circuit/Reversed and remanded. Justice Kagan for a 5–4 Court (Thomas, J., concurring in the judgment; Kavanaugh, J., joined by Roberts, C.J., and Alito and Barrett, J.J., dissenting). The Court reversed the judgment of the Sixth Circuit and remanded. The plurality concluded that the "use of force" clause does not encompass crimes with a *mens rea* of recklessness, because such uses of force are not "against another." Justice Thomas adhered to his prior view that a crime with a *mens rea* of mere recklessness does not involve the "use of physical force."

Gibson Dunn
Counsel for *Amicus*
Families Against
Mandatory Minimums

Partners
David Debold
Avi Weitzman

22. ***Sanchez v. Mayorkas*, No. 20-315 (3d Cir., 967 F.3d 242; cert. granted Jan. 8, 2021; argued Apr. 19, 2021). Whether, under 8 U.S.C. § 1254a(f)(4), a grant of temporary protected status authorizes eligible noncitizens to obtain lawful-permanent-resident status under 8 U.S.C. § 1255.**

Decided June 7, 2021 (593 U.S.). Third Circuit/Affirmed. Justice Kagan for a unanimous Court. The Court held that that conferral of temporary protected status does not enable noncitizens to obtain lawful-permanent-resident status despite their unlawful entry. Noncitizens are eligible for lawful-permanent-resident status, the Court reasoned, only if they were admitted lawfully. Temporary protected status allows noncitizens to be "treated as having nonimmigrant status," but does not satisfy the "independent legal-entry requirement." Rather, lawful status and admission "are distinct concepts in immigration law: Establishing one does not necessarily establish the other." Indeed, 18 U.S.C. § 1255 allows certain noncitizens—specifically, crime victims who can assist with the investigation—to obtain lawful-permanent-resident status without lawful admission. Because Congress did not do so with respect to noncitizens who have temporary protected status, the Court would not rule those unlawful entrants eligible for lawful-permanent-resident status.

23. ***Van Buren v. United States*, No. 19-783 (11th Cir., 940 F.3d 1192; cert. granted Apr. 20, 2020; argued Nov. 30, 2020). Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act ("CFAA") if he accesses the same information for an improper purpose.**

Decided June 3, 2021 (593 U.S.). Eleventh Circuit/Reversed and remanded. Justice Barrett for a 6–3 Court (Thomas, J., joined by Roberts, C.J., and Alito, J., dissenting). The Court held that the CFAA "covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend," not those who "have improper motives for obtaining information that is otherwise available to them." The CFAA makes it illegal to "exceed[] authorized access" to a computer, which the statute defines to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(a)(2), (e)(6). Petitioner, a police officer, breached department policy by accessing a law enforcement database for the purpose of selling the information he obtained. The Court reasoned that petitioner's conduct did not violate the CFAA. Under the plain text of the statute, the phrase "'is not entitled so to obtain" means "information that a person is not entitled to obtain by using a computer that he is authorized to access." That interpretation does not render the word "so" superfluous—rather that word makes clear that a person must be authorized to obtain the relevant information using computer access, as opposed to some other means. And the word "entitled" similarly refers to the manner in which a person obtains access to information, not to whether the person has proper grounds for obtaining the information.

Moreover, the Court's interpretation made sense in statutory context. The CFAA protects against "outside hackers"—those who lack any authorized access to a computer system—and "inside hackers"—those who have permission to access a computer system in general but exceed that access by entering areas to which they lack permission. Finally, the alternative interpretation "would attach criminal penalties to a breathtaking amount of commonplace computer activity," including employees who send personal emails from work computers or people who violate a website's terms of service.

Gibson Dunn
Counsel for *Amici* Thirty-Five Former Immigration Judges and Members of the Board of Immigration Appeals

Partners
Richard W. Mark
Amer S. Ahmed

24. ***Garland v. Ming Dai*, No. 19-1155 (9th Cir., 884 F.3d 858; cert. granted Oct. 2, 2020, consolidated with *Garland v. Alcaraz-Enriquez*, No. 19-1156 (9th Cir., 727 F. App'x 260); argued Feb. 23, 2021). The Questions Presented are: (1) Whether a court of appeals may conclusively presume that an asylum applicant's testimony is credible and true whenever an immigration judge or the Board of Immigration Appeals adjudicates an application without making an explicit adverse credibility determination. (2) Whether the court of appeals violated the remand rule as set forth in *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), when it determined in the first instance that respondent was eligible for asylum and entitled to withholding of removal.**

Decided June 1, 2021 (593 U.S.). Ninth Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court. The Court held that the Ninth Circuit's rule deeming an applicant's testimony to be credible in the absence of an express adverse credibility determination is inconsistent with the INA. Under the INA, reviewing courts must accept "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Moreover, the INA's presumption of credibility applies only when an applicant appeals from an Immigration Judge to the Board of Immigration Appeals ("BIA")—not on a subsequent petition for review to an appellate court. That distinction makes sense in historical context and in light of background administrative law principles. The Court also rejected respondents' alternative argument that the Ninth Circuit merely held the BIA to its statutorily mandated presumption of credibility. For one thing, the Ninth Circuit failed to consider whether the BIA had implicitly found the presumption to be rebutted. For another, credibility is not a "trump card" under the INA—"even credible testimony may be outweighed by other more persuasive evidence or be insufficient to satisfy the burden of proof."

25. ***United States v. Cooley*, No. 19-1414 (9th Cir., 919 F.3d 1135; cert. granted Nov. 20, 2020; argued Mar. 23, 2021). Whether the lower courts erred in suppressing evidence on the theory that a police officer of an Indian tribe lacked authority to temporarily detain and search the respondent, a non-Indian, on a public right-of-way within a reservation based on a potential violation of state or federal law.**

Decided June 1, 2021 (593 U.S.). Ninth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Alito, J., concurring). The Court held that a "an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." Generally, Indian tribes lack inherent sovereign authority to regulate the activities

of nonmembers of the tribe. But there are two exceptions to that rule. First, an Indian tribe may regulate the activities of nonmembers who enter into consensual relationships, such as contracts or leases, with the tribe. Second, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981). That second exception, the Court reasoned, "fits the present case, almost like a glove." "To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats," including drunk driving or transporting contraband. Moreover, the Court had previously recognized tribal authority to detain offenders and transport them to the proper authorities. The authority to search potential offenders is "ancillary" to that recognized authority. And "existing legislation and executive action appear to operate on the assumption that tribes have retained this authority."

26. ***City of San Antonio v. Hotels.com, L.P.*, No. 20-334 (5th Cir., 959 F.3d 159; cert. granted Jan. 8, 2021; argued Apr. 21, 2021). Whether district courts lack discretion to deny or reduce appellate costs deemed "taxable" in district court under Federal Rule of Appellate Procedure 39(e).**

    Decided May 27, 2021 (593 U.S.). Fifth Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that district courts lack discretion to deny or reduce appellate costs. Federal Rule of Appellate Procedure 39 provides a series of default rules for taxing costs that apply unless "the court orders otherwise." That reference to "the court," the Court reasoned, naturally refers to the court of appeals, which has discretion both to decide the party against whom to tax costs and how to allocate such costs. "With that settled," the Court explained, "it is easy to see why district courts cannot exercise a second layer of discretion." An appellate court's determination that one party is entitled to 70% of its costs, for example, would be undone if the district court later decided that the party was entitled only to 35% of its costs. To be sure, Rule 39 divides costs between those that are incurred on appeal and those incurred in the district court (for example, fees for reporter's transcripts). But the appellate court has discretion to allocate all of them.

27. ***Guam v. United States*, No. 20-382 (D.C. Cir., 950 F.3d 104; cert. granted Jan. 8, 2021; argued Apr. 26, 2021). The Questioned Presented are: (1) Whether a settlement that is not under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") can trigger a contribution claim under CERCLA Section 113(f)(3)(B). (2) Whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).**

    Decided May 24, 2021 (593 U.S.). D.C. Circuit/Reversed and remanded. Justice Thomas for a unanimous Court. The Court held "that CERCLA contribution requires resolution of a CERCLA-specific liability," rather than liability under another environmental statute. In 2004, Guam settled claims

brought by the EPA under the Clean Water Act relating to a toxic waste dump on the island. In 2017, Guam sued the United States under CERCLA, claiming, among other theories, that it was entitled to contribution based on the 2004 settlement. After the D.C. Circuit held that Guam's CERCLA-contribution claim was barred by the statute of limitations and that Guam could not pursue other claims because it had once had a viable CERCLA-contribution claim, Guam "retreat[ed] from its complaint and argue[d] that it *never* had a viable" CERCLA-contribution claim. The Court agreed. Contribution "is a tool for apportioning the burdens of a predicate 'common liability' among the responsible parties" and the "most obvious place to look for that threshold liability is CERCLA's reticulated statutory matrix of environmental duties and liabilities." Moreover, "a federal contribution action is virtually always a creature of a specific statutory regime." And the "interlocking language and structure" of CERCLA's contribution section "confirm this understanding." Although not every provision within that section is explicit that contribution is available only for CERCLA liability, that is the most natural reading of the section when read as a whole.

28. ***United States v. Palomar-Santiago*, No. 20-437 (9th Cir., 813 F. App'x 282; cert. granted Jan. 8, 2021; argued Apr. 27, 2021). Whether a defendant, charged with unlawful reentry into the United States following removal, automatically satisfies the prerequisites to asserting the invalidity of the original removal order as an affirmative defense solely by showing that he was removed for a crime that would not be considered a removable offense under current circuit law, even if he cannot independently demonstrate administrative exhaustion or deprivation of the opportunity for judicial review.**

    Decided May 24, 2021 (593 U.S.). Ninth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that defendants charged with unlawful reentry must show exhaustion of administrative remedies and deprivation of judicial review even if their removal was premised on offenses later found not to be removable offenses. The relevant statutory text, the Court explained, provides that defendants "may not" challenge their removal orders "unless" they "demonstrat[e]" that each of three conditions has been satisfied—including administrative exhaustion and the deprivation of judicial review. 8 U.S.C. § 1326(d). That text is clear and mandatory, and the statute's requirements may not be excused. It makes no difference that the immigration judge originally errored in informing defendants that their offenses rendered them removable, the Court reasoned, because the purpose of administrative and judicial review is precisely to correct such errors. And the same statutory requirements apply to both procedural and substantive challenges.

29. ***CIC Servs., LLC v. IRS*, No. 19-930 (6th Cir., 925 F.3d 247; cert. granted May 4, 2020; argued Dec. 1, 2020). Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.**

    Decided May 17, 2021 (593 U.S.). Sixth Circuit/Reversed and remanded. Justice Kagan for a unanimous Court (Sotomayor, J., concurring; Kavanaugh, J.,

concurring). The Court held that the Anti-Injunction Act does not bar "a suit seeking to set aside an information-reporting requirement that is backed by both civil tax penalties and criminal penalties." Petitioner sued the IRS under the Administrative Procedure Act ("APA"), seeking the invalidation of a tax reporting requirement. If a tax adviser fails to comply with that requirement, it may be subject to civil monetary penalties that are "deemed" taxes, as well as criminal liability. The Court concluded that petitioner's suit is not barred by the Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). The "purpose" of petitioner's suit, the Court explained, was to enjoin the reporting requirement itself, not the civil tax penalties that might follow from violating the requirement. First, the reporting requirement imposes significant "costs separate and apart from the statutory tax penalty." Second, the reporting requirement "and the statutory tax penalty are several steps removed from each other." And, third, "violation of the [reporting requirement] is punishable not only by a tax, but by separate criminal penalties." As a result, if the Anti-Injunction Act bars pre-enforcement challenges to the reporting requirement, the only alternative to challenge its validity—refusing to comply, paying the tax penalty, and suing for a refund—would subject the adviser to criminal punishment.

30. ***Edwards v. Vannoy*, No. 19-5807 (5th Cir., No. 18-31095; cert. granted May 4, 2020, with the Question Presented directed by the Court; argued Dec. 2, 2020). Whether the Court's decision in *Ramos v. Louisiana*, 590 U.S. __ (2020), applies retroactively to cases on federal collateral review.**

Decided May 17, 2021 (593 U.S.). Fifth Circuit/Affirmed. Justice Kavanaugh for a 6–3 Court (Thomas, J., joined by Gorsuch, J., concurring; Gorsuch, J., joined by Thomas, J., concurring; Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that its decision in *Ramos v. Louisiana*, 590 U.S. __ (2020), does not apply retroactively to cases on federal collateral review. Under the Court's precedent, new constitutional rules of criminal procedure apply retroactively to all cases pending on direct review, but generally do not apply retroactively to cases pending on collateral review. *Teague v. Lane*, 489 U.S. 288, 311, 313 (1989) (plurality opinion), the Court explained, stated that only "watershed" rules of criminal procedure would apply retroactively on collateral review and also noted that it was "unlikely" such rules would "emerge." *Teague* identified only one "watershed" rule—the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963). And, in the three decades since *Teague*, the Court had not identified any other "watershed" rule. The new rule identified in *Ramos*, the Court concluded, was indistinguishable from other landmark procedural rules the Court had previously declined to apply retroactively on collateral review. Like *Duncan v. Louisiana*, 391 U.S. 145 (1968), which recognized a constitutional right to a jury trial in state criminal cases, *Ramos* was significant—but *Duncan* was not applied retroactively. Like *Crawford v. Washington*, 541 U.S. 36 (2004), *Ramos* was based on the original meaning of the Sixth Amendment—but *Crawford* was not applied retroactively. And like *Batson v. Kentucky*, 476 U.S. 79 (1986), *Ramos* prevents racial discrimination—but *Batson* was not applied retroactively. Given the "landmark and historic criminal

procedure decisions" that "do not apply retroactively on federal collateral review," the Court "candid[ly]" explained that "no new rules of criminal procedure can satisfy the watershed exception." "Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."

Gibson Dunn
Counsel for Petitioners
Chevron Corporation and
Chevron U.S.A., Inc.

Partners
Theodore J. Boutrous, Jr.
Joshua S. Lipshutz
Anne Champion

31. ***B.P. p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (4th Cir., 952 F.3d 452; cert. granted Oct. 2, 2020; argued Jan. 19, 2021). Whether 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443.**

    Decided May 17, 2021 (593 U.S.). Fourth Circuit/Vacated and remanded. Justice Gorsuch for a 7–1 Court (Sotomayor, J., dissenting). The Court held that 28 U.S.C. § 1447(d) permits courts of appeals "to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on the federal officer removal statute . . . or the civil rights removal statute." Beginning with the text of the statute, the Court noted that it permits appellate review of "an order" remanding to state court. "From this it would seem to follow that, when a district court's removal order rejects all of the defendants' grounds for removal, § 1447(d) authorizes a court of appeals to review each and every one of them." To be sure, only certain orders are encompassed within Section 1447(d), but so long as a defendant removes a case "pursuant to" one of the relevant removal statutes, it makes no difference whether the defendant removes "pursuant to" other statutes as well. The Court declined to construe the statute narrowly or to rely on (conflicting) inferences from other ways in which Congress might have written the statute. Moreover, the Court's interpretation followed from its decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), which held that 28 U.S.C. § 1292(b) permits courts of appeals "to review any question contained in the district court's order" certified for interlocutory review, not just the question on which certification was premised. And although there might be good policy reasons for limiting appellate review of remand orders, the Court concluded, those arguments cannot overcome the text of the statute. Finally, the Court declined to address whether petitioners properly removed the case on grounds the Fourth Circuit did not address and instead remanded for the court of appeals to consider those arguments in the first instance.

32. ***Caniglia v. Strom*, No. 20-157 (1st Cir., 953 F.3d 112; cert. granted Nov. 20, 2020; argued Mar. 24, 2021). Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.**

    Decided May 17, 2021 (593 U.S.). First Circuit/Vacated and remanded. Justice Thomas for a unanimous Court (Roberts, C.J., joined by Breyer, J., concurring; Alito, J., concurring; Kavanaugh, J., concurring). The Court held that the "community caretaking" doctrine does not apply to warrantless searches and seizures in the home. The Fourth Amendment includes some exceptions for

Gibson Dunn
Counsel for *Amici*
Thirty-Three Former
Immigration Judges and
Members of the Board of
Immigration Appeals

Partners
Richard W. Mark
Amer S. Ahmed

warrantless searches of a home, the Court explained. For example, warrants are not required in exigent circumstances. But the "community caretaking" exception "goes beyond anything this Court has recognized." Instead, it was drawn from a case involving "an impounded vehicle—not a home." "What is reasonable for vehicles," the Court concluded, "is different from what is reasonable for homes."

33. ***Niz-Chavez v. Garland*, No. 19-863 (6th Cir., 789 F. App'x 523; cert. granted June 8, 2020; argued Nov. 9, 2020). Whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in Section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.**

Decided Apr. 29, 2021 (593 U.S.). Sixth Circuit/Reversed. Justice Gorsuch for a 6–3 Court (Kavanaugh, J., joined by Roberts, C.J., and Alito, J., dissenting). The Court held that to trigger the stop-time rule, the government must provide all of the necessary information in a single notice. To establish eligibility for discretionary relief from removal, an otherwise removable alien must have been continuously present in the United States for at least 10 years. Under the stop-time rule, an alien's "continuous . . . presence in the United States shall be deemed to end . . . when the alien is served with a notice to appear." 8 U.S.C. § 1229b(d)(1). The Court reasoned that the ordinary meaning of "a" notice to appear means just that—a single notice containing all of the required information. Statutory context confirmed that understanding: The statute elswhere refers to "the Notice to appear," *id.* § 1229(e)(1), and "the notice," *id.* § 1229a(b)(7). Although the government may find that requirement onerous, "the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him."

34. ***Jones v. Mississippi*, No. 18-1259 (Miss. Ct. App., 285 So. 3d 626; cert. granted Mar. 9, 2020; argued Nov. 3, 2020). Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.**

Decided Apr. 22, 2021 (593 U.S.). Court of Appeals of Mississippi/Affirmed. Justice Kavanaugh for a 6–3 Court (Thomas, J., concurring in the judgment; Sotomayor, J., joined by Breyer and Kagan, J.J., dissenting). The Court held that the Eighth Amendment does not require the sentencer to make a finding of permanent incorrigibility before sentencing a juvenile to life imprisonment without the possibility of parole. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that juveniles who commit homicide can be sentenced to life without parole only if the sentencer has discretion to impose a lesser sentence. In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Court held that *Miller* was a substantive rule that applies retroactively on collateral review. The Court reasoned that neither of those cases required the sentencer to make a finding that a juvenile was permanently incorrigible before imposing life without parole: "*Miller* mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-

parole sentence." (Quoting 567 U.S. at 483.) And "*Montgomery* then flatly stated that '*Miller* did not impose a formal factfinding requirement' and that 'a finding of fact regarding a child's incorrigibility . . . is not required.'" (Quoting 577 U.S. at 211.) The Court rejected petitioner's arguments against that "clear language." "[P]ermanent incorrigibility is not an eligibility criterion akin to sanity or lack of intellectual disability," where the Court has required specific fact finding. Nor does *Montgomery*'s description of *Miller* as reaching a substantive holding overcome *Montgomery*'s express statement that no fact finding is required. And the Court's expectation that trial courts exercising discretion would sentence fewer juveniles to life without parole was based on data from States using a discretionary regime, not based on a fact-finding requirement. Finally, the Court rejected petitioner's alternative argument that sentencers must provide an on-the-record explanation "with an implicit finding of permanent incorrigibility" as, among other reasons, "not necessary to ensure that a sentencer considers a defendant's youth" and "not required by or consistent with *Miller*."

35. ***AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (9th Cir., 910 F.3d 417; cert. granted July 9, 2020; argued Jan. 13, 2021). The Questions Presented are: (1) Whether § 13(b) of the Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), by authorizing "injunction[s]," also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief. (2) Whether § 13(b) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.**

    Decided Apr. 22, 2021 (593 U.S.). Ninth Circuit/Reversed and remanded. Justice Breyer for a unanimous Court. The Court held that Section 13(b) of the Federal Trade Commission Act ("FTCA") does not authorize the Commission to seek, or a court to award, "equitable monetary relief such as restitution or disgorgement." "Several considerations, taken together, convince[d] [the Court] that §13(b)'s 'permanent injunction' language does not authorize the Commission directly to obtain court-ordered monetary relief." An "injunction" is not the same thing as equitable monetary relief. And the full subsection of the statute "focuses upon relief that is prospective, not retrospective." Moreover, other provisions of the FTCA allow district courts to grant monetary relief where the Commission has previously "engaged in administrative proceedings" and such relief is subject to "important limitations that are absent in § 13(b)." The Court reasoned that Congress likely would not "have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations." The Commission remains free to seek monetary relief for consumers by using the administrative process, but it cannot do so by going to federal court in the first instance.

36. ***Carr v. Saul*, No. 19-1442 (10th Cir., 961 F.3d 1267; cert. granted Nov. 9, 2020, consolidated with *Davis v. Saul*, No. 20-105 (8th Cir. 963 F.3d 790); argued Mar. 3, 2021). Whether a claimant seeking disability benefits under the Social Security Act forfeits an appointments-clause challenge to the**

appointment of an administrative law judge by failing to present that challenge during administrative proceedings.

Decided Apr. 22, 2021 (593 U.S.). Tenth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court (Thomas, J., joined by Gorsuch and Barrett, J.J., concurring in part and in the judgment; Breyer, J., concurring in part and in the judgment). The Court held that claimants do not need to present Appointments Clause challenges to an administrative law judge during administrative proceedings. No statute or regulation imposed such a requirement, the Court explained, and it would not impose a judicially created exhaustion requirement. The most important factor in determining whether to impose a judicially created exhaustion requirement is whether the underlying proceedings are adversarial, but proceedings before administrative law judges under the Social Security Act are relatively informal and non-adversarial. Moreover, agency adjudicators have no special expertise in resolving Appointments Clause challenges. And Social Security Act administrative law judges are "powerless" to grant relief based on a challenge to their own appointments. For those reasons, petitioners properly raised their Appointments Clause challenges in federal court without first raising such challenges during the administrative process.

Gibson Dunn
Counsel for *Amicus*
Rimini Street, Inc.

Partners
Mark A. Perry
Blaine H. Evanson

37. ***Google LLC v. Oracle Am., Inc.*, No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argued Oct. 7, 2020). The Questions Presented are:**
(1) Whether copyright protection extends to a software interface.
(2) Whether petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.

Decided Apr. 5, 2021 (593 U.S.). Federal Circuit/Reversed and remanded. Justice Breyer for a 6–2 Court (Thomas, J., joined by Alito, J., dissenting). The Court held that, assuming the material petitioner copied was copyrightable, petitioner's copying constituted fair use. Respondent owns a copyright in the computer program Java SE, which uses Java computer programing language. Petitioner copied approximately 11,500 lines of code from the Java SE program in developing its Android platform software. Those lines of code permitted developers to use familiar programming language to manipulate and control task-performing computer programs. The Court assumed that the code petitioner copied could be copyrighted. But it concluded that petitioner's copying constituted "fair use." The Court first decided that the fair use question is a mixed question of fact and law; thus, reviewing courts should defer to the jury's determination of underlying fact issues, but should review the ultimate question whether those facts demonstrate a fair use *de novo*. In doing so, reviewing courts should consider four factors: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. Each of those factors, the Court reasoned, weighed in favor of petitioner. Beginning with the second factor, the Court explained that the particular code petitioner copied was "further than are most

computer programs . . . from the core of copyright." With respect to the first factor, the Court reasoned that petitioner's "copying was transformative"—it copied the code "to create new products" and to "offer[] programmers a highly creative and innovative tool for a smartphone environment." Moreover, the fact that petitioner's purpose was commercial was not dispositive. As to the third factor, the Court noted that the number of lines of code copied was small compared to the millions of lines of total code. Finally, the Court explained that the "uncertain nature of [respondent's] ability to compete in Android's market place, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convince that th[e] fourth factor—market effects—also weighs in favor of fair use."

Gibson Dunn
Counsel for *Amicus*
salesforce.com, inc.

Partners
Mark A. Perry
Kristin A. Linsley

38. ***Facebook, Inc. v. Duguid*, No. 19-511 (9th Cir., 926 F.3d 1146; cert. granted July 9, 2020, limited to Question 2; argued Dec. 8, 2020). Whether the definition of "automatic telephone dialing system" in the Telephone Consumer Protection Act ("TCPA") encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."**

Decided Apr. 1, 2021 (592 U.S.). Ninth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court (Alito, J., concurring in the judgment). The Court held that "Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator." The TCPA defines autodialer to mean any device that can "store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1). The Court rejected respondent's interpretation that the phrase "using a random or sequential number generator" modifies only the verb "produce," such that any device capable of automatically dialing stored phone numbers would qualify as an autodialer, regardless of whether it uses a random and sequential number generator to do so. That interpretation, the Court reasoned, was inconsistent with conventional rules of grammar. The series-qualifier canon, for example, suggests that a modifier at the end of a list generally applies to each word in the list. Under that rule, the qualifier "random or sequential number generator" applies to both verbs in the prior list: "store" and "produce." Moreover, under respondents' definition, smart phones would qualify as autodialers, subjecting ordinary cell phone users to liability under the TCPA. Even if Congress' definition provides insufficient protection against nuisance calls using current technology, the Court concluded, that policy concern should be addressed to Congress, not the courts.

Gibson Dunn
Counsel for Petitioner
National Association of
Broadcasters

Partner
Helgi C. Walker

39. ***Federal Communications Commission v. Prometheus Radio Project*, No. 19-1231, consolidated with *National Association of Broadcasters v. Prometheus Radio Project*, No. 19-1241 (3d Cir., 939 F.3d 567; cert. granted Oct. 2, 2020; argued Jan. 19, 2021). The Questions Presented are: (1) Whether the court of appeals erred in vacating as arbitrary and capricious the Federal Communications Commission ("FCC") orders under review, which, among other things, relaxed the agency's cross-ownership restrictions to accommodate changed market conditions. (2) Whether under Section 202(h) of the Telecommunications Act of 1996 the FCC may repeal or**

modify media ownership rules that it determines are no longer "necessary in the public interest as the result of competition" without statistical evidence about the prospective effect of its rule changes on minority and female ownership.

Decided Apr. 1, 2021 (592 U.S.). Third Circuit/Reversed. Justice Kavanaugh for a unanimous Court (Thomas, J., concurring). The Court held that the FCC's order repealing or modifying three of its local media ownership rules "was reasonable and reasonably explained for purposes of the [APA's] deferential arbitrary-and-capricious standard." While reviewing its regulations under Section 202(h), the FCC concluded that the rules at issue were not necessary to promote competition, localism, or viewpoint diversity, and that changing them was unlikely to harm minority and female ownership of broadcast stations. The Court concluded that the FCC's predictive judgment with respect to minority and female ownership was not arbitrary and capricious. The FCC had requested public comment on that issue, yet no commenter provided evidence that the rules were necessary to promote minority and female ownership, and the only data in the record suggested that minority and female ownership had increased following a previous relaxation of the FCC's rules. Under the APA, the FCC's "best estimate, based on the sparse record," was reasonable. "To be sure," the Court explained, "the FCC did not have perfect empirical or statistical data." But the "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." Because the Court concluded that the FCC's order satisfied arbitrary-and-capricious review, it did not need to decide whether Section 202(h) required or authorized the FCC to consider minority and female ownership at all.

40. ***Florida v. Georgia*, No. 22O142 (Original Jurisdiction; exceptions to the Second Report of the Special Master filed Apr. 13, 2020; exceptions opposed June 26, 2020; exceptions set for oral argument in due course Oct. 5, 2020; argued Feb. 22, 2021). Whether the Supreme Court should adopt the Special Master's recommendation to deny Florida's requested relief.**

Decided Apr. 1, 2021 (592 U.S.). Exceptions overruled; case dismissed. Justice Barrett for a unanimous Court. The Court held that Florida was not entitled to relief on its claims that Georgia consumes too much water from several interstate rivers. Florida was required to prove by clear and convincing evidence that it had suffered a serious injury caused by Georgia's overconsumption of water. Both States agreed that the collapse of the oyster population in Florida's Apalachicola Bay qualified a serious injury. But they disputed whether that collapse was caused by Georgia's water use or other factors, such as Florida's mismanagement of oyster harvesting or climate change. Although the Court lacked expertise to resolve the underlying scientific questions, it concluded that Florida had failed to carry its burden. The record showed that "Florida allowed unprecedented levels of oyster harvesting in the years before the collapse" and "failed to adequately reshell its oyster bars." Moreover, Florida's evidence suggested that Georgia's water consumption might have contributed to the collapse, but not that it caused the collapse. In sum, Florida failed to carry its

heavy burden "to warrant the exercise of th[e] Court's extraordinary authority to control the conduct of a coequal sovereign."

41. ***Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, No. 19-368 (Mont., 443 P.3d 407; cert. granted Jan. 17, 2020, consolidated with *Ford Motor Co. v. Bandemer*, No. 19-369 (Minn., 931 N.W.2d 744); argued Oct. 7, 2020). Whether the "arise out of or relate to" requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.**

Decided Mar. 25, 2021 (592 U.S.). Supreme Court of Montana/Affirmed. Justice Kagan for a unanimous Court (Alito, J., concurring in the judgment; Gorsuch, J., joined by Thomas, J., concurring in the judgment). The Court held that when a company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." Under the Court's test for specific personal jurisdiction, a defendant must purposefully avail itself of the privilege of conducting activities in the forum State, and the plaintiff's claims must arise out of or relate to the defendant's contacts with the forum State. In these cases, the defendant conceded that it did substantial business—selling and marketing automobiles—in the forum States. But it argued that plaintiffs' claims did arise out of those contacts because it did not sell the specific cars in question—or design or manufacture them—in the forum States. The Court rejected that argument. "None of [the Court's] precedents," it reasoned, "ha[d] suggested that only a strict causal relationship between the defendant's in-state activities and the litigation will do." To the contrary, the plaintiff's claims need only "relate to" the defendant's activities. And the Court concluded that requirement was satisfied in these cases. Petitioner sells new and used automobiles—including the two models at issue—at dozens of dealerships in each forum State; it advertises extensively in those States; its dealers regularly maintain automobiles in each State; and it distributes replacements parts in the two States. "In other words, [petitioner] had systematically served a market in [the forum States] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." That connection was "close enough to support specific jurisdiction."

42. ***Torres v. Madrid*, No. 19-292 (10th Cir., 769 F. App'x 654; cert. granted Dec. 18, 2019; argued Oct. 14, 2020). Whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a "seizure," as the Tenth Circuit and the D.C. Court of Appeals hold.**

Decided Mar. 25, 2021 (592 U.S.). Tenth Circuit/Vacated and remanded. Chief Justice Roberts for a 5–3 Court (Gorsuch, J., joined by Thomas and Alito, J.J., dissenting). The Court held that the "application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." Respondent police officers shot, but did not stop, petitioner as she fled in a car. The Court reasoned that she had been seized

within the meaning of the Fourth Amendment. Surveying English and American decisions, the Court explained that "slightest application of force" gave rise to an arrest at common law, "even if the officer does not secure control over the arrestee." And this "mere-touch" rule does not change when officers use a firearm—instead of their hands—to apply force, so long as the officers use force "*with intent to restrain*." And the seizure by force "lasts only as long as the application of force." Thus, the limited duration of the application of force in this case might affect petitioner's damages, but it does not alter the fact that she was seized.

43. ***Uzuegbunam v. Preczewski*, No. 19-968 (11th Cir., 781 F. App'x 824; cert. granted July 9, 2020; argued Jan. 12, 2021). Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.**

Decided Mar. 8, 2021 (592 U.S.). Eleventh Circuit/Reversed and remanded. Justice Thomas for an 8–1 Court (Kavanaugh, J., concurring; Roberts, C.J., dissenting). The Court held that "an award of nominal damages by itself can redress a past injury." Petitioners sued their college, alleging that limitations placed on their religious speech violated the First Amendment and seeking nominal damages and injunctive relief. During the litigation, the college rescinded the challenged policies, thus mooting petitioners' request for injunctive relief. The Court concluded that the case as a whole was not moot, however, because nominal damages could redress petitioners' past injury. Reviewing historical cases, the Court reasoned that courts at common law awarded nominal damages absent proof of other damages, including "where there was no apparent continuing or threatened injury for nominal damages to redress." The Court disagreed with respondents' argument that those courts awarded nominal damages only when plaintiffs failed to prove the amount of compensatory damages to which they were entitled. Nor are nominal damages merely symbolic; they provide some, albeit limited, redress. And although courts might be required to decide every case where a plaintiff asks for a mere dollar in damages, Congress rejected that policy concern when it eliminated the statutory amount-in-controversy requirement for federal question jurisdiction, and the Constitution never imposed such a requirement.

44. ***Pereida v. Wilkinson*, No. 19-438 (8th Cir., 916 F.3d 1128; cert. granted Dec. 18, 2019; argued Oct. 14, 2020). Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act ("INA").**

Decided Mar. 4, 2021 (592 U.S.). Eighth Circuit/Affirmed. Justice Gorsuch for a 5–3 Court (Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that "nonpermanent aliens seeking to cancel a lawful removal order must prove that they have not been convicted of a disqualifying crime" and that petitioner failed to carry that burden. Under the INA, nonpermanent resident aliens may be eligible for relief from removal if they prove four elements, including that they have not been convicted of a crime involving moral turpitude.

Petitioner had been convicted under a Nebraska criminal statute that provide four separate prohibitions, three of which involve moral turpitude—namely, fraud. But the record in petitioner's immigration proceeding did not reveal which of the four prohibitions petitioner had violated. The Court reasoned from statutory text and context that nonresident aliens seeking relief from removal "ha[ve] the burden of proof to establish" each of the necessary elements, including that they have not been convicted of certain crimes. 8 U.S.C. § 1229a(c)(4)(A). Although the Nebraska statute criminalizes at least some conduct that does *not* involve moral turpitude, the statute is "divisible," meaning that petitioner was obligated to prove that the crime for which he was convicted did not involve moral turpitude. But petitioner "refused to produce any evidence about his crime of conviction," and thus "failed to carry that burden."

45. ***U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, No. 19-547 (9th Cir., 925 F.3d 1000; cert. granted Mar. 2, 2020; argued Nov. 2, 2020). Whether Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), by incorporating the deliberative process privilege, protects against compelled disclosure a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, and that concerned a proposed agency action that was later modified in the consultation process.**

Decided Mar. 4, 2021 (592 U.S.). Ninth Circuit/Reversed and remanded. Justice Barrett for a 7–2 Court (Breyer, J., joined by Sotomayor, J., dissenting). The Court held that the deliberative process privilege shields "in-house drafts that proved to be the agencies' last word about a proposal's potential threat to endangered species." When the Environmental Protection Agency ("EPA") proposed a regulation on cooling water intake structures, it informally consulted with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the "Services") regarding whether the regulation would adversely affect any endangered species. Staff members at the Services provided EPA with draft opinions that the proposed regulation would jeopardize certain species. Upon receiving the opinions, EPA modified its proposed regulation, and the Services concluded that the revised regulation would not jeopardize any endangered species. EPA withheld the draft opinions from a FOIA request under the deliberative process privilege, which protects from disclosure "documents reflecting deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The Court concluded that FOIA did not require EPA to disclose the draft opinions. Although the privilege does not shield documents that embody a final decision, the draft opinions at issue reflected a preliminary view, not a final decision. The Services identified them as "drafts," the consultation process contemplated additional changes by the Services after the drafts were shared with EPA, and they were prepared by lower-level staff. As a practical matter, the draft opinions may have been the last word on EPA's proposed regulation because they prompted EPA to modify its proposal. But "[t]he recommendations were not last because they were final; they were last because they died on the vine."

46. ***Brownback v. King*, No. 19-546 (6th Cir., 917 F.3d 409; cert. granted Mar. 30, 2020; argued Nov. 9, 2020). Whether a final judgment in favor of the United States in an action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.**

Decided Feb. 25, 2021 (592 U.S.). Sixth Circuit/Reversed. Justice Thomas for a unanimous Court (Sotomayor, J., concurring). The Court held that the district court's rejection of respondent's FTCA claim was on the merits, and thus barred his *Bivens* claim. The FTCA's "judgment bar" provides that "[t]he judgment in an action under" the FTCA shall bar "any action by the [plaintiff], by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2674. The Court agreed with the parties that, for the judgment bar to apply, the decision on a plaintiff's FTCA claim must have been "a final judgment on the merits." Here, the district court's grant of summary judgment to the United States "involved a quintessential merits decision: whether the undisputed facts established all the elements of [respondent's] FTCA claims." And the district court's alternative ruling that respondent's complaint failed to state a claim "also passed on the substance of [respondent's] FTCA claims." It made no difference that the district court's ruling on the merits also meant that it lacked subject-matter jurisdiction, given that "all elements of a meritorious [FTCA] claim are also jurisdictional." Where "pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that triggers the judgment bar," as it did in this case.

47. ***Salinas v. U.S. R.R. Ret. Bd.*, No. 19-199 (5th Cir., 765 F. App'x 79; cert. granted Jan. 10, 2020; argued Nov. 2, 2020). Whether, under Section 5(f) of the Railroad Unemployment Insurance Act ("RUIA"), 45 U.S.C. § 355(f), and Section 8 of the Railroad Retirement Act ("RRA"), 45 U.S.C. § 231g, the Railroad Retirement Board's denial of a request to reopen a prior benefits determination is a "final decision" subject to judicial review.**

Decided Feb. 3, 2021 (592 U.S.). Fifth Circuit/Reversed and remanded. Justice Sotomayor for a 5–4 Court (Thomas, J., joined by Alito, Gorsuch, and Barrett, J.J., dissenting). The Court held that the Railroad Retirement Board's "refusal to reopen the prior denial of benefits is subject to judicial review." The RRA provides that Board determinations shall be subject to judicial review as though they were determinations under the RUIA. The RUIA, in turn, provides that "any final decision of the Board" is subject to judicial review. 45 U.S.C. § 355(f). A refusal to reopen a prior benefits determination, the Court reasoned, is a final decision of the Board. Such a refusal marks the end of administrative proceedings and "entails substantive changes that affect benefits and obligations under the RRA." And Congress did not limit the types of final decisions that are subject to judicial review. Moreover, any ambiguity in the statute's text must be

resolved in favor of judicial review, given the general presumption favoring review of administrative actions. Finally, the Court noted that because reopening is discretionary, a refusal to reopen is subject to reversal only for abuse of discretion.

48. ***Fed. Republic of Germany v. Philipp*, No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020; argued Dec. 7, 2020). The Questions Presented are: (1) Whether the "expropriation exception" of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States' responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany's instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.**

Decided Feb. 3, 2021 (592 U.S.). D.C. Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court. The Court held that a country's alleged taking of its own nationals' property does not fall within the FSIA's exception to sovereign immunity for cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). That exception, the Court reasoned, incorporates the longstanding "domestic takings rule," which "assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law." The Court rejected respondents' argument that the phrase "in violation of international law" should be read "as a broad incorporation of any international norm," rather than a specific "invocation of the international law governing property rights," and thus that the relevant taking fell within the exception because it was an act of genocide by the Third Reich against the Jewish population of Germany. The Court noted that the FSIA's exception "places repeated emphasis on property and property-related rights, while injuries and acts . . . associate[d] with genocide are notably lacking." And respondents' interpretation would arguably compel courts themselves to violate international law by "ignoring the domestic takings rule" and "derogating international law's preservation of sovereign immunity for violations of human rights." Where Congress intended to deny sovereign immunity for human-rights violations, "it did so explicitly and with precision." Nor do other statutes designed to promote restitution for victims of the Holocaust support respondents' interpretation. Those statutes "generally encourage redressing those injuries outside of public court systems" and do not modify sovereign immunity. Because the Court concluded that domestic takings do not abrogate sovereign immunity, it

did not reach petitioner's alternative argument for abstention on grounds of international comity. And the Court instructed the lower courts to consider in the first instance respondents' alternative argument that the relevant taking was not subject to the domestic takings rule because the victims were not German nationals at the time of the transaction.

Gibson Dunn
Counsel for *Amici*
Members of Congress

Partner
Akiva Shapiro

49. ***Republic of Hungary v. Simon*, No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1; argued Dec. 7, 2020). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.**

Decided Feb. 3, 2021 (592 U.S.). D.C. Circuit/Vacated and remanded. Per Curiam. The Court vacated the judgment and remanded for further proceedings consistent with the decision in *Federal Republic of Germany v. Philipp*, 592 U.S. __ (2021).

50. ***City of Chicago v. Fulton*, No. 19-357 (7th Cir., 926 F.3d 916; cert. granted Dec. 18, 2019; argued Oct. 13, 2020). Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.**

Decided Jan. 14, 2021 (592 U.S.). Seventh Circuit/Vacated and remanded. Justice Alito for a unanimous Court (Sotomayor, J., concurring). The Court held "that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code." When a bankruptcy petition is filed, § 362 generally imposes an automatic stay of all efforts to collect from the debtor outside of the bankruptcy process. Section 362(a)(3) specifically prohibits "any act . . . to exercise control over property of the [bankruptcy] estate." 11 U.S.C. § 362(a)(3). Read naturally, the Court reasoned, the words "stay," "act," and "exercise control" suggest that § 362(a)(3) "prohibits affirmative acts that would disturb the status quo of estate property as of the time the bankruptcy petition was filed." And reading § 362(a)(3) to prohibit the mere retention of property would create difficulties in reading other provisions of the Code. For one, it would render the general requirement that estate property be turned over to the trustee, 11 U.S.C. § 542(a), largely superfluous. For another, it would contradict the exceptions to the general turnover command found in § 542(a). Moreover, there is no evidence that Congress intended to prohibit mere retention of property when it added "exercise control" to § 362(a)(3).

Gibson Dunn
Counsel for *Amici*
Businesses and Business Organizations

Partners
Stuart F. Delery (former)
Alexander H. Southwell

51. ***Trump v. New York*, No. 20-366 (S.D.N.Y., 2020 WL 5422959; Appellate Jurisdiction; case set for merits briefing on Oct. 16, 2020; argued Nov. 30, 2020). The Questions Presented are: (1) Whether a group of states and local governments have standing under Article III of the Constitution to challenge a July 21, 2020, memorandum by President Donald Trump instructing the**

secretary of commerce to include in his report on the 2020 Census information enabling the President to exclude noncitizens from the base population number for purposes of apportioning seats in the House of Representatives. (2) Whether the memorandum is a permissible exercise of the President's discretion under the provisions of law governing congressional apportionment.

Decided Dec. 18, 2020 (592 U.S.). U.S. District Court for the Southern District of New York/Vacated and remanded. Per Curiam (Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that respondents lacked standing to challenge President Trump's memorandum and that their dispute was not yet ripe. The three-judge district court had concluded that respondents had standing because the memorandum would chill noncitizens and their families from responding to the census. But by the time the case reached the Court, the census response period had concluded, dissipating any chilling effect. And the Court concluded that respondents' alternate theory—that the memorandum would harm them through "an unlawful apportionment of congressional representation and federal funding"—was impermissibly conjectural. As an initial matter, excluding substantial numbers of noncitizens might "not prove feasible to implement" consistently with the Constitution's requirement of an "actual Enumeration" of the persons in each State. Art. I, § 2, cl. 3. Nor was it certain "which (and how many) aliens the President [would] exclude from the census if the Secretary manages to gather and match suitable administrative records." As a result, determining the ultimate effect of the memorandum on apportionment and funding "involve[d] a significant degree of guesswork." Because respondents lacked standing and the case was not ripe, the Court expressed "no view on the merits of the constitutional and related statutory claims presented." The Court thus vacated the district court's judgment and remanded with instructions to dismiss for lack of jurisdiction.

52. ***Texas v. New Mexico*, No. 22O65 (Original Jurisdiction; CVSG June 3, 2019; motion for review opposed Dec. 9, 2019; motion for review set for oral argument in due course Jan. 27, 2020; argued Oct. 5, 2020). The Questions Presented are: (1) Whether the River Master clearly erred in retroactively amending the River Master Manual and his final accounting for 2015 without Texas's consent and contrary to this Court's decree that governs modification of the manual and the period for review of the River Master's final determinations. (2) Whether the River Master clearly erred by charging Texas for evaporative losses without authority under the Pecos River Compact.**

Decided Dec. 14, 2020 (592 U.S.). Motion for review denied. Justice Kavanaugh for a 7-1 Court (Alito, J., concurring in the judgment in part and dissenting in part). The Court held that the River Master's Manual approved by the Court in 1988 "speaks directly" to the question, mandating that "New Mexico's delivery obligation must be reduced by the amount of water that evaporated" while New Mexico stored water from the Pecos River on Texas's behalf. Section C.5 of the Manual provides that where New Mexico stores water "at the request of Texas," the amount of water New Mexico must discharge to

Texas "will be reduced by the amount of reservoir losses attributable to its storage." Here, Texas requested that New Mexico store water from the river to avoid flooding following a tropical storm in 2014. Section C.5 thus reduces New Mexico's discharge obligations by the evaporative losses resulting from storage in New Mexico. The Court rejected Texas's arguments that the stored water was not part of Texas's "allocation," that New Mexico did not "store" the water within the meaning of Section C.5, and that New Mexico should be held responsible for evaporative losses between March and August 2015. The Court also held that New Mexico's motion to the River Master for credit for the evaporated water was timely because both States agreed to postpone the River Master's resolution of the evaporated-water issue while they negotiated, and the applicable filing deadlines are not jurisdictional. Finally, the Court declined to rule on the River Master's amendment to the Manual because the amendment did not affect the Court's resolution of the case.

53. ***Carney v. Adams*, No. 19-309 (3d Cir., 922 F.3d 166; cert. granted Dec. 6, 2019, with Question 3 directed by the Court; argued Oct. 5, 2020). The Questions Presented are: (1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the State's three highest courts, with the other seats reserved for judges affiliated with the "other major political party." (2) Whether the Third Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts. (3) Whether respondent has demonstrated Article III standing.**

Decided Dec. 10, 2020 (592 U.S.). Third Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Sotomayor, J., concurring). The Court held that respondent lacked standing to challenge Delaware's requirement that the state's major courts reflect a partisan balance. Delaware's Constitution requires that, for each of the state's five major courts, no more than a bare majority of judges can belong to any one political party. Art. IV, § 3. It also mandates that, for three of the courts, the remaining judges "shall be of the other major political party." *Id.* Respondent sued to challenge these requirements, claiming that they violated his First Amendment right to freedom of association by making him, a political independent, ineligible to become a judge. In his deposition and his answer to interrogatories, respondent uttered two general statements that he "would" apply for a judgeship. But all other evidence showed that, at the time respondent sued, he was not "'able and ready' to apply for a vacancy in the reasonably imminent future." He had failed to apply for judicial vacancies in the past despite being eligible; he had made no effort to determine likely openings; and he had expressed an interest in challenging Delaware's judicial eligibility requirements only after reading a law review article arguing that they were unconstitutional. Shortly after reading the article, he switched his political

affiliation from Democrat to independent, and he sued eight days after this switch. Given all this, the Court reasoned, respondent's "few words of general intent" were not enough to demonstrate an injury that was concrete, particularized, and imminent; he had shown only an abstract, generalized desire "to vindicate his view of the law." The Court thus vacated and remanded with instructions to dismiss respondent's suit.

Gibson Dunn
Counsel for *Amicus* U.S. Chamber of Commerce

Partner
Helgi C. Walker

54. ***Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argued Oct. 6, 2020). Whether Arkansas's statute regulating pharmacy benefit managers' drug-reimbursement rates, which is similar to laws enacted by a substantial majority of States, is preempted by ERISA.**

Decided Dec. 10, 2020 (592 U.S.). Eighth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court (Thomas, J., concurring). The Court held that ERISA does not preempt an Arkansas statute regulating the price at which pharmacy benefit managers reimburse pharmacies for the cost of drugs covered by prescription-drug plans. Prior cases established that ERISA preempts state statutes that have a "connection with" or "reference to" an ERISA plan. The Arkansas statute does not have an impermissible connection with an ERISA plan, the Court concluded, because it does not force plans to adopt any particular scheme of substantive coverage. While the statute could result in higher prices for ERISA plans insofar as pharmacy benefit managers may pass along higher pharmacy rates to plans with which they contract, the statute is "merely a form of cost regulation," and cost uniformity is not an objective of ERISA preemption. Nor does the statute impermissibly refer to ERISA, the Court determined. A law refers to ERISA if it acts immediately and exclusively upon ERISA plans or if the existence of ERISA plans is essential to its operation. The Arkansas statute, however, applies to pharmacy benefit managers regardless of whether they manage an ERISA plan. And the statute does not directly regulate plans at all.

55. ***FNU Tanzin v. Tanvir*, No. 19-71 (2d Cir., 894 F.3d 449; cert. granted Nov. 22, 2019; argued Oct. 6, 2020). Whether RFRA, 42 U.S.C. § 2000bb *et seq.*, permits suits seeking money damages against individual federal employees.**

Decided Dec. 10, 2020 (592 U.S.). Second Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held RFRA's remedies provision, which grants persons whose religious exercise has been unlawfully burdened the right to seek "appropriate relief against a government," 42 U.S.C. § 2000bb–1(c), permits litigants to obtain money damages against federal officials in their individual capacities. The Court first held that the provision allows injured parties to sue federal officials in their individual capacities. RFRA's express definition of "government . . . extends beyond the term's plain meaning to include officials," and the "term 'official' does not refer solely to an office, but rather to the actual person 'who is invested with an office.'" Further, the "legal backdrop against which Congress enacted RFRA confirms the propriety of individual-capacity suits." The court next held that money damages constitutes "appropriate relief." Money damages fell within the plain meaning of "appropriate" at the time of RFRA's enactment, and money damages have been available against Government officials "since the dawn of the Republic."

56. ***United States v. Briggs*, No. 19-108 (C.A.A.F., 78 M.J. 289; cert. granted Nov. 15, 2019, consolidated with *United States v. Collins*, No. 19-184 (C.A.A.F., 78 M.J. 415 & 79 M.J. 150); argued Oct. 13, 2020). Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice ("UCMJ") allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.**

Decided Dec. 10, 2020 (592 U.S.). Court of Appeals for the Armed Forces/Reversed. Justice Alito for a unanimous Court (Gorsuch, J., concurring). The Court held that, under the UCMJ, prosecutions for rape occurring between 1986 and 2006 may be brought at any time. During that time period, the UCMJ provided that any offense "punishable by death" could be tried "at any time without limitation." 10 U.S.C. § 843(a) (1988 ed.). All other offenses generally had a statute of limitations. The Court interpreted "punishable by death" as a term of art that refers to "the provisions of the UCMJ specifying the punishments for the offenses it outlaws." Because the UCMJ authorized capital punishment for rape, it made no difference for statute-of-limitations purposes that the Supreme Court had held in *Coker v. Georgia*, 433 U.S. 584 (1977), "that the Eighth Amendment forbids a death sentence for the rape of an adult woman." The UCMJ's context supported the Court's interpretation for three reasons. First, it would be natural for the UCMJ's statute-of-limitations provision to refer to other parts of the UCMJ rather than Supreme Court case law or other sources of law. Second, Congress likely would not have enacted a provision tying the statute of limitations to external sources of law, because doing so would detract from the clarity that statutes of limitations usually exist to provide. And, third, it would make little sense to interpret the limitations period by reference to Eighth Amendment jurisprudence because "the factors that lawmakers are likely to take into account when fixing the statute of limitations for a crime differ significantly from the considerations that underlie [the Court's] Eighth Amendment decisions."

Cases Held in Abeyance

57. ***Becerra v. Gresham*, No. 20-37 (D.C. Cir., 950 F.3d 93; cert. granted Dec. 4, 2020, consolidated with *Arkansas v. Greshman*, No. 20-38 (D.C. Cir., 950 F.3d 93); argument scheduled Mar. 29, 2021; argument date vacated Mar. 11, 2021; held in abeyance Apr. 5, 2021). Whether the D.C. Circuit in erred in concluding that the Secretary of Health and Human Services may not authorize demonstration projects to test requirements that are designed to promote the provision of health-care coverage by means of facilitating the transition of Medicaid beneficiaries to commercial coverage and improving their health.**

October Term 2021

1. ***Wooden v. United States*, No. 20-5279 (6th Cir., 945 F.3d 498; cert. granted Feb. 22, 2021). Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were "committed on occasions different from one another" for purposes of a sentencing enhancement under the Armed Career Criminal Act.**

2. ***United States v. Vaello-Madero*, No. 20-303 (1st Cir., 956 F.3d 12; cert. granted Mar. 1, 2021). Whether Congress violated the equal-protection component of the due process clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind and disabled individuals—in the 50 states and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico.**

3. ***Babcock v. Saul*, No. 20-480 (6th Cir., 959 F.3d 210; cert. granted Mar. 1, 2021). Whether a civil service pension received for federal civilian employment as a "military technician (dual status)" is "a payment based wholly on service as a member of a uniformed service" for the purposes of the Social Security Act's windfall elimination provision.**

4. ***Thompson v. Clark*, No. 20-659 (2d Cir., 794 F. App'x 140; cert. granted Mar. 11, 2021). Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," as the U.S. Court of Appeals for the 11th Circuit held, or that the proceeding "ended in a manner that affirmatively indicates his innocence," as the U.S. Court of Appeals for the 2d Circuit held.**

5. ***United States v. Tsarnaev*, No. 20-443 (1st Cir., 968 F.3d 24; cert. granted Mar. 22, 2021). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the 1st Circuit erred in concluding that the defendant's capital sentence must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about the case. (2) Whether the district court committed reversible error at the penalty phase of the trial by excluding evidence that the defendant's older brother was allegedly involved in different crimes two years before the offenses for which the defendant was convicted.**

6. ***Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (7th Cir., 975 F.3d 689; cert. granted Mar. 22, 2021). Whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals, as the U.S. Courts of Appeals for the 4th and 6th Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as**

the U.S. Court of Appeals for the 2nd, 5th, and, in the case below, the 7th Circuit have held.

7. ***Cameron v. EMW Women's Surgical Center, P.S.C.*, No. 20-601 (6th Cir., 831 F. App'x 748; cert. granted Mar. 29, 2021). Whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.**

8. ***Brown v. Davenport*, No. 20-826 (6th Cir., 975 F.3d 537; cert. granted Apr. 5, 2021). Whether a federal habeas court may grant relief based solely on its conclusion that the test from *Brecht v. Abrahamson* is satisfied, as the U.S. Court of Appeals for the 6th Circuit held, or whether the court must also find that the state court's application of *Chapman v. California* was unreasonable under 28 U.S.C. § 2254(d)(1), as the U.S. Courts of Appeals for the 2nd, 3rd, 7th, 9th and 10th Circuits have held.**

9. ***Hemphill v. New York*, No. 20-637 (N.Y., 150 N.E. 3d 356; cert. granted Apr. 19, 2021). Whether, or under what circumstances, a criminal defendant, whose argumentation or instruction of evidence at trial "opens the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence, also forfeits his right to exclude evidence otherwise barred by the confrontation clause.**

10. ***Houston Community College System v. Wilson*, No. 20-804 (5th Cir., 955 F.3d 490; cert. granted Apr. 26, 2021). Whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech.**

11. ***United States v. Zubaydah*, No. 20-827 (9th Cir., 938 F.3d 1123; cert. granted Apr. 26, 2021). Whether the U.S. Court of Appeals for the 9th Circuit erred when it rejected the United States' assertion of the state-secrets privilege based on the court's own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. § 1782(a) against former Central Intelligence Agency contractors on matters concerning alleged clandestine CIA activities.**

12. ***New York State Rifle & Pistol Association Inc. v. Corlett*, No. 20-843 (2d Cir., 818 F. App'x 99; cert. granted Apr. 26, 2021). Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.**

13. ***Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (5th Cir., 945 F.3d 265; cert. granted May 17, 2021). Whether all pre-viability prohibitions on elective abortions are unconstitutional.**

14. ***Shinn v. Ramirez*, No. 20-1009 (9th Cir., 937 F.3d 1230; cert. granted May 17, 2021). Whether application of the equitable rule the Supreme Court announced in *Martinez v. Ryan* renders the Antiterrorism and Effective Death Penalty Act, which precludes a federal court from considering**

Gibson Dunn
Counsel for *Amici* The Bronx Defenders, et al.

Partners
David Debold
Joel M. Cohen

evidence outside the state-court record when reviewing the merits of a claim for habeas relief if a prisoner or his attorney has failed to diligently develop the claim's factual basis in state court, inapplicable to a federal court's merits review of a claim for habeas relief.

15. ***Badgerow v. Walters*, No. 20-1143 (5th Cir., 975 F.3d 469; cert. granted May 17, 2021). Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question.**

16. ***Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, No. 20-915 (9th Cir., 959 F.3d 1194; cert. granted June 1, 2021). Whether the U.S. Court of Appeals for the 9th Circuit erred in breaking with its own prior precedent and the findings of other circuits and the Copyright Office in holding that 17 U.S.C. § 411 requires referral to the Copyright Office where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration.**

17. ***Federal Bureau of Investigation v. Fazaga*, No. 20-828 (9th Cir., 965 F.3d 1015; cert. granted June 7, 2021). Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 displaces the state-secrets privilege and authorizes a district court to resolve, in camera and ex parte, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.**

18. ***Patel v. Garland*, No. 20-979 (11th Cir., 971 F.3d 1258; cert. granted June 28, 2021). Whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief.**

19. ***City of Austin v. Reagan National Advertising of Texas Inc.*, No. 20-1029 (5th Cir., 972 F.3d 696; cert. granted June 28, 2021). Whether the Austin city code's distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.**

20. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; exceptions to the Report of the Special Mater filed Feb. 22, 2021; exceptions opposed Apr. 23, 2021; case set for oral argument in due course July 2, 2021). 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 borders. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.**

21. ***Hughes v. Northwestern University*, No. 19-1401 (7th Cir., 953 F.3d 980; CVSG Oct. 5, 2020; cert. supported May 25, 2021; cert. granted July 2,**

2021). Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1)(B).

22. ***Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (5th Cir., 948 F.3d 673; CVSG Nov. 2, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021). Whether the compensatory damages available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and the Affordable Care Act, include compensation for emotional distress.**

23. ***Carson v. Makin*, No. 20-1088 (1st Cir., 979 F.3d 21; cert. granted July 2, 2021). Whether a state violates the religion clauses or equal protection clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction.**

24. ***American Hospital Association v. Becerra*, No. 20-1114 (D.C. Cir., 967 F.3d 818; cert. granted July 2, 2021). The Questions Presented are: (1) Whether deference under *Chevron U.S.A. v. Natural Resources Defense Council* permits the Department of Health and Human Services to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data. (2) Whether petitioners' suit challenging HHS's adjustments is precluded by 42 U.S.C. § 1395*l*(t)(12).**

25. ***Gallardo v. Marstiller*, No. 20-1263 (11th Cir., 963 F.3d 1167; cert. granted July 2, 2021). Whether the federal Medicaid Act provides for a state Medicaid program to recover reimbursement for Medicaid's payment of a beneficiary's past medical expenses by taking funds from the portion of the beneficiary's tort recovery that compensates for future medical expenses.**

26. ***Becerra v. Empire Health Foundation*, No. 20-1312 (9th Cir., 958 F.3d 873; cert. granted July 2, 2021). Whether, for purposes of calculating additional payments for hospitals that serve a "significantly disproportionate number of low-income patients," the Secretary of Health and Human Services has permissibly included in a hospital's Medicare fraction all of the hospital's patient days of individuals who satisfy the requirements to be entitled to Medicare Part A benefits, regardless of whether Medicare paid the hospital for those particular days.**

27. ***CVS Pharmacy Inc. v. Doe*, No. 20-1374 (9th Cir., 982 F.3d 1204; cert. granted July 2, 2021). Whether Section 504 of the Rehabilitation Act of 1973—and by extension Section 1557 of the Patient Protection and Affordable Care Act, which incorporates the "enforcement mechanisms" of other federal antidiscrimination statutes—provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.**

Gibson Dunn
Counsel for *Amici*
Innovative Schools

Partner
Allyson N. Ho

28. ***United States v. Taylor*, No. 20-1459 (4th Cir., 979 F.3d 203; cert. granted July 2, 2021). Whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).**

29. ***Pivotal Software, Inc. v. Tran*, No. 20-1541 (Cal. Super. Ct.; cert. granted July 2, 2021). Whether the Private Securities Litigation Reform Act's discovery-stay provision applies to a private action under the Securities Act of 1933 in state or federal court, or solely to a private action in federal court.**

Cases Decided Without Argument

1. ***Dunn v. Reeves*, No. 20-1084 (11th Cir., 836 F. App'x 733; Reversed and remanded July 2, 2021).** Per Curiam (Breyer, J., dissenting; Sotomayor, J., joined by Kagan, J., dissenting). The Court held that Eleventh Circuit erred in granting habeas relief on respondent's ineffective assistance of counsel claim. Habeas review of such a claim is "doubly deferential." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). Federal habeas courts must defer to a state court's determination that defense counsel performed adequately, and state courts must defer to defense counsel's strategic judgments. As a result, "a federal court may grant relief only if *every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." The Court explained that the Eleventh Circuit failed to comply with that principle. Because defense counsel might have had a reasonable basis for their investigative and litigation choices, the Alabama courts reasonably rejected respondent's claim. And rather than defer to that determination, the Eleventh Circuit mischaracterized the Alabama court's opinion.

2. ***Lombardo v. City of St. Louis*, No. 20-391 (8th Cir., 956 F.3d 1009; Vacated and remanded June 28, 2021).** Per Curiam (Alito, J., joined by Thomas and Gorsuch, J.J., dissenting). The Court held that the Eighth Circuit erred to the extent it "thought the use of a prone restraint—no matter the kind, intensity, during, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." The Eight Circuit concluded that officers did not apply excessive force when they held a prisoner—who apparently attempted to hang himself and then initially struggled with them—in a prone position for 15 minutes until he died. The Court reasoned that it was not clear whether the Eighth Circuit had adopted a *per se* rule that ongoing resistance always justifies the use of a prone position, which "would contravene the careful, context-specific analysis required by th[e] Court's excessive force precedent," and therefore remanded "to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances" of the case.

3. ***Pakdel v. City & County of San Francisco*, No. 20-1212 (9th Cir., 798 F. App'x 162; Vacated and remanded June 28, 2021).** Per Curiam. The Court held that the Ninth Circuit erred by imposing an administrative exhaustion requirement for petitioner's regulatory takings claim. Before a plaintiff can bring a regulatory takings claim, the Court explained, the claim must be "final" in the sense that there is no question how the regulations will apply to the land in question. But that finality requirement does not demand that a plaintiff exhaust state

administrative remedies, such as seeking a regulatory exemption. Because the Ninth Circuit had no basis for imposing such a requirement, the Court vacated and remanded for further proceedings.

4. ***Alaska v. Wright*, No. 20-940 (9th Cir., 819 F. App'x 544; Vacated and remanded Apr. 26, 2021).** Per Curiam. The Court held that the Ninth Circuit "clearly erred" in permitting respondent to file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a). That provision permits habeas corpus petitions by persons "in custody pursuant to the judgment of a State court." But respondent was not in custody pursuant to the judgment of a state court. Although his state-court conviction served as the necessary predicate to his federal conviction for failure to register as a sex offender, he had finished serving his state sentence and thus was no longer in custody pursuant to that judgment.

5. ***Tandon v. Newsom*, No. 20A151 (9th Cir., 992 F.3d 916; Injunction granted Apr. 9, 2021).** Per Curiam (Roberts, C.J., dissenting; Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court enjoined Governor Newsom's orders restricting petitioners from holding in-home Bible studies. For the fifth time, the Court explained, the Ninth Circuit had erred in analyzing California's COVID restrictions on religious exercise. The Court's prior decisions made clear that: government regulations trigger strict scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise"; the comparability of activities must be assessed in light of the government's interests; the government bears the burden of proof; and withdrawing or modifying a COVID restriction does not necessarily moot the case. Applying those principles, the Court concluded that petitioners were likely to succeed on the merits of their free exercise challenge and that without an injunction, they would suffer irreparable harm.

6. ***Mays v. Hines*, No. 20-507 (6th Cir., 814 F. App'x 898; Reversed Mar. 29, 2021).** Per Curiam (Sotomayor, J., dissenting). The Court held that the Sixth Circuit "plainly violated Congress' prohibition on disturbing state-court judgments on federal habeas review absent an error that lies beyond any possibility for fairminded disagreement." The Tennessee court's determination that respondent's trial counsel's assistance was not prejudicial, even if it were constitutionally ineffective, was reasonable. In finding that determination unreasonable, the Sixth Circuit failed to consider substantial evidence of respondent's guilt and replaced the Tennessee court's "straightforward, commonsense analysis" with its own "fanciful theory."

7. ***Shinn v. Kayer*, No. 19-1302 (9th Cir., 923 F.3d 692; Vacated and remanded Dec. 14, 2020).** Per Curiam (Breyer, Sotomayor, Kagan, J.J., dissenting). The Court held that the Ninth Circuit "erred in ordering issuance of a writ of habeas corpus despite ample room for reasonable disagreement about the prisoner's ineffective-assistance-of-counsel claim." The state postconviction court held that the prisoner failed to show he was prejudiced by his counsel's alleged failure to investigate mitigating evidence. Rather than applying deferential review as required by the Anti-Terrorism and Effective Death Penalty Act, the Ninth Circuit applied *de novo* review in concluding that the state court erred. Contrary to the Ninth Circuit's decision, fairminded jurists could agree with the state court's

conclusion. A reasonable judge could have determined both that the prisoner's past conviction was a significant aggravating factor and that the new mitigating evidence was "hardly overwhelming."

8. ***McKesson v. Doe*, No. 19-1108 (5th Cir., 945 F.3d 818; Vacated and remanded Nov. 2, 2020).** Per Curiam (Thomas, J., dissenting). The Court held that the Fifth Circuit should have certified to the Louisiana Supreme Court the questions whether (1) petitioner "could have breached a duty of care in organizing and leading" a protest that occupied a highway; and (2) respondent had "alleged a particular risk within the scope of protection afforded by that duty, provided one exists." Those questions present novel issues of state law, and certification would ensure that any conflict between Louisiana law and the First Amendment is not purely hypothetical. Because the Fifth Circuit erred by "ventur[ing] into so uncertain an area of tort law" without seeking "guidance on potentially controlling Louisiana law from the Louisiana Supreme Court," the Court vacated and remanded for further proceedings.

9. ***Taylor v. Riojas*, No. 19-1261 (5th Cir., 946 F.3d 211; Vacated and remanded Nov. 2, 2020).** Per Curiam (Alito, J., concurring; Thomas, J., dissenting). The Court held that the Fifth Circuit erred in granting qualified immunity to correctional officers who confined petitioner "in a pair of shockingly unsanitary cells." Any reasonable officer would have concluded that it was constitutionally impermissible to confine petitioner for six days in one cell covered in feces and a second cell in which he was "left to sleep naked in sewage." Because the Fifth Circuit concluded otherwise, the Court vacated and remanded for an officer-by-officer analysis whether each respondent was "deliberately indifferent to the conditions of [petitioner's] cells."

10. ***Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, consolidated with *Agudath Israel of America v. Cuomo*, No. 20A90 (2d Cir., 980 F.3d 222; Injunction granted Nov. 25, 2020).** Per Curiam (Gorsuch, J., concurring; Kavanaugh, J., concurring; Roberts, C.J., dissenting; Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting; Sotomayor, J., joined by Kagan, J., dissenting). The Court enjoined respondent Governor Andrew Cuomo from enforcing the provisions of his executive order imposing 10- and 25-person occupancy limits on applicants. The Court reasoned that applicants had "made a strong showing" that those restrictions violated the Free Exercise Clause "because they single out houses of worship for especially harsh treatment." In areas where houses of worship are limited to 10 persons, "essential" businesses "may admit as many people as they wish." And in areas where houses of worship are limited to 25 persons, "even non-essential businesses may decide for themselves how many persons to admit." Because the challenged restrictions were not neutral with respect to religion, the Court explained, they must satisfy strict scrutiny, which they likely did not. Moreover, the occupancy limits would cause applicants to suffer irreparable harm by depriving them of their First Amendment freedoms. And "the State ha[d] not claimed that attendance at the applicants' services ha[d] resulted in the spread of" COVID-19 or "shown that public health would be imperiled if less restrictive measures were imposed." Although respondent had lifted the challenged limits after applicants requested relief from the Court, the

Gibson Dunn
Counsel for Applicant
Roman Catholic
Diocese of Brooklyn

Partners
Randy M. Mastro
Akiva Shapiro

"matter is not moot." If respondent again imposed those limits, it would "almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." Thus, the Court enjoined respondent from enforcing the challenged occupancy limits pending disposition of applicants' Second Circuit appeal and any timely petitions for certiorari.

Case Dismissed As Improvidently Granted

1. ***Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963 (5th Cir., 935 F.3d 274; cert. granted June 15, 2020; argued Dec. 8, 2020; dismissed as improvidently granted Jan 25, 2021). Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.**

Pending Cases Calling For The Views Of The Solicitor General ("CVSG")

1. ***Ysleta del Sur Pueblo v. Texas*, No. 20-493 (5th Cir., 918 F.3d 440; CVSG Feb. 22, 2021). Whether the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act provides the Ysleta del Sur Pueblo with sovereign authority to regulate non-prohibited gaming activities on its lands (including bingo), as set forth in the plain language of Section 107(b), the act's legislative history and the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*, or whether the U.S. Court of Appeals for the 5th Circuit's decision affirming *Ysleta del Sur Pueblo v. Texas (Ysleta I)* correctly subjects the pueblo to all Texas gaming regulations.**

2. ***Torres v. Texas Dep't of Public Safety*, No. 20-603 (Tex. App., 583 S.W.3d 221; CVSG Mar. 1, 2021). Whether Congress has the power to authorize suits against nonconsenting states pursuant to its constitutional war powers.**

3. ***Waterfront Commission of New York Harbor v. Murphy*, No. 20-772 (3d Cir., 961 F.3d 234; CVSG Apr. 5, 2021). Whether, under the doctrine of *Ex parte Young*, an interstate compact agency may sue a state official to prevent that official from implementing a state law that would be preempted under a congressionally approved interstate compact.**

4. ***Golan v. Saada*, No. 20-1034 (2d Cir., 833 F. App'x 829; CVSG Apr. 5, 2021). Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding.**

5. ***Gannett Co. v. Quatrone*, No. 20-609 (4th Cir., 970 F.3d 465; CVSG Apr. 19, 2021). Whether a plaintiff adequately pleads breach of the duties of prudence and diversification solely by alleging that fiduciaries permitted participants in a defined contribution plan to choose, from an adequately**

diversified menu of investment options, to invest in an undiversified single-stock fund.

6. ***Volkswagen Group of America Inc. v. Environmental Protection Commission of Hillsborough County, Florida*, No. 20-994 (9th Cir., 959 F.3d 1201; CVSG Apr. 26, 2021). Whether the Clean Air Act preempts state and local governments from regulating manufacturers' post-sale, nationwide updates to vehicle emission systems.**

7. ***American Axle & Manufacturing Inc. v. Neapco Holdings LLC*, No. 20-891 (Fed. Cir., 966 F.3d 1294; CVSG May 3, 2021). The Questions Presented are: (1) What standard determines whether a paten claim is "directed to" a patent-ineligible concept under step 1 of the Supreme Court's two-step framework for determining whether an invention is eligible for patenting under 35 U.S.C. § 101. (2) Whether patent eligibility (at each step of the Supreme Court's two-step framework) is a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of art at the time of the patent.**

8. ***Independent School District No. 283 v. E.M.D.H. ex rel. L.H. and S.D.*, No. 20-905 (8th Cir., 960 F.3d 1073; CVSG May 3, 2021). Whether the continuing-violation doctrine applies to the two-year statutory time limit to file an administrative complaint under the Individuals with Disabilities Education Act.**

9. ***LeDure v. Union Pacific Railroad Co.*, No. 20-807 (7th Cir., 962 F.3d 907; CVSG May 17, 2021). The Questions Presented are: (1) Whether a locomotive is "in use" on a railroad's line and subject to the Locomotive Inspection Act when its train makes a temporary stop in a railyard as part of its unitary journey in interstate commerce, or whether such use does not resume until the locomotive has left the yard as part of a fully assembled train. (2) Whether the Federal Employers' Liability Act allows a jury determination on the issue of foreseeability of harm from oil on a locomotive passageway when the railroad failed to conduct federally mandated daily safety inspections intended to discover and cure such hazards in the days before the injury.**

10. ***Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (1st Cir., 980 F.3d 157; CVSG June 14, 2021). The Questions Presented are: (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions. (2) Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives.**

11. ***Marin Housing Authority v. Reilly*, No. 20-1046 (Cal., 472 P.3d 472; CVSG June 21, 2021). Whether a public housing authority, in calculating a family's annual income, is required by 24 C.F.R. § 5.609(c)(16) to exclude Medicaid-funded payments made to a family by a State agency to allow the**

Section 8 tenant to provide personal caregiving services in order to keep a developmentally disabled family member at home.

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Americans for Prosperity Found. v. Becerra***, **No. 19-251, consolidated with *Thomas More Law Ctr. v. Becerra*, No. 19-255 (9th Cir., 903 F.3d 1000; CVSG Feb. 24, 2020; cert. supported Nov. 24, 2020; cert. granted Jan. 8, 2021; argued Apr. 26, 2021; decided July 1, 2021). The Questions Presented are: (1) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights. (2) Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest. (3) Whether California's disclosure requirement violates charities' and their donors' freedom of association and speech facially or as applied to the Law Center.**

2. ***PennEast Pipeline Co. v. New Jersey***, **No. 19-1039 (3d Cir., 938 F.3d 96; CVSG June 29, 2020; cert. supported Dec. 9, 2020; cert. granted Feb. 3, 2021; argued Apr. 28, 2021; decided June 29, 2021). The Questions Presented are: (1) Whether the Natural Gas Act delegates to Federal Energy Regulatory Commission certificate-holders the authority to exercise the federal government's eminent-domain power to condemn land in which a state claims an interest. (2) Whether the U.S. Court of Appeals for the 3rd Circuit properly exercised jurisdiction over the case.**

3. ***Nestlé USA, Inc. v. Doe I***, **No. 19-416, consolidated with *Cargill, Inc. v. Doe I*, No. 19-453 (9th Cir., 929 F.3d 623; CVSG Jan. 13, 2020; cert. supported May 26, 2020, limited to No. 19-453, with a Question 3 proposed by the SG; cert. granted July 2, 2020; argued Dec. 1, 2020; decided June 17, 2021). The Questions Presented are: (1) Whether an aiding-and-abetting claim against a domestic corporation brought under the ATS, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. (2) Whether the Judiciary has the authority under the ATS to impose liability on domestic corporations.**

Gibson Dunn
Co-counsel for Petitioner
Nestlé USA, Inc.

Partners
Theodore Boutrous, Jr.
Perlette Michèle Jura

Gibson Dunn
Counsel for *Amici*
Members of Congress

Partner
Akiva Shapiro

4. ***Fed. Republic of Germany v. Philipp*, No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020; argued Dec. 7, 2020; decided Feb. 3, 2021). The Questions Presented are: (1) Whether the "expropriation exception" of the FSIA, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States' responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany's instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.**

Gibson Dunn
Counsel for *Amici*
Members of Congress

Partner
Akiva Shapiro

5. ***Republic of Hungary v. Simon*, No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1; argued Dec. 7, 2020; decided Feb. 3, 2021). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.**

Gibson Dunn
Counsel for *Amicus* U.S.
Chamber of Commerce

Partner
Helgi C. Walker

6. ***Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argued Oct. 6, 2020; decided Dec. 10, 2020). Whether Arkansas's statute regulating pharmacy benefit managers' drug-reimbursement rates, which is similar to laws enacted by a substantial majority of States, is preempted by ERISA.**

7. ***Hughes v. Northwestern University*, No. 19-1401 (7th Cir., 953 F.3d 980; CVSG Oct. 5, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021). Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B).**

8. ***Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (5th Cir., 948 F.3d 673; CVSG Nov. 2, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021). Whether the compensatory damages available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and the ACA, include compensation for emotional distress.**

9. ***Texas v. California*, No. 22O153 (Original Jurisdiction; CVSG June 15, 2020; motion for leave to file a bill of complaint supported Dec. 4, 2020; motion denied Apr. 26, 2021). The Questions Presented are: (1) Whether California's economic sanctions against Texas and Texans are unconstitutional. (2) Whether California must remove Texas from its travel ban list.**

10. ***CACI Premier Tech., Inc. v. Al Shimari*, No. 19-648 (4th Cir., 775 F. App'x 758; CVSG Jan. 27, 2020; cert. supported Aug. 26, 2020, provided the Court's disposition of *Nestlé USA, Inc. v. Doe I*, No. 19-416, and *Cargill, Inc. v. Doe I*, No. 19-453 does not effectively eliminate respondents' substantive claims; cert. denied June 28, 2021). Whether an order denying a federal contractor's claim of derivative sovereign immunity is an immediately appealable final order under the collateral-order doctrine.**

Gibson Dunn
Counsel for Petitioner

Partners
Theodore B. Olson
Amir C. Tayrani

CVSG Cases In Which The Solicitor General Opposed Certiorari

Gibson Dunn
Counsel for *Amicus*
Rimini Street, Inc.

Partners
Mark A. Perry
Blaine Evanson

1. ***Google LLC v. Oracle Am., Inc.*, No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argued Oct. 7, 2020; decided Apr. 5, 2021). The Questions Presented are: (1) Whether copyright protection extends to a software interface. (2) Whether petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.**

2. ***Deutsche Bank Trust Co. v. Robert R. McCormick Foundation*, No. 20-8 (2d Cir., 946 F.3d 66; CVSG Oct. 5, 2020; cert. opposed Mar. 12, 2021; cert. denied Apr. 19, 2021). The Questions Presented are: (1) Whether the presumption against preemption of state law does not apply to creditor-rights claims once federal bankruptcy law has been invoked. (2) Whether laws allowing creditors to avoid certain fraudulent transfers are preempted because they are an obstacle to the "purposes and objectives" of 11 U.S.C. § 546(e). (3) Whether Section 546(e) exempts certain fraudulent transfers from avoidance if executed via a bank as a conduit, on the ground that the bank's customer is itself a "financial institution."**

3. ***Montana and Wyoming v. Washington*, No. 22O152 (Original Jurisdiction; CVSG Oct. 5, 2020; motion for leave to file a bill of complaint opposed May 25, 2021; motion denied June 28, 2021). Whether the Court should grant leave to Montana and Wyoming to file an original bill of complaint alleging that Washington's denial of port access violates the Commerce Clause.**

4. ***PricewaterhouseCoopers LLP v. Laurent*, No. 20-28 (2d Cir., 945 F.3d 739; CVSG Oct. 19, 2020; cert. opposed May 25, 2021; cert. denied June 28, 2021). Whether the Second Circuit improperly combined parts of two separate remedial sections under ERISA, interpreting § 502(a)(3) to permit reformation of a plan solely as a preparatory step to ultimate relief under § 502(a)(1)(B) in the form of money damages.**

Gibson Dunn
Counsel for Petitioners

Partners
Miguel A. Estrada
Daniel J. Thomasch
Richard W. Mark
Lucas C. Townsend
Amer S. Ahmed

Gibson Dunn
Counsel for Respondent

Partners
Theodore J. Boutrous, Jr.
Theane D. Evangelis

Gibson Dunn
Counsel for Petitioner

Partners
Miguel A. Estrada
Mark A. Perry
Cynthia Richman

5. ***Richardson v. Omaha School District*, No. 20-402 (8th Cir., 957 F.3d 869; CVSG Jan. 11, 2021; cert. opposed May 25, 2021; cert. denied June 28, 2021). Whether, for attorneys' fees actions under the Individuals with Disabilities Education Act ("IDEA"), courts should borrow years-long state statutes of limitations because fee actions are analogous to independent lawsuits separate from the underlying merits of the IDEA administrative proceedings, or, in contract, courts should borrow far shorter periods designed for judicial review of IDEA administrative merits decisions because fees actions are merely ancillary to the underlying educational dispute.**

6. ***Comcast Corp. v. Viamedia, Inc.*, No. 20-319 (7th Cir., 951 F.3d 429; CVSG Dec. 7, 2020; cert. opposed May 25, 2021; cert. denied June 28, 2021). The Questions Presented are: (1) Whether the Seventh Circuit erred in holding that a refusal-to-deal claim under § 2 of the Sherman Act may proceed despite the presence of valid business justifications for the refusal, in direct conflict with *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and decisions of the Second, Ninth, Tenth, and Eleventh Circuits. (2) whether the Seventh Circuit erred in allowing a plaintiff to avoid the limitations on a § 2 refusal-to-deal claim by reframing it as some other form of anticompetitive conduct, such as tying, in direct conflict with *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009) and decisions of the Fourth, Ninth, and Tenth Circuits.**

7. ***New Hampshire v. Massachusetts*, No. 22O154 (Original Jurisdiction; CVSG Jan. 25, 2021; motion for leave to file a bill of complaint opposed May 25, 2021; motion denied June 28, 2021). Whether Massachusetts' tax rule—which subjects nonresident-earned income received for services performed outside Massachusetts to the state's income tax—is unconstitutional confiscation.**

Supreme Court Statistics:

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