June 29, 2017
Vol. 8, No. 3

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.

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October Term 2016

Argued Cases

1. ***Davila v. Davis*, No. 16-6219 (5th Cir., 2016 WL 3171870; cert. granted Jan. 13, 2017; argued Apr. 24, 2017). Whether the rule established in *Martinez v. Ryan* and *Trevino v. Thaler*, that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also applies to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims.**

   Decided June 26, 2017 (582 U.S. __). Fifth Circuit/Affirmed. Justice Thomas for a 5-4 Court (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). The Court held that the ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of a claim that appellate counsel provided ineffective assistance. Under 28 U.S.C. § 2254, a state prisoner may pursue federal habeas relief if he (i) exhausts all available state remedies and (ii) the federal claims were not procedurally defaulted in state court. A prisoner may overcome these requirements by showing (i) "cause" to excuse non-compliance with state procedural rules and (ii) "prejudice" from a constitutional violation. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Attorney error can provide such cause if the error deprives a defendant of the right to counsel. *Edwards v. Carpenter*, 529 U.S. 446 (2000). However, attorney error during state postconviction review *cannot* supply cause because the Constitution does not provide a right to counsel after a state trial. *Coleman v. Thompson*, 501 U.S. 722 (1991). Nonetheless, the Court has created an equitable exception to the rule in *Coleman* for when state law requires prisoners to raise a claim of ineffective assistance of trial counsel in a collateral proceeding rather than on direct appeal. *Martinez v. Ryan*, 566 U.S. 1 (2012). In this case, petitioner is a state prisoner who seeks to expand that exception to include claims of ineffective assistance of *appellate* counsel. The Court declined to adopt that expansion, reasoning that doing so would allow the exception to swallow the rule. Further, expanding the exception is not needed to ensure that meritorious claims of trial error receive

review by at least one state or federal court, because a claim of trial error that is preserved by trial counsel, yet not raised by appellate counsel, will be addressed by the trial court. "If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance." Moreover, expanding the *Martinez* exception would "impose significant costs on federal courts," and "aggravate the harm to federalism that federal habeas review necessarily causes."

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2. ***Cal. Pub. Emps.' Ret. v. Anz Sec., Inc.*, No. 16-373 (2d Cir., 2016 WL 3648259; cert. granted Jan. 13, 2017; argued Apr. 17, 2017). Whether the filing of a putative class action serves, under the *American Pipe & Construction Co. v. Utah* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members (the question granted in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*).**

   Decided June 26, 2017 (582 U.S. __). Second Circuit/Affirmed. Justice Kennedy for a 5-4 Court (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.). The Court held that the filing of a class action does not toll the three-year statute of repose in the Securities Act of 1933. Section 11 of the Act gives purchasers of securities a private right of action against issuers for any material misstatements or omissions in a registration statement. Section 13 of the Act limits that right of action by providing that no action may "be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public." The California Public Employees' Retirement System ("CalPERS") opted out of a timely filed class action and then filed suit more than three years after the securities were issued. The Court concluded that CalPERS's suit was untimely because the three-year deadline in Section 13 is a statute of repose, not a statute of limitations, and was therefore not subject to equitable tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Further, Section 13 instructs that, "[i]n no event" shall an action be brought more than three years after the relevant securities offering, signifying "no exception" and a "fixed bar against future liability." The statute thus affords "complete peace to defendants," and "supersedes the application of a tolling rule based in equity."

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3. ***Hernandez v. Mesa*, No. 15-118 (5th Cir., 785 F.3d 117; CVSG Nov. 30, 2015; cert. opposed Feb. 29, 2016; cert. granted Oct. 11, 2016; argued Feb. 21, 2017). The Questions Presented are: (1) Whether a formalist or functionalist analysis governs the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States. (2) Whether qualified immunity may be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident. (3) Whether the claim in this case may be asserted under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).**

Decided June 26, 2017 (582 U.S. __). Fifth Circuit/Vacated and remanded. Per Curiam for a 5-3 Court (Thomas, J., dissenting; Breyer, J., dissenting, joined by Ginsburg, J.; Gorsuch, J., took no part in the case). The Court remanded for the Fifth Circuit to consider how an intervening authority, *Ziglar v. Abbasi*, 582 U.S. __ (June 19, 2017), impacts petitioners' claim to money damages under *Bivens*. The Court also held that the Fifth Circuit erred in granting qualified immunity to the U.S. Border Patrol agent based on the fact that the victim was an alien without significant connection to the United States, explaining that the victim's nationality and lack of ties to the United States were not known to the agent at the time of the shooting and, therefore, the agent could not rely on those facts to establish the defense. The Court, however, instructed the court of appeals to consider whether the defendant is nonetheless entitled to qualified immunity on other grounds.

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4. ***Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (8th Cir., 788 F.3d 779; cert. granted Jan. 15, 2016; argued Apr. 19, 2017). Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.**

   Decided June 26, 2017 (582 U.S. __). Eighth Circuit/Reversed and remanded. Chief Justice Roberts for a 7-2 Court (Thomas, J., concurring in part, joined by Gorsuch, J.; Gorsuch, J., concurring in part, joined by Thomas, J.; Breyer, J., concurring in the judgment; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that the Missouri Department of Natural Resources' policy of categorically disqualifying religious organizations from receiving grants for installing playground surfaces made from recycled tires violates the Free Exercise Clause because it denies religious organizations an otherwise available public benefit on account of their religious status. Under the Free Exercise Clause, denying a generally available benefit based solely on religious identity is subject to strict scrutiny. Thus, because the Department's policy expressly discriminates against grant applicants solely based on their religious character—depriving them of the ability to compete with secular organizations for the grants—the policy is subject to "the most exacting scrutiny." The Department, however, offered as its purported compelling state interest a mere "policy preference for skating as far as possible from religious establishment concerns." "In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling" and, therefore, State's policy "is odious to our Constitution . . . and cannot stand."

5. ***Lee v. United States*, No. 16-327 (6th Cir., 825 F.3d 311; cert. granted Dec. 14, 2016; argued Mar. 28, 2017). Whether it is always irrational for a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.**

   Decided June 23, 2017 (582 U.S. __). Sixth Circuit/Reversed and remanded. Chief Justice Roberts for a 6-2 Court (Thomas, J., dissenting, joined by Alito, J., except as to Part I; Gorsuch, J., took no part in the case). The Court held that petitioner established prejudice for his ineffective assistance claim under

Strickland v. Washington, 466 U.S. 668 (1984), by demonstrating that his attorney had wrongly advised him that he would not be deported if he entered a guilty plea. Petitioner's attorney advised him to plead guilty to a federal drug crime because the evidence was "overwhelming," and further assured petitioner that doing so would not result in deportation. But in reality, petitioner's crime was an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), and thus his guilty plea triggered mandatory deportation. Petitioner filed a motion to vacate his conviction, claiming ineffective assistance of counsel. The district court denied the motion, and the Sixth Circuit affirmed, concluding that petitioner could not establish prejudice because he likely would have lost at trial. The Supreme Court reversed. Relying on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court reasoned that, "[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial," the prejudice analysis does not focus on the likely result of the trial, but instead focuses on "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Flores-Ortega*, 528 U.S. at 483. Rejecting "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial," the Court emphasized the need for a "case-by-case" approach. Here, petitioner established prejudice under the "unusual circumstances" of this case because both he and his plea-stage counsel testified that avoiding deportation was "*the* determinative factor" for petitioner's decision to accept the plea, and further testified that if petitioner had known he would be deported upon pleading guilty, he would have gone to trial.

6. ***Murr v. Wisconsin*, No. 15-214 (Wis. Ct. App., 359 Wis. 2d 675; cert. granted Jan. 15, 2016; argued Mar. 20, 2017; SG as amicus, supporting respondents). Whether, in a regulatory taking case, the "parcel as a whole" concept as described in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.**

Decided June 23, 2017 (582 U.S. __). Wis. Ct. App./Affirmed. Justice Kennedy for a 5-3 Court (Roberts, C.J., dissenting, joined by Thomas and Alito, J.J.; Thomas, J. dissenting; Gorsuch, J., took no part in the case). The Court held that, in considering petitioners' regulatory taking claim, the state appellate court correctly analyzed petitioners' two contiguous lots of land as a single unit when assessing the effect of governmental regulations on petitioners' ability to use or sell their lots. Determining whether a regulatory taking has occurred requires comparing the value taken from the property with the value that remains in the property. "Defining the property at the outset," then, is critically important to the analysis. Yet no single consideration supplies the exclusive test for defining the property; instead, a court must consider the "parcel as a whole" and assess "a number of factors," including "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." A court also should look to "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." Here, applying this multifactor test, petitioners' adjacent lots of land should be treated as a single unit

in the takings analysis: state law merged the two parcels, the lots are contiguous and share a shoreline, and the value of the combined lots far exceeds the sum of the values of the individual lots. Thus, because the challenged regulation diminished the value of the units, when considered as a single parcel, by less than 10%, no compensable regulatory taking occurred.

7. ***Perry v. Merit Sys. Prot. Bd.*, No. 16-399 (D.C. Cir., 2016 WL 3947838; cert. granted Jan. 13, 2017; argued Apr. 17, 2017). Whether a Merit Systems Protection Board decision disposing of a "mixed" case (one which challenges certain adverse employment actions and also involves a claim under the federal anti-discrimination laws) on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.**

Decided June 23, 2017 (582 U.S. __). D.C. Circuit/Reversed and remanded. Justice Ginsburg for a 7-2 Court (Gorsuch, J., dissenting, joined by Thomas, J.). The Court held that federal district court is the proper forum for review of jurisdictional decisions by the Merit Systems Protection Board in "mixed" cases—*i.e.*, when an employee alleges adverse action as a result of unlawful discrimination. The Civil Service Reform Act of 1978 ("CSRA") created the Board to review serious personnel actions taken against federal employees. If a party asserts rights under the CSRA only, the party must seek review of the Board's decisions in the Federal Circuit. But in a "mixed case," where the employee alleges a violation of the CSRA *and* a federal antidiscrimination law, the proper forum for review is federal district court—at least when the Board decides the case on the merits. In *Kloeckner v. Solis*, 568 U.S. 41 (2012), the Court held that district court is also the correct avenue for review when the Board dismisses a mixed case on procedural grounds. Here, the Board dismissed a mixed case for lack of jurisdiction, and the employee petitioned for review in the D.C. Circuit, which held that the Federal Circuit has exclusive jurisdiction. The Supreme Court reversed, finding no statutory or practical basis for distinguishing mixed cases dismissed on procedural grounds, like *Kloeckner*, and those dismissed on jurisdictional grounds, like this case. In both instances, review of such mixed cases lies in the district court.

8. ***Maslenjak v. United States*, No. 16-309 (6th Cir., 821 F.3d 675; cert. granted Jan. 13, 2017; argued Apr. 26, 2017). Whether the U.S. Court of Appeals for the Sixth Circuit erred by holding, in direct conflict with the U.S. Courts of Appeals for the First, Fourth, Seventh, and Ninth Circuits, that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement.**

Decided June 22, 2017 (582 U.S. __). Sixth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court (Gorsuch, J., concurring in part and concurring in the judgment, joined by Thomas, J.; Alito, J., concurring in the judgment). The Court held that in order to prove a defendant has knowingly "procure[d], contrary to law, [her] naturalization," in violation of 18 U.S.C. § 1425(a), the Government must show a causal connection between an illegal act and the procurement of citizenship. The text of the statute compels this conclusion. To "procure . . . naturalization" means to obtain it, and obtaining

naturalization "contrary to law" means doing so illegally. "Putting the pieces together, someone 'procure[s], contrary to law, naturalization' when she obtains citizenship illegally." That is, "the illegal act must have somehow contributed to the obtaining of citizenship." Accordingly, where, as here, the alleged illegal conduct underlying a § 1425 prosecution is a false statement to government officials, a jury must decide whether that false statement influenced the award of citizenship. Because the jury in this case was not asked to make that necessary determination, the case is remanded for further proceedings.

9. ***Turner v. United States*, No. 15-1503 (D.C., 116 A.3d 894; consolidated with *Overton v. United States*, No. 15-1504; cert. granted Dec. 14, 2016; argued Mar. 29, 2017). Whether the petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).**

Decided June 22, 2017 (582 U.S. __). D.C./Affirmed. Justice Breyer for a 6-2 Court (Kagan, J., dissenting, joined by Ginsburg J.; Gorsuch, J., took no part in the case). The Court held that petitioners were not entitled to relief under *Brady v. Maryland*, 373 U.S. 83 (1963), because, although the State withheld evidence "favorable to the defense," the evidence is not "material"—that is, there is no "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). After their murder convictions became final, petitioners discovered that the State had withheld seven pieces of evidence favorable to the defense, including the identity of a man seen stopping near a garage where the victim's body was found, and evidence tending to impeach three State witnesses. Petitioners argued that, had the evidence been disclosed before trial, they could have challenged the State's theory that they had killed the victim in a group attack, and also could have raised an alternative theory that a single perpetrator committed the crime. The Court, however, agreed with the lower courts that, "in the context of the entire record," the withheld evidence was "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." Virtually every witness to the crime agreed that a large group of perpetrators had committed the murder, and it is not reasonably probable that the withheld evidence would have persuaded the jury to conclude that only one person was responsible. Further, the undisclosed impeachment evidence would have been "largely cumulative," and therefore not material, under the circumstances of this case.

10. ***Weaver v. Massachusetts*, No. 16-240 (Mass.; 54 N.E.3d 495; cert. granted Jan. 13, 2017; argued Apr. 19, 2017). Whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.**

Decided June 22, 2017 (582 U.S. __). Mass./Affirmed. Justice Kennedy for a 7-2 Court (Thomas, J., concurring, joined by Gorsuch, J.; Alito, J., concurring in the judgment, joined by Gorsuch, J.; Breyer, J., dissenting, joined by Kagan, J.). The Court held that, when a defendant raises an unpreserved structural error for the

first time in asserting a claim for ineffective assistance of counsel, the defendant must demonstrate prejudice to receive a new trial. The courtroom at petitioner's trial was too small to accommodate all potential jurors, and so an officer of the court excluded from the courtroom all members of the public who were not potential jurors. Petitioner's trial counsel neither objected nor raised the issue on direct review. Petitioner later sought a new trial on the basis that his trial counsel provided ineffective assistance under *Strickland* by failing to object to the courtroom closure. The Court assumed that relief must be granted under *Strickland* if counsel's error rendered the trial fundamentally unfair, and also assumed that the courtroom closure resulted in structural error in violation of the Sixth Amendment. But the Court reasoned that not every structural error creates a fundamentally unfair trial; indeed, the Court has recognized exceptions to the public-trial right. *See, e.g.*, *Waller v. Georgia*, 467 U.S. 39 (1984). Thus, to prevail on his *Strickland* claim, petitioner must establish that his counsel's failure to object to the public-trial violation rendered his trial fundamentally unfair, and he has not done so: "[t]he closure was limited to the jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself."

11. ***Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., S.F. Cnty.*, No. 16-466 (Cal., 377 P.3d 874; cert. granted Jan. 19, 2017; argued Apr. 25, 2017; SG as amicus, supporting petitioner). Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.**

    Decided June 19, 2017 (582 U.S. __). Cal./Reversed and remanded. Justice Alito for an 8-1 Court (Sotomayor, J., dissenting). The Court held that California state courts lack specific jurisdiction over claims against an out-of-state pharmaceutical company alleging that the company's drug harmed state nonresidents who did not allege that they acquired the drug in California, were injured by the drug in California, or were treated for their injuries in California. A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers Squibb in California state court alleging they were harmed by the drug Plavix. Bristol-Myers is incorporated in Delaware and headquartered in New York. Although personal jurisdiction "was uncontested" for the claims of the California residents, personal jurisdiction was lacking as to the claims of the non-California residents because the nonresidents could not "identify[] any adequate link between [California] and the nonresidents' claims." The non-residents "were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." And "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California . . . does not allow the State to assert specific jurisdiction over the nonresidents' claims." Nor did personal jurisdiction exist merely because Bristol-Myers "contracted with a California distributor," as the plaintiffs did not

allege that Bristol-Myers "engaged in relevant acts together with [the distributor] in California," or that Bristol-Myers "is derivatively liable for [the distributor's] conduct in California." In short, for specific jurisdiction to exist, there must be "an affiliation between the forum and the underlying controversy," and that required affiliation does not exist here. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

12. ***Matal v. Tam*, No. 15-1293 (Fed. Cir., 808 F.3d 1321; cert. granted Sept. 29, 2016; argued Jan. 18, 2017). Whether the disparagement provision in Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a)—which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute"—is facially invalid under the Free Speech Clause of the First Amendment.**

    Decided June 19, 2017 (582 U.S. __). Federal Circuit/Affirmed. Justice Alito for a unanimous Court (Kennedy, J., concurring in part and concurring in the judgment, joined by Ginsburg, Sotomayor, and Kagan, J.J.; Thomas, J., concurring in part and concurring in the judgment; Gorsuch, J., took no part in the case). The Court held that 15 U.S.C. § 1052(a), which prohibits the registration of trademarks that might "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead," violates the Free Speech Clause of the First Amendment. After the Patent and Trademark Office ("PTO") relied on § 1052(a) to deny federal trademark registration to a band called "The Slants," the band sued and the en banc Federal Circuit concluded that § 1052(a) is unconstitutional. The Supreme Court agreed, reasoning that trademarks are "private, not government, speech" because they have an "expressive content," and the Government "does not dream up" the trademarks submitted for registration. By banning certain private speech on the ground that it might "disparage" any person, § 1052(a) violates a "bedrock First Amendment principle"—namely, that the Government may not ban speech on the ground that "it expresses ideas that offend."

13. ***McWilliams v. Dunn*, No. 16-5294 (11th Cir., 634 F. App'x 698; cert. granted Jan. 13, 2017; argued Apr. 24, 2017). Whether, when this Court held in *Ake v. Oklahoma* that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," it clearly established that the expert should be independent of the prosecution.**

    Decided June 19, 2017 (582 U.S. __). Eleventh Circuit/Reversed and remanded. Justice Breyer for a 5-4 Court (Alito, J., dissenting, joined by Roberts, C.J., and Thomas and Gorsuch, J.J.). The Court held that the Eleventh Circuit erred in concluding that the Alabama state court did not unreasonably rule that petitioner received all constitutionally required mental health assistance in light of *Ake v. Oklahoma*, 470 U.S. 68 (1985). Petitioner was convicted of capital murder. Because he was indigent and his mental condition was a mitigating circumstance, the State provided him a mental health expert before his capital sentencing hearing. The expert filed a report two days before the hearing, and defense

counsel moved for a continuance in order to evaluate the new information. The trial court denied the request and sentenced petitioner to death. Petitioner appealed, arguing that he was unable to have an expert "evaluate" the report (and related medical documents) and then "translate" that information into a legal strategy, as *Ake* requires. The state courts affirmed on direct appeal, and the Eleventh Circuit affirmed on habeas review. The Supreme Court, however, concluded that the trial court's failure "to provide the defense with help in evaluating, preparing, and presenting its case" fell "dramatically short of what *Ake* requires," and thus contravened "clearly established Federal law." *Ake* requires more than just a mental health *examination*; it also requires "access to a competent psychiatrist who will in assist in "*evaluation*," "*preparation*," and "*presentation*" of the defense. *Ake*, 470 U.S. at 83. Because the State failed to satisfy those three requirements, the Alabama court's decision affirming petitioner's conviction and sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The Court remanded to the lower courts for consideration in the first instance of whether the error had the "substantial and injurious effect or influence" required to warrant habeas relief. *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015).

14. ***Packingham v. North Carolina*, No. 15-1194 (N.C., 777 S.E.2d 738; cert. granted Oct. 28, 2016; argued Feb. 27, 2017). Whether a North Carolina criminal law, N.C. Gen. Stat. § 14-202.5—which makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites that enable communication, expression, and the exchange of information among their users if the site is "know[n]" to allow minors to have accounts, and which does not require the State to prove that the accused had contact with, or gathered information about, a minor, or intended to do so, or accessed a website for any illicit or improper purpose—is permissible under the First Amendment, both on its face and as applied to petitioner, who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket, declaring, "God is Good!"**

Decided June 19, 2017 (582 U.S. __). N.C./Reversed and remanded. Justice Kennedy for a unanimous Court (Alito, J., concurring in the judgment, joined by Roberts, C.J., and Thomas, J.; Gorsuch, J., took no part in the case). The Court held that a North Carolina statute making it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages" impermissibly restricts lawful speech in violation of the First Amendment. Today, cyberspace and "social media in particular" are "the most important places (in a spatial sense) for the exchange of views," and this case "is one of the first . . . to address the relationship between the First Amendment and the modern Internet." The Court, therefore, "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." Here, even assuming that the statute is content neutral, and thus subject to intermediate scrutiny, the statute fails intermediate scrutiny by burdening substantially more speech than is necessary to further the government's legitimate interest in "keeping convicted

sex offenders away from vulnerable victims." By foreclosing access to social media altogether, the statute prevents convicted criminals from engaging in the legitimate exercise of First Amendment rights. "Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." Thus, the State may not seek to protect children by enacting a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."

15. ***Ziglar v. Abbasi*, No. 15-1358 (2d Cir., 789 F.3d 218; consolidated with *Ashcroft v. Abbasi*, No. 15-1359, and *Hasty v. Abbasi*, 15-1363; cert. granted Oct. 11, 2016; argued Jan. 18, 2017). The Questions Presented are: (1) Whether the Court of Appeals, in finding that Respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), erred by defining "context" at too high a level of generality. (2) Whether the Court of Appeals erred in denying qualified immunity for actions taken in the immediate aftermath of the attacks of September 11, 2001, regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of those attacks. (3) Whether the Court of Appeals erred in finding that Respondents met the pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).**

Decided June 19, 2017 (582 U.S. __). Second Circuit/Reversed in part, vacated in part, and remanded in part. Justice Kennedy for a 4-2 Court (Thomas, J., concurring in part and concurring in the judgment; Breyer, J., dissenting, joined by Ginsburg, J.; Sotomayor, Kagan, and Gorsuch, J.J., took no part in the case). The Court held that illegal immigrants detained in the aftermath of September 11 cannot maintain a *Bivens* claim against the federal officials responsible for their confinement. Expanding the *Bivens* remedy is "disfavored," and this case involves a "new *Bivens* context." Among other things, some of the plaintiffs' claims in this case concern "high-level executive policy created in the wake of" September 11, and the claims also implicate facts and a constitutional right different than those at issue in previous *Bivens* cases. Given the potential intrusion into the "sensitive functions of the Executive Branch," as well as the availability of habeas corpus and other "alternative methods of relief," creating a damages action in this context is "a decision for the Congress to make, not the courts." The court of appeals therefore erred in allowing the plaintiffs' *Bivens* claims to proceed. Moreover, the federal officials are entitled to qualified immunity from the claims brought under 42 U.S.C. § 1985(3) alleging that the officials conspired to confine the plaintiffs on the basis of race, religion, or national origin. At the time of the alleged violations, it was not "clearly established" that "officials employed by the same governmental department" are capable of conspiring "when they speak to one another and work together in their official capacities."

16. ***Henson v. Santander Consumer USA*, No. 16-349 (4th Cir., 817 F.3d 131; cert. granted Jan. 13, 2017; argued Apr. 18, 2017). Whether a company that regularly attempts to collect debts it purchased after the debts had fallen into default is a "debt collector" subject to the Fair Debt Collection Practices Act.**

Decided June 12, 2017 (582 U.S. __). Fourth Circuit/Affirmed. Justice Gorsuch for a unanimous Court. The Court held that a company that collects debts purchased for its own account are not necessarily "debt collectors" subject to the Fair Debt Collection Practices Act. The Court focused on the plain language of the statute, which defines "debt collector" as one who regularly collects "debts owed or due . . . another." 15 U.S.C. § 1692a(6). That language clearly means "third party collection agents" who collect "debts owed to others," not debt owners seeking to collect debts for themselves. Given the clarity of that definition, the Court declined petitioners' invitation to "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done" had it known at the time of passing the Act that the industry of debt purchasing would "blossom." The Court, however, left unresolved whether a debt purchaser can qualify as a "debt collector" under an alternative definition in the Act encompassing those engaged "in any business the principal purpose of which is the collection of any debts." *Id.*

17. ***Microsoft Corp. v. Baker*, No. 15-457 (9th Cir., 797 F.3d 607; cert. granted Jan. 15, 2016; argued Mar. 21, 2017). Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice.**

Decided June 12, 2017 (582 U.S. __). Ninth Circuit/Reversed and remanded. Justice Ginsburg for a unanimous Court (Thomas, J., concurring in the judgment, joined by Roberts, C.J., and Alito, J.; Gorsuch, J., took no part in the case). The Court held that the federal courts of appeals lack jurisdiction under 28 U.S.C. § 1291 to review an order denying class certification (or an order striking class allegations) after the named plaintiffs voluntarily dismiss their class claims with prejudice. Here, the district court struck the plaintiffs' class allegations, and the Ninth Circuit declined to hear a permissive interlocutory appeal under Federal Rule of Civil Procedure 23(f). The plaintiffs then stipulated to voluntary dismissal with prejudice, but reserved the right to revive their class claims if the Ninth Circuit reversed the denial of certification. The Ninth Circuit held that it had jurisdiction to hear the direct appeal under § 1291, which allows courts of appeals to review "final decisions of the district courts." Reversing, the Supreme Court held that "the voluntary dismissal essayed by [the plaintiffs] does not qualify as a 'final decision' within the compass of § 1291." Authorizing the voluntary-dismissal tactic would undermine § 1291's finality principle, invite "protracted litigation and piecemeal appeals," and "allow indiscriminate appellate review of interlocutory orders." The tactic also would permit "plaintiffs only, never defendants, to force an immediate appeal of an adverse certification," yet certification "may be just as important to defendants."

18. ***Sandoz Inc. v. Amgen Inc.*, No. 15-1039 (Fed. Cir., 794 F.3d 1347; consolidated with *Amgen Inc. v. Sandoz*, No. 15-1195; CVSG June 20, 2016; cert. supported Dec. 7, 2016; cert. granted Jan. 13, 2017; argued Apr. 26, 2017; SG as amicus, supporting petitioner). Whether notice of commercial marketing given before FDA approval can be effective and whether, in any event, treating 42 U.S.C. § 262(l)(8)(A) of the Biologics Price Competition and Innovation Act of 2009 as a standalone requirement and creating an injunctive remedy that delays all biosimilars by 180 days after approval is improper.**

    Decided June 12, 2017 (582 U.S. __). Federal Circuit/Vacated in part, reversed in part, and remanded. Justice Thomas for a unanimous Court (Breyer, J., concurring). The Court held that federal law does not permit an injunction to enforce the disclosure requirements in 42 U.S.C. § 262(l)(2)(A), and that an applicant may provide notice under § 262(l)(8)(A) *before* obtaining licensure of a biosimilar product. Under § 262(l)(2)(A), a biosimilar manufacturer (applicant) seeking FDA approval of a biosimilar product must provide its application and manufacturing information to the manufacturer of a reference product (sponsor) within 20 days after the FDA notifies the applicant that the agency has accepted the application for review. Section 262(l)(9)(C) provides that, to remedy an applicant's failure to comply with § 262(l)(2)(A), the sponsor may bring a declaratory-judgment action against the applicant for artificial infringement. The presence of that remedy, and the lack of any other textually specified remedies, indicates that Congress did not intend sponsors to have access to federal injunctive relief to enforce § 262(l)(2)(A). When a statute provides an express remedy, "courts must be especially reluctant to provide additional remedies." *Karahalios v. Fed. Emps.*, 489 U.S. 527, 533 (1989). The Court, however, remanded for the Federal Circuit to determine in the first instance whether an injunction is available under state law. Next, the Court considered whether an applicant may provide notice to a manufacturer before obtaining a license from the FDA for its biosimilar. Under § 262(l)(8)(A), an applicant "shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." Because the phrase "of the biological product licensed under subsection (k)" modifies "commercial marketing," not "notice," "commercial marketing" is the point in time by which the biosimilar product must be "licensed." Thus, the applicant may provide notice either before or after receiving FDA approval. If Congress had intended for notice to occur only after the license was granted, it would have said so expressly in the statute, as it did with regard to an adjacent provision, § 262(l)(8)(B).

19. ***Sessions v. Morales-Santana*, No. 15-1191 (2d Cir., 804 F.3d 520; cert. granted June 28, 2016; argued Nov. 9, 2016). The Questions Presented are: (1) Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. §§ 1401 and 1409 (1958), violates the Fifth Amendment's guarantee of equal protection. (2) Whether the Court of Appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.**

Decided June 12, 2017 (582 U.S. __). Second Circuit/Affirmed in part, reversed in part, and remanded. Justice Ginsburg for a unanimous Court (Thomas, J., concurring in the judgment in part, joined by Alito, J.; Gorsuch, J., took no part in the case). The Court held that the Immigration and Nationality Act of 1952, which governs how long a U.S.-citizen parent must be present in the United States to pass citizenship to a child born abroad with a parent of another nation, violates the equal protection guarantee of the Fifth Amendment's Due Process Clause. The statute in effect at the relevant time, 8 U.S.C. § 1401(a)(7) (1958 ed.), required unwed U.S.-citizen fathers to be physically present in the United States for five years to transmit citizenship, but created an exception of only one year for similarly situated mothers. That statute relied on an impermissible stereotype of the relationship between unwed fathers and their children, and failed to serve an important governmental objective that is substantially related to the gender classification. *See United States v. Virginia*, 518 U.S. 515 (1996). The disparate gender-specific criteria does not withstand heightened scrutiny "under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens." Accordingly, "Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender," but until that occurs, "§ 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S. citizen mothers."

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20. ***Advocate Health Care Network v. Stapleton*, No. 16-74 (7th Cir., 817 F.3d 517; consolidated with *St. Peter's Healthcare Sys. v. Kaplan*, No. 16-86 (3d Cir.), and *Dignity Health v. Rollins*, No. 16-258 (9th Cir.); cert. granted Dec. 2, 2016; argued Mar. 27, 2017; SG as amicus, supporting petitioner). Whether the Employee Retirement Income Security Act of 1974's church-plan exemption applies so long as a pension is maintained by an otherwise-qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.**

Decided June 5, 2017 (581 U.S. __). Third, Seventh, and Ninth Circuits/Reversed. Justice Kagan for a unanimous Court (Sotomayor, J., concurring; Gorsuch, J., took no part in the case). The Court held that under the Employee Retirement Income Security Act ("ERISA"), an employee-benefits plan can qualify as an exempt "church plan" even if the plan is not established by a church. Current and former employees of church-affiliated hospitals sued to challenge the longstanding view of the IRS, the Department of Labor, and the Pension Benefit Guaranty Board that ERISA's amended definition of an exempt "church plan" includes plans established and maintained by church-affiliated hospitals. As originally enacted, ERISA defined a "church plan" as "a plan established and maintained . . . for its employees . . . by a church." 29 U.S.C. § 1002(33)(A). Congress later amended that definition to provide that a "plan established and maintained . . . by a church . . . includes a plan maintained by" a church-affiliated organization whose "principal purpose" is to fund or administer such a plan, *id.* § 1002(33)(C)(i)—a so-called "principal-purpose organization." The Third, Seventh, and Ninth Circuits concluded that Congress's definitional amendment expanded only the meaning of "maintained" to include principal-purpose organizations, but did not alter the statutory requirement that a church

"establish" the plan. Reversing, the Court reasoned that, had Congress intended to alter only the meaning of "maintained," it could have said that "a plan maintained" by a church now includes "a plan maintained" by a principal-purpose organization. But Congress did not say that. Instead, Congress said that a "plan *established and* maintained" by a church now includes "a plan maintained by" a principal-purpose organization. The conclusion of the circuit courts would read out of the amended definition the words "established and." The Court also rejected the employees' attempts to use "scattered floor statements" from individual legislators to support their position, explaining that "those lowly sources speak at best indirectly to the precise question here."

21. ***Honeycutt v. United States*, No. 16-142 (6th Cir., 816 F.3d 362; cert. granted Dec. 9, 2016; argued Mar. 29, 2017). Whether 21 U.S.C. § 853(a)(1) mandates joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy.**

Decided June 5, 2017 (581 U.S. __). Sixth Circuit/Reversed. Justice Sotomayor for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that 21 U.S.C. § 853(a)(1)—which mandates forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug crimes—does not authorize a court to hold a defendant jointly and severally liable for property acquired by a co-conspirator. Terry Honeycutt worked at a hardware store owned by his brother Tony. The brothers were indicted for selling water-purification products knowing that an ingredient in the products would be used to make methamphetamine. Tony pleaded guilty and agreed to forfeit $200,000 of his store's total profits ($269,751.98) from selling the products. Terry was convicted after a trial, and the Government sought forfeiture from him for the remaining profits ($69,751.98) not paid by Tony, even though Terry had no controlling interest in his brother's store and never received any of the profits. The district court declined to order forfeiture from Terry under § 853(a)(1) because he personally did not stand to benefit from the illegal sales, but the Sixth Circuit reversed on the theory that the brothers were jointly and severally liable for the proceeds of their conspiracy. The Supreme Court sided with the district court. Parsing the text of § 853, the Court reasoned that the statute generally limits forfeitures to property tainted by criminal activity that is actually "obtained" by the defendant. Joint-and-several liability exceeds that limitation. Here, for example, imposing such liability would require Terry to forfeit profits that he never actually "obtained." Thus, even though the law of conspiracy normally holds conspirators liable for their coconspirators' foreseeable actions, the text of § 853 makes clear that Congress did not incorporate that principle into this forfeiture regime.

22. ***Kokesh v. SEC*, No. 16-529 (10th Cir., 834 F.3d 1158; cert. granted Jan. 13, 2017; argued Apr. 18, 2017). Whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to claims for "disgorgement."**

Decided June 5, 2017 (581 U.S. __). Tenth Circuit/Reversed. Justice Sotomayor for a unanimous Court. The Court held that disgorgement, as applied in SEC enforcement proceedings, operates as a "penalty" under 28 U.S.C. § 2462, and thus any claim for disgorgement in an SEC enforcement action must be

commenced within five years of the claim's accrual. Section 2462 establishes a five-year statute of limitations for any SEC enforcement action seeking a "civil fine, penalty, or forfeiture, pecuniary or otherwise." The SEC brought an action against petitioner alleging misappropriation of funds and seeking disgorgement of funds that petitioner received more than five years before the action was filed. Petitioner argued that disgorgement was barred by the statute of limitations because it was a "penalty" under § 2462. The Court agreed, reasoning that disgorgement is a "penalty" because it is a pecuniary sanction that is sought "for the purpose of punishment, and to deter others from offending in like manner," as opposed to "compensating a victim for his loss." Indeed, disgorged profits are paid to the district courts, which have discretion to determine how the money will be distributed. Moreover, because disgorgement can often leave the defendant "worse off" than the status quo ante, the Government is wrong in arguing that disgorgement is "remedial" and outside the scope of § 2462.

23. ***Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (2d Cir., 828 F.3d 60; cert. granted Jan. 13, 2017; argued Apr. 17, 2017; SG as amicus, supporting petitioner). Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing (as three circuits have held), or whether Article III of the Constitution is satisfied so long as there is a valid case or controversy between the named parties (as seven circuits have held).**

Decided June 5, 2017 (581 U.S. __). Second Circuit/Vacated and remanded. Justice Alito for a unanimous Court. The Court held that a litigant seeking to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) must possess Article III standing if the intervenor pursues relief not requested by a plaintiff. Emphasizing that '"standing is not dispensed in gross,"' *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008), the Court reasoned that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Thus, for all relief sought in a case, "there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." For that reason, "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." Because the record was unclear whether the intervenor in this case seeks additional relief not requested by the plaintiff, the Court remanded for the Second Circuit to conduct that inquiry in the first instance.

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24. ***BNSF Railway Co. v. Tyrrell*, No. 16-405 (Mont., 373 P.3d 1; cert. granted Jan. 13, 2017; argued Apr. 25, 2017; SG as amicus, supporting petitioner). Whether a state court may decline to follow the Supreme Court's decision in *Daimler AG v. Bauman*, which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not at home in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.**

Decided May 30, 2017 (581 U.S. __). Mont./Reversed and remanded. Justice Ginsburg for an 8-1 Court (Sotomayor, J., concurring in part and dissenting in part). The Court held that (1) Section 56 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 56, does not confer personal jurisdiction on federal or

state courts; and (2) the Fourteenth Amendment's Due Process Clause precludes Montana from asserting personal jurisdiction over BNSF in this case because the events at issue occurred outside of Montana and BNSF is not "at home" in the state. First, Section 56's language providing that an action "may be brought in a district court of the United States" indicates only where *venue* may be proper; it does not confer *personal jurisdiction*. Other language in Section 56 stating that the district court's jurisdiction "shall be concurrent with that of the courts of the several States" refers to only subject-matter jurisdiction, not personal jurisdiction. Second, Montana lacks personal jurisdiction over BNSF because the company is not "at home" in Montana: BNSF is not incorporated there, does not have its principal place of business there, and does not have other contacts with Montana that are "so substantial and of such a nature as to render the corporation at home in that State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014). The business BNSF does in Montana—maintaining more than 2,000 miles of railroad track and employing more than 2,000 people in the state—would subject the railroad to *specific* personal jurisdiction on claims related to its business in Montana, but such instate business does not create *general* jurisdiction over claims, like those at issue here, that are "unrelated to any activity occurring in Montana." The Due Process Clause therefore prohibits Montana from exercising personal jurisdiction over BNSF in this case.

25. ***Cnty. of Los Angeles v. Mendez*, No. 16-369 (9th Cir., 815 F.3d 1178; cert. granted in part Dec. 2, 2016; argued Mar. 22, 2017; SG as amicus, supporting petitioner). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the Ninth Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other courts of appeals. (2) Whether, in an action brought under Section 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event that breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.**

Decided May 30, 2017 (581 U.S. __). Ninth Circuit/Vacated and remanded. Justice Alito for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that the Fourth Amendment is incompatible with the Ninth Circuit's "provocation rule," which provides that an officer's otherwise reasonable use of force is unreasonable if (i) the officer "intentionally or recklessly" provoked a violent confrontation and (ii) "the provocation is an independent Fourth Amendment violation." The provocation rule defies the "exclusive" framework for analyzing excessive-force claims established in *Graham v. Connor*, 490 U.S. 386 (1989), which adopts a test of objective reasonableness. "The basic problem with the provocation rule" is that it instructs courts to "look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force," and then that distinct preceding violation can serve as the foundation of a plaintiff's excessive force claim. But an excessive force claim is a claim that an officer carried out a seizure through an *unreasonable* use of force; it is not a claim that an officer used *reasonable* force after committing a Fourth

Amendment violation. "If there is no excessive force claim under *Graham,* there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately."

26. ***Esquivel-Quintana v. Sessions*, No. 16-54 (6th Cir., 810 F.3d 1019; cert. granted Oct. 28, 2016; argued Feb. 27, 2017). Whether a conviction under one of the seven state statutes that criminalize consensual sexual intercourse between a 21-year-old and someone almost 18 years old constitutes the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act and therefore constitutes grounds for mandatory removal.**

    Decided May 30, 2017 (581 U.S. __). Sixth Circuit/Reversed. Justice Thomas for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that, "in the context of statutory rape offenses focused solely on the age of the participants, the generic federal definition of 'sexual abuse of a minor' under [8 U.S.C. § 1101(a)(43)(A)] requires the age of the victim to be less than 16." Petitioner, a lawful permanent resident, pleaded no contest in state court to "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," under a statute that defines "minor" as "a person under the age of 18." Cal. Penal Code § 261.5(a), (c). The United States then initiated removal proceedings under the Immigration and Nationality Act ("INA") on the ground that petitioner's conviction qualified as "sexual abuse of a minor." Because the INA does not define "sexual abuse of a minor," the Court consulted dictionaries, statutory context, and state criminal codes as evidence of the ordinary meaning of "sexual abuse of a minor." It concluded that the generic offense of statutory rape had an age of consent of 16 at the time that Congress passed the INA, which means that convictions under the California statute using an age of 18 do not qualify as "sexual abuse of a minor" under § 1101(a)(43)(A). Because the statutory text, "read in context," was clear, the Court did not resolve whether the rule of lenity applies. Nor did it resolve whether *Chevron* deference applies to the Board of Immigration Appeals' construction of the phrase "sexual abuse of a minor."

27. ***Impression Prods., Inc. v. Lexmark Int'l, Inc.*, No. 15-1189 (Fed. Cir., 816 F.3d 721; CVSG June 20, 2016; cert. supported Oct. 12, 2016; cert. granted Dec. 2, 2016; argued Mar. 21, 2017; SG as amicus, supporting reversal in part and vacatur in part). The Questions Presented are: (1) Whether a "conditional sale" that transfers title to the patented item while specifying post-sale restrictions on the article's use or resale avoids application of the patent exhaustion doctrine and therefore permits the enforcement of such post-sale restrictions through the patent law's infringement remedy. (2) Whether, in light of the holding in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), that the common law doctrine barring restraints on alienation that is the basis of exhaustion doctrine "makes no geographical distinctions," a sale of a patented article—authorized by the U.S. patentee—that takes place outside of the United States exhausts the U.S. patent rights in that article.**

    Decided May 30, 2017 (581 U.S. __). Federal Circuit/Reversed and remanded. Chief Justice Roberts for a 7-1 Court (Ginsburg, J., concurring in part and

dissenting in part; Gorsuch, J., took no part in the case). The Court held that selling a product exhausts all of the patent holder's patent rights in that product even if (i) the patent holder placed express post-sale restrictions on the product or (ii) the sale occurred outside of the United States. Under the "exhaustion doctrine," the sale of a product extinguishes all of the patent holder's patent rights in that product. The Federal Circuit, however, held that patent holders may avoid exhaustion by expressly prohibiting reuse or resale of their products, and that no exhaustion occurs when a product is sold abroad. The Court reversed on both counts, explaining that exhaustion limits the rights of the *patent holder*, not the *product buyer*, and therefore exhaustion applies even when the patent holder clearly prohibits resale. If the patent holder negotiates a contract restricting a purchaser's right to use or resell the item, then contract law might provide a remedy for any breach, but a suit for patent infringement is unavailable. Further, the Patent Act does not evince a congressional intent to undermine the longstanding "borderless" common law principle of exhaustion. Thus, exhaustion applies to sales occurring outside of the United States.

28. ***Cooper v. Harris*, No. 15-1262 (M.D.N.C., 159 F. Supp. 3d 600; probable jurisdiction noted June 27, 2016; argued Dec. 5, 2016; SG as amicus, supporting appellees). The Questions Presented are: (1) Whether the court below erred in presuming racial predominance from North Carolina's reasonable reliance on *Bartlett v. Strickland*, 556 U.S. 1 (2009), that a district created to ensure that African Americans have an equal opportunity to elect their preferred candidate of choice complies with the Voting Rights Act if it contains a numerical majority of African Americans. (2) Whether the court below erred in applying a standard of review that required North Carolina to demonstrate its construction of North Carolina Congressional District 1 was "actually necessary" under the Voting Rights Act instead of simply showing it had "good reasons" to believe the district, as created, was needed to foreclose future vote dilution claims. (3) Whether the court below erred in relieving plaintiffs of their burden to prove "race rather than politics" predominated with proof of an alternative plan that achieves the legislature's political goals, is comparably consistent with traditional redistricting principles, and brings about greater racial balance than the challenged districts. (4) Whether, regardless of any other error, the finding of the court below of racial gerrymandering violations was based on clearly erroneous fact-finding. (5) Whether the court below erred in failing to dismiss plaintiffs' claims as being barred by claim preclusion or issue preclusion. (6) Whether, in the interests of judicial comity and federalism, the Supreme Court should order full briefing and oral argument to resolve the split between the court below and the North Carolina Supreme Court, which reached the opposite result in a case raising identical claims.**

Decided May 22, 2017 (581 U.S. __). M.D.N.C./Affirmed. Justice Kagan for a 5-3 Court (Thomas, J., concurring; Alito, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., and Kennedy, J.; Gorsuch, J., took no part in the case). The Court held that (1) a prior state-court judgment finding lawful two North Carolina congressional districts did not dictate the disposition of this case; (2) the district court did not clearly err in concluding that race was the

predominant factor in the drawing of the two districts; and (3) North Carolina's use of race in drawing the districts does not withstand strict scrutiny. The Court largely grounded all three conclusions on the "clear error" standard of review that applies to the factual findings of the three-judge district court. First, the district court reasonably found that the plaintiffs in the previous state-court case are not members of the same organizations that brought this case, and therefore res judicata does not bar this suit. Second, the district court reasonably concluded that the State intentionally established a racial target for the two districts based on the court's review of witness testimony, racial data, and other evidence. Third, the State failed to satisfy strict scrutiny for either district. The first district, District 1, had previously functioned as a successful "crossover district" (one in which white voters regularly joined black voters in electing the black voters' preferred candidates), and thus § 2 of the Voting Rights Act did not require the State to make the district a majority-minority district in order to avoid liability for vote dilution. The second district, District 12, failed strict scrutiny because direct and circumstantial evidence—including public statements from state senators admitting that racial considerations underlie the redistricting of District 12—demonstrates that the State's purpose had been racial, not political, gerrymandering.

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29. ***TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, No. 16-341 (Fed. Cir., 821 F.3d 1338; cert. granted Dec. 14, 2016; argued Mar. 27, 2017). Whether the patent venue statute, 28 U.S.C. § 1400(b), which provides that patent infringement actions "may be brought in the judicial district where the defendant resides[,]" is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by the statute governing "[v]enue generally," 28 U.S.C. § 1391, which has long contained a subsection (c) that, where applicable, deems a corporate entity to reside in multiple judicial districts.**

Decided May 22, 2017 (581 U.S. __). Federal Circuit/Reversed and remanded. Justice Thomas for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that venue in a patent infringement action against a domestic corporation is controlled solely by the patent venue statute, 28 U.S.C. § 1400(b), which requires plaintiffs to file suit in either the defendant's state of "residence"—defined by the Court in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226 (1957), to mean the state of incorporation—or "where the defendant has committed acts of infringement and has a regular and established place of business." Section 1400(b) does not incorporate the broader definition of "residence" contained in the general venue statute, 28 U.S.C. § 1391, but instead stands alone and apart from § 1391. In reversing the Federal Circuit and the long-standing practice of allowing suit in any district where a defendant is subject to personal jurisdiction, the Court focused on the current language of § 1391, which states that it applies unless "otherwise provided by law." The Court also cited the history of the patent venue statute, explaining that the savings clause in § 1391 "makes explicit the qualification that this Court previously found implicit in the statute"—namely, that § 1400(b) takes patent infringement actions out of the purview of § 1391.

30. ***Water Splash, Inc. v. Menon*, No. 16-254 (Tex. App., 472 S.W.3d 28; cert. granted Dec. 2, 2016; argued Mar. 22, 2017; SG as amicus, supporting petitioner). Whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters authorizes service of process by mail.**

Decided May 22, 2017 (581 U.S. __). Tex. App./Vacated and remanded. Justice Alito for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), 20 U.S.T. 361, permits service of process by mail. Article 10(a) of the Convention states that, absent a signatory's objection, the "Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad." Although Article 10(a) does not expressly mention service of process, the Court reasoned that the phrase "'send judicial documents' encompasses sending documents *for the purposes of service*." Moreover, the word "send" is a "broad term," and "the scope of the Convention is limited to service of documents." Further, the Convention's drafters, the Executive Branch, and foreign signatories all have interpreted the Convention to encompass service by mail. Thus, service by mail is permissible under the Convention "if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law."

31. ***Howell v. Howell*, No. 15-1031 (Ariz., 361 P.3d 936; CVSG Apr. 18, 2016; cert. supported Oct. 11, 2016; cert. granted Dec. 2, 2016; argued Mar. 20, 2017; SG as amicus, supporting respondent). Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.**

Decided May 15, 2017 (581 U.S. __). Ariz./Reversed and remanded. Justice Breyer for a unanimous Court (Thomas, J., concurring in part and concurring in the judgment; Gorsuch, J., took no part in the case). The Court held that when a military veteran waives part of his retirement pay in order to receive disability benefits, a state court cannot order the veteran to compensate his former spouse for the reduction in her share of the retirement pay. A 1982 federal statute authorizes states to treat a veteran's retirement pay as community property divisible in a divorce, except for any portion of the retirement pay that the veteran waives to receive disability benefits. (Veterans commonly do this because disability benefits are nontaxable, unlike retirement pay.) Here, a veteran's ex-wife received half of his retirement pay under a divorce decree. When the veteran later waived part of the retirement pay in order to receive disability benefits, the ex-wife moved to enforce the original decree, and the Arizona courts ordered him to reimburse her for reducing her share of the retirement pay. The Court reversed, explaining that federal law preempts such an order, which effectively treats waived retirement pay as divisible community property.

32. ***Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, No. 16-32 (Ky., 478 S.W.3d 306; cert. granted Oct. 28, 2016; argued Feb. 22, 2017). Whether the Federal Arbitration Act, 9 U.S.C. § 2, preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.**

Decided May 15, 2017 (581 U.S. __). Ky./Reversed in part, vacated in part, and remanded. Justice Kagan for a 7-1 Court (Thomas, J., dissenting; Gorsuch, J., took no part in the case). The Court held that requiring an explicit statement of intent before a power of attorney can authorize the negotiation of arbitration agreements violates the Federal Arbitration Act ("FAA"). The FAA's equal-treatment provision, 9 U.S.C. § 2, requires courts to treat arbitration agreements the same as any other contract, and therefore prohibits facial discrimination *and* covert discrimination disfavoring contracts that have the defining features of arbitration agreements. Kentucky's "clear-statement" rule violates the FAA because, although states are permitted to adopt general rules that incidentally burden arbitration agreements, Kentucky's rule here hinged on the primary characteristic of an arbitration agreement, singling out arbitration agreements for disfavored treatment.

Gibson Dunn
Counsel for
Amicus Curiae
Chamber of
Commerce of the
United States of
America

33. ***Midland Funding, LLC v. Johnson*, No. 16-348 (11th Cir., 823 F.3d 1334; cert. granted Oct. 11, 2016; argued Jan. 17, 2017; SG as amicus, supporting respondent). The Questions Presented are: (1) Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (2) Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.**

Decided May 15, 2017 (581 U.S. __). Eleventh Circuit/Reversed. Justice Breyer for a 5-3 Court (Sotomayor, J., dissenting, joined by Ginsburg and Kagan, J.J.; Gorsuch, J., took no part in the case). The Court held that a debt collector who submits a claim that is time barred and identifies the age of the debt in a bankruptcy proceeding does not violate provisions of the Fair Debt Collection Practices Act ("the Act") prohibiting creditors from using "false, deceptive, or misleading representations" or "unfair or unconscionable means" to collect a debt. 15 U.S.C. §§ 1692e, 1692f. In litigation following a bankruptcy proceeding, Midland Funding submitted a claim for payment of a debt and specified that the debt was more than ten years old, even though the relevant statute of limitations was six years. The bankruptcy court disallowed the claim. After the bankruptcy proceeding concluded, respondent sued Midland Funding seeking damages under Section 1692. The Supreme Court held that Midland Funding's submission to the bankruptcy court was not prohibited by the Act. The Court noted that the Bankruptcy Code defines a "claim" as a "right to payment" and, under the laws of most states, the expiration of a statute of limitations eliminates a creditor's remedy but leaves its right to repayment intact. The Court noted that no part of the Bankruptcy Code limits creditors to submitting *enforceable* claims; to the

contrary, a number of provisions allow the submission of contingent or disputed claims. Further, a debtor must assert the statute of limitations as an affirmative defense in a bankruptcy proceeding, and Chapter 13 bankruptcies involve experienced counterparties, including a trustee, who are unlikely to be deceived or misled by time-barred claims. Finally, Midland Funding's claim was neither "unconscionable" nor "unfair" because the debtor, not the debt collector, initiated the bankruptcy proceeding and would have access to the services of a professional, experienced trustee. The Court declined to resolve whether initiating civil litigation over stale claims, rather than submitting a stale claim in a bankruptcy proceeding, violates the Act.

34. ***Bank of Am. Corp. v. City of Miami*, No. 15-1111 (11th Cir., 800 F.3d 1262; consolidated with *Wells Fargo & Co. v. City of Miami*, No. 15-1112; cert. granted June 28, 2016; argued Nov. 8, 2016; SG as amicus, supporting respondent). The Questions Presented are: (1) Whether, by limiting suit to "aggrieved person[s]" under the Fair Housing Act ("FHA"), Congress required that FHA plaintiffs plead more than Article III injury-in-fact. (2) Whether proximate cause, which FHA plaintiffs must plead, requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies. (3) Whether the City of Miami is an "aggrieved person" under the FHA.**

Decided May 1, 2017 (581 U.S. __). Eleventh Circuit/Vacated and remanded. Justice Breyer for a 5-3 Court (Thomas, J., concurring in part and dissenting in part, joined by Kennedy and Alito, J.J.; Gorsuch, J., took no part in the case). The Court held that a city claiming that a bank's discriminatory lending practices caused, among other things, reduced property taxes and urban blight, is an "aggrieved person" authorized to sue under the Fair Housing Act ("FHA"). The FHA allows any "aggrieved person" to file a civil action seeking damages for a violation of the statute. 42 U.S.C. §§ 3613(a)(1)(A), 3613(c)(1). An "aggrieved person" is "any person who . . . claims to have been injured by a discriminatory housing practice." *Id.* at § 3602(i). Here, the City of Miami qualifies as an "aggrieved person" because it complains that certain banks engaged in unlawfully predatory lending practices that caused a disproportionate number of foreclosures in minority neighborhoods, decreasing the property value of the foreclosed homes and other homes in the neighborhood, and ultimately leading to reduced tax revenues and increased expenditures on municipal services. Because those and other claimed injuries "are, at least, '*arguably* within the zone of interests' that the FHA protects," the City is an "aggrieved person" under the statute. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The Court also held that establishing proximate cause for damages under the FHA requires more than merely showing that the injuries foreseeably flowed from the alleged violation. Rather, there must be some direct relation between the injury asserted and the injurious conduct alleged. The Court, however, declined to further define "proximate cause" for purposes of the FHA, remanding for the lower courts to consider the issue in the first instance.

35. ***Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, No. 15-423 (D.C. Cir., 784 F.3d 804; consolidated with *Helmerich & Payne Int'l Drilling Co. v. Venezuela*, No. 15-698; CVSG Feb. 29, 2016; cert. opposed May 24, 2016; cert. granted in part June 28, 2016; argued Nov. 2, 2016; SG as amicus, supporting petitioners). Whether the pleading standard for alleging that a case falls within the Foreign Sovereign Immunities Act's expropriation exception, 28 U.S.C. § 1605(a)(3), is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.**

Decided May 1, 2017 (581 U.S. __). D.C. Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that in cases brought under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), courts must decide the foreign sovereign's immunity defense "as near to the outset of the case as is reasonably possible," and that a nonfrivolous argument for denying immunity is insufficient to allow the case to proceed. FSIA shields foreign states from suit in U.S. courts unless a specified exception applies. The expropriation exception generally applies to cases where property is "taken in violation of international law," and the property "is owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The D.C. Circuit ruled that an expropriation claim may proceed so long as the plaintiff makes a nonfrivolous argument to bring a case within the exception. Rejecting that standard, the Supreme Court held that a court should resolve the merits of the immunity issue "[a]t the threshold" of the action, *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), even if that requires resolving factual disputes over whether the property was indeed "taken in violation of international law." Finding jurisdiction where a taking does not actually violate international law—e.g., "where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law"—would undermine the purposes of the statute, embroil sovereign states in American litigation for extended periods of time, and create "increased complexity in respect to a jurisdictional matter where clarity is particularly important."

36. ***Lewis v. Clarke*, No. 15-1500 (Conn., 320 Conn. 706; cert. granted Sept. 29, 2016; argued Jan. 9, 2017; SG as amicus, supporting reversal). Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.**

Decided Apr. 25, 2017 (581 U.S. __). Conn./Reversed and remanded. Justice Sotomayor for a unanimous Court (Thomas, J., concurring in the judgment; Ginsburg, J., concurring in the judgment; Gorsuch, J., took no part in the case). The Court held that (i) an Indian tribe's sovereign immunity does not bar a tort suit in state court against a tribal employee in his individual capacity, and (ii) an indemnification provision in tribal law cannot expand a tribe's sovereign immunity to protect individual employees who otherwise would not be protected. William Clarke, an employee of the Mohegan Tribe of Indians, hit a

car on Interstate 95 in Connecticut. The Connecticut Supreme Court held that Clarke was entitled to tribal sovereign immunity in the resulting lawsuit, reasoning that Clarke was protected because he was acting within the scope of his employment when the accident occurred. Reversing, the Supreme Court held that "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars [a] suit." Thus, because Clarke was sued in his individual capacity, he—not the Tribe—was the real party in interest and sovereign immunity did not bar the suit. The Court further held that a clause in the Mohegan Tribe Code requiring the Tribe to indemnify certain employees for any adverse judgments was irrelevant to the issue of sovereign immunity because "[t]he critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."

37. ***Manrique v. United States*, No. 15-7250 (11th Cir., 618 F. App'x 579; cert. granted Apr. 25, 2016; argued Oct. 11, 2016). Whether the Court should resolve the significant division among the circuits concerning the jurisdictional prerequisites for appealing a deferred restitution award made during the pendency of a timely appeal of a criminal judgment imposing sentence, a question left open by *Dolan v. United States*, 560 U.S. 605, 618 (2010).**

Decided Apr. 19, 2017 (581 U.S. __). Eleventh Circuit/Affirmed. Justice Thomas for a 6-2 Court (Ginsburg, J., dissenting, joined by Sotomayor, J.; Gorsuch, J., took no part in the case). The Court held that, to challenge a deferred restitution order, a criminal defendant must file a notice of appeal from that order, not from the initial judgment, unless the Government waives the deficiency by failing to raise a timely objection. After petitioner pleaded guilty, the district court entered an initial judgment and deferred the calculation of restitution. Petitioner appealed from the initial judgment. A few months later, the district court ordered petitioner to pay $4,500 in restitution and amended the initial judgment. Petitioner did not file a second notice of appeal, but instead challenged the amount of restitution in the pending appeal of the initial judgment. The Government timely objected. The Court held that petitioner failed to properly appeal the restitution order and amended judgment, explaining that the requirement of a notice of appeal is a mandatory rule of claims processing that is not subject to harmless-error review, and that the initial judgment and amended judgment did not merge. Nor did the notice of appeal from the initial judgment "spring forward" to cure the defect in the same way as a notice of appeal filed between the announcement and entry of a sentence.

38. ***Nelson v. Colorado*, No. 15-1256 (Colo., 364 P.3d 866; cert. granted Sept. 29, 2016; argued Jan. 9, 2017). Whether Colorado's apparently unique requirement that criminal defendants whose convictions have been reversed must prove their innocence by clear and convincing evidence in order to receive a refund for criminal monetary penalties they had paid is consistent with due process.**

Decided Apr. 19, 2017 (581 U.S. __). Colo./Reversed and remanded. Justice Ginsburg for a 7-1 Court (Alito, J., concurring in the judgment; Thomas, J., dissenting; Gorsuch, J., took no part in the case). The Court held that Colorado's

Compensation for Certain Exonerated Persons statute ("Exoneration Act"), which allows Colorado to retain conviction-related assessments unless a defendant institutes a civil proceeding and proves innocence by clear and convincing evidence, violates the Fourteenth Amendment's guarantee of due process. After petitioner was convicted of certain crimes, the trial court imposed a prison sentence and ordered her to pay $8,192.50 in court costs, fees, and restitution. Petitioner was acquitted of all charges on appeal. She then sought a refund of all amounts she had paid, but the Colorado Supreme Court denied the refund, reasoning that the Exoneration Act provides the exclusive authority for refunds, and petitioner had not filed or proved a claim under that statute. Reversing, the Supreme Court held that the Exoneration Act violates due process under the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, petitioner has an "obvious interest in regaining the money . . . paid to Colorado." Second, there is a risk of "erroneous deprivation" of that interest because, once the convictions were erased on appeal, petitioner's presumption of innocence was "restored" and she "should not be saddled with any burden of proof," and yet the statute requires her to prove innocence by clear and convincing evidence. Third, Colorado has "no interest" in withholding money to which it has "zero claim of right." Thus, the Exoneration Act violates due process because petitioner's interest in regaining her funds is high, "the risk of erroneous deprivation of those funds . . . is unacceptable, and the State has shown no countervailing interest in retaining the amounts in question."

Gibson Dunn
Counsel for Petitioner

39. ***Coventry Health Care of Missouri, Inc. v. Nevils*, No. 16-149 (Mo., 418 S.W.3d 451; cert. granted Nov. 4, 2016; argued Mar. 1, 2017; SG as amicus, supporting petitioners). The Questions Presented are: (1) Whether the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, preempts state laws that prevent private insurance carriers from seeking subrogation or reimbursement pursuant to their FEHBA contracts with the U.S. Office of Personnel Management. (2) Whether FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), violates the Supremacy Clause.**

Decided Apr. 18, 2017 (581 U.S. __). Mo./Reversed and remanded. Justice Ginsburg for a unanimous Court (Thomas, J., concurring; Gorsuch, J., took no part in the case). The Court held that the Federal Employees Health Benefits Act of 1959 ("FEHBA") expressly preempts a Missouri statute prohibiting private insurance contracts from including subrogation or reimbursement provisions. FEHBA authorizes the Office of Personnel Management ("OPM") to contract with private insurance carriers for federal employees' health insurance, and gives preemptive effect to the "terms of any contract under this chapter which relate to . . . payments with respect to benefits." 5 U.S.C. § 8902(m)(1). OPM contracts have long included provisions requiring insurance carriers to seek subrogation and reimbursement, contrary to Missouri law. Emphasizing the breadth of the phrase "relates to," as well as the federal interest in "uniform administration of the [insurance] program," the Court held that the subrogation and reimbursement provisions in OPM contracts plainly "relate to" benefits payments and therefore preempt Missouri's prohibition of contractual subrogation and reimbursement provisions in private insurance contracts. The Court further held that § 8902(m)(1) does not violate the

Supremacy Clause because "the statute, not a contract, strips state law of its force." Although the statute nominally assigns preemptive force to the "terms of any contract" as opposed to FEHBA, Congress need not "employ a particular linguistic formulation when preempting state law."

40. ***Goodyear Tire & Rubber Co. v. Haeger*, No. 15-1406 (9th Cir., 813 F.3d 1233; consolidated with *Musnuff v. Haeger*, No. 15-1491; cert. granted in part Sept. 29, 2016; argued Jan. 10, 2017). Whether a federal court is required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process.**

    Decided Apr. 18, 2017 (581 U.S. __). Ninth Circuit/Reversed and remanded. Justice Kagan for a unanimous Court (Gorsuch, J., took no part in the case). The Court held that when a federal court in a civil proceeding exercises its inherent authority to order a litigant to pay an adversary's legal fees as a sanction for bad-faith conduct, the award must be limited to the amount of fees the innocent party would not have incurred "but for" the misconduct. Courts "may not impose an additional amount as punishment for the sanctioned party's misbehavior" without providing "procedural guarantees applicable in criminal cases," such as applying the "beyond a reasonable doubt" burden of proof. Absent such procedures, monetary sanctions for a wrong must be limited to the losses caused by that wrong.

41. ***Dean v. United States*, No. 15-9260 (8th Cir., 810 F.3d 521; cert. granted in part Oct. 28, 2016; argued Feb. 28, 2017). Whether *Pepper v. United States*, 562 U.S. 476 (2011), overruled *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), and related opinions from the Eighth Circuit to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence or sentences under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the 18 U.S.C. § 924 (c) convictions.**

    Decided Apr. 3, 2017 (581 U.S. __). Eighth Circuit/Reversed and remanded. Chief Justice Roberts for a unanimous Court. The Court held that 18 U.S.C. § 924(c)—which mandates certain terms of imprisonment for using or carrying a firearm in furtherance of specified predicate crimes—does not preclude a sentencing court from considering the mandatory sentence required by that provision when calculating an appropriate sentence for the predicate offense. Petitioner was convicted of multiple robbery and firearms counts, as well as two counts of possessing a firearm in furtherance of a crime of violence in violation of § 924(c). At sentencing, petitioner asked the district court to consider his 30-year mandatory minimum sentence for the § 924(c) offenses when calculating the sentences for his other crimes. The district court refused, and the Eighth Circuit affirmed. Reversing, the Supreme Court reasoned that "sentencing courts have long enjoyed discretion in the information they may consider when setting an appropriate sentence." The Court rejected the Government's argument that district courts should calculate the sentence for each offense while disregarding whatever sentences a defendant faces on other counts. "Nothing in the law requires such an approach." Section 924(c) simply requires that any mandatory

minimum be imposed "in addition to" the sentence for the predicate offense, and that the mandatory sentence run consecutively to any other term of imprisonment imposed on the defendant, and those two requirements do not restrict a sentencing court's ability to consider a sentence imposed under § 924(c) when calculating the sentence for the predicate count.

42. ***McLane Co. v. E.E.O.C.*, No. 15-1248 (9th Cir., 804 F.3d 1051; cert. granted in part Sept. 29, 2016; argued Feb. 21, 2017). Whether a district court's decision to quash or enforce an Equal Employment Opportunity Commission subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with the Supreme Court's precedents concerning the choice of standards of review.**

Decided Apr. 3, 2017 (581 U.S. __). Ninth Circuit/Vacated and remanded. Justice Sotomayor for a 7-1 Court (Ginsburg, J., concurring in part and dissenting in part). The Court held that a district court's decision to enforce or quash a subpoena issued by the Equal Employment Opportunity Commission ("EEOC") is reviewed for an abuse of discretion. Two factors compel this conclusion. First, the courts of appeals have a "longstanding" and "uniform" practice of reviewing for an abuse of discretion district court orders enforcing or quashing an administrative subpoena—a practice that predates Title VII, which granted the EEOC subpoena authority. Second, "basic principles of institutional capacity counsel in favor of deferential review" because a district court's decision to enforce or quash a subpoena generally "will turn either on whether the evidence sought is relevant to the specific charge before it or whether the subpoena is unduly burdensome in light of the circumstances," and district courts are "well suited" to make those determinations. Deferential review also streamlines litigation and frees appellate courts from the burden of reweighing facts that a district court already has weighed. Thus, because the Ninth Circuit wrongly reviewed *de novo* the district court's decision quashing an EEOC subpoena, the Court remanded the case so the court of appeals could reconsider its decision under the appropriate standard of review.

43. ***Expressions Hair Design v. Schneiderman*, No. 15-1391 (2d Cir., 808 F.3d 118; cert. granted Sept. 29, 2016; argued Jan. 10, 2017; SG as amicus, supporting neither party). Do state no-surcharge laws—laws allowing merchants to charge higher prices to consumers who pay with a credit card instead of cash, but require the merchant to communicate that price difference as a cash "discount" and not as a credit-card "surcharge"—unconstitutionally restrict speech conveying price information, as the Eleventh Circuit has held, or do they regulate economic conduct, as the Second and Fifth Circuits have held?**

Decided Mar. 29, 2017 (581 U.S. __). Second Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court (Breyer, J., concurring in the judgment; Sotomayor, J., concurring in the judgment, joined by Alito, J.). The Court held that New York General Business Law § 518, which prohibits merchants from assessing a "surcharge" on customers who use credit cards, implicates the merchants' First Amendment rights by regulating speech. Credit

card companies require merchants to pay a fee each time merchants complete a transaction with a credit card. Section 518 permits merchants to pass on these "swipe fees" to customers by either (i) setting two prices or (ii) setting a single price that incorporates the swipe fee and then offering a "discount" for cash purchasers. The statute, however, forbids merchants from setting a lower price and assessing a "surcharge" on customers who use credit cards. The Second Circuit concluded that Section 518 does not raise First Amendment concerns because the statute regulates conduct, not speech. Reversing, the Court acknowledged that "price controls regulate conduct alone," but explained that Section 518 regulates "the communication of prices rather than prices themselves." The Court therefore remanded for the circuit court to determine in the first instance whether the statute, as a speech regulation, violates the First Amendment. The Court also rejected a vagueness challenge to the statute, explaining that Section 518 clearly proscribes the speech of the merchants that filed suit, and "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

44. ***Moore v. Texas*, No. 15-797 (Tex. Crim. App., 470 S.W.3d 481; cert. granted in part June 6, 2016; argued Nov. 29, 2016). Whether it violates the Eighth Amendment and the decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.**

    Decided Mar. 28, 2017 (581 U.S. __). Tex. Crim. App./Vacated and remanded. Justice Ginsburg for a 5-3 Court (Roberts, C.J., dissenting, joined by Thomas and Alito, J.J.). The Court held that the Texas Court of Criminal Appeals ("CCA") applied an unconstitutional legal standard in determining that petitioner does not have an intellectual disability sufficient to preclude his death sentence under the Eighth Amendment. Under *Hall v. Florida*, 572 U.S. __ (2014), states must consider the medical community's diagnostic framework in determining whether a defendant is intellectually disabled. Here, the CCA deviated from modern medical standards by relying on its prior decision in *Ex parte Briseno*, 135 S.W.3d 1 (2004), which adopted medical standards from 1992 and crafted a unique multifactor test that includes non-clinical factors. The Court held that *Briseno*, in both application and design, creates an unconstitutional risk that persons with intellectual disabilities will be executed. By applying *Briseno*'s outdated standards, the CCA failed to adequately inform itself of the medical community's "prevailing" diagnostic framework and clinical practices, creating an "unacceptable risk that persons with intellectual disabilities will be executed" in violation of the Eighth Amendment.

45. ***Czyzewski v. Jevic Holding Corp.*, No. 15-649 (3d Cir., 787 F.3d 173; CVSG Feb. 29, 2016; cert. supported May 23, 2016; cert. granted June 28, 2016; argued Dec. 7, 2016; SG as amicus, supporting petitioners). Whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.**

Decided Mar. 22, 2017 (580 U.S. __). Third Circuit/Reversed and remanded. Justice Breyer for a 6-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that a bankruptcy court implementing a "structured dismissal" may not distribute a debtor's assets in a way that deviates from the Bankruptcy Code's default order of priorities without first obtaining the consent of affected creditors. As an initial matter, the Court held that petitioners, a group of former employees holding a judgment against the debtor, have Article III standing because they "suffered an injury in fact" when the bankruptcy court approved the structured dismissal—namely, the court's dismissal cost petitioners "a chance to obtain a settlement that respected their priority." Next, the Court explained that Chapter 11 bankruptcy typically ends in one of three ways: (1) approval of a negotiated plan for distributing the estate's assets, which must follow the Code's priority system unless the disadvantaged creditors consent; (2) conversion of the case to Chapter 7 for liquidation of the estate in accordance with the priority system; or (3) dismissal of the case and restoration of the status quo ante. Bankruptcy courts, however, sometimes approve structured dismissals, dismissing the bankruptcy case with certain strings attached. Here, a bankruptcy court approved a structured dismissal that distributed the estate's assets without following the Code's priority scheme by skipping a group of objecting creditors. The Third Circuit approved the structured dismissal, reasoning that the absence of feasible alternatives made this a "rare case" in which deviation from the statutory priorities was appropriate. The Court reversed, holding that structured dismissals (assuming they are permissible) may not be used to effect an end-run around the Code's priority system. Congress would have spoken more clearly if it had intended to allow bankruptcy courts to approve final dispositions of bankruptcy cases that skip objecting creditors. The Court also warned that creating a "rare case" exception would allow courts to "alter the balance" Congress struck when writing the Code.

46. ***Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827 (10th Cir., 798 F.3d 1329; CVSG May 31, 2016; cert. supported Aug. 18, 2016; cert. granted Sept. 29, 2016; argued Jan. 11, 2017; SG as amicus, supporting petitioners). What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?**

Decided Mar. 22, 2017 (580 U.S. __). Tenth Circuit/Vacated and remanded. Chief Justice Roberts for a unanimous Court. The Court held that, to meet their obligation to provide a free appropriate public education under the Individuals with Disabilities Education Act ("IDEA"), schools must offer an individualized educational program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." In reaching that holding, the Court rejected the school district's argument that *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), requires that individualized education programs provide only "*some* benefit, as opposed to *none*." The appropriate standard is "markedly more demanding." To fulfill the purpose of the IDEA and to "remedy the pervasive and tragic academic stagnation that prompted Congress to act," individualized education programs must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." In order to meet this

standard, school districts generally should seek to integrate the student in the regular classroom while providing individualized special education calculated to achieve advancement from grade to grade, although these goals do not create "an inflexible rule." Finally, the Court rejected the parents' argument that the IDEA requires "equal" educational opportunities, reasoning that such a standard would be "entirely unworkable."

47. ***Star Athletica, L.L.C. v. Varsity Brands, Inc.*, No. 15-866 (6th Cir., 799 F.3d 468; cert. granted May 2, 2016; argued Oct. 31, 2016; SG as amicus, supporting respondents). What is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?**

Decided Mar. 22, 2017 (580 U.S. __). Sixth Circuit/Affirmed. Justice Thomas for a 6-2 Court (Ginsburg, J., concurring in the judgment; Breyer, J., dissenting, joined by Kennedy, J.). The Court held that a design feature incorporated into a useful article is eligible for copyright protection if the design feature would itself qualify for copyright protection independently of the useful article, and the surface decorations on the cheerleading uniforms at issue here satisfy that test. In reaching that conclusion, the Court relied on the language of Section 101 of the Copyright Act, which states that any "pictorial, graphic, or sculptural work" incorporated into the "design of a useful article" is eligible for copyright protection if it "can be identified separately from" and is "capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101. The first element is met if a graphic design can easily be identified as a two- or three-dimensional element; the second element is met if a design can be viewed independently of the useful article. Here, Varsity Brands sued Star Athletica for infringing the graphic designs of five cheerleader uniforms. The district court granted summary judgment in favor of Star Athletica, finding that the designs were a utilitarian part of the uniforms and thus not protectable under the Copyright Act. The Sixth Circuit reversed, finding that the designs on the uniforms were "separately identifiable" because they can be viewed apart from the cheerleading uniform itself. The Court affirmed, explaining that the designs on the cheerleading uniforms were eligible for copyright protection because (1) a person can identify the decorations on the uniforms "as features having pictorial, graphic, or sculptural qualities;" and (2) "if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium—for example, on a painter's canvas—they would qualify" as two-dimensional works of art under Section 101.

48. ***Manuel v. City of Joliet*, No. 14-9496 (7th Cir., 590 F. App'x 641; cert. granted Jan. 15, 2016; argued Oct. 5, 2016; SG as amicus, supporting petitioner). Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.**

Decided Mar. 21, 2017 (580 U.S. __). Seventh Circuit/Reversed and remanded. Justice Kagan for a 6-2 Court (Thomas, J., dissenting; Alito, J., dissenting, joined by Thomas, J.). The Court held that when a judicial determination of probable cause is based solely on fabricated evidence, a criminal defendant may challenge his pretrial detention as an unreasonable seizure under the Fourth Amendment

even if his detention follows the start of the "legal process" in the criminal case—that is, "after the judge's determination of probable clause." The Fourth Amendment "prohibits government officials from detaining a person in the absence of probable cause," which occurs "when the police hold someone without any reason before the formal onset of a criminal proceeding." It also occurs when, as in petitioner's case, the "legal process itself goes wrong" because the judicial probable-cause determination is predicated on fabricated evidence, such as an arresting officer making false statements. The Court remanded for the Seventh Circuit to determine the accrual date of petitioner's claim under 42 U.S.C. § 1983, instructing the court of appeals to "look first to the common law of torts" and consider "the values and purposes of the constitutional right at issue."

49. ***NLRB v. SW Gen., Inc.*, No. 15-1251 (D.C. Cir., 796 F.3d 67; cert. granted June 20, 2016; argued Nov. 7, 2016). Whether the precondition in 5 U.S.C. § 3345(b)(1) of the Federal Vacancies Reform Act of 1998, on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis, applies only to first assistants who take office under Subsection (a)(1) of Section 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).**

Decided Mar. 21, 2017 (580 U.S. __). D.C. Circuit/Affirmed. Chief Justice Roberts for a 6-2 Court (Thomas, J., concurring; Sotomayor, J., dissenting, joined by Ginsburg, J.). The Court held that the Federal Vacancies Reform Act of 1998 ("FVRA") prohibits persons from performing the duties of a vacant office that requires Presidential appointment and Senate confirmation (a "PAS office") if that person also has been nominated to fill the position permanently. Article II of the Constitution requires the President to obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." § 2, cl. 2. Because the duties of these PAS offices may not be performed if a vacancy arises, Congress authorized the President in the FVRA to appoint acting officers to carry out the duties of vacant PAS offices. Subsection (a)(1) of the FVRA designates the first assistant of the office as the default acting official. Subsections (a)(2) and (a)(3) provide that, in the alternative, the President may choose either a person already serving in a PAS office or a senior employee in the relevant agency to serve as the acting official. But subsection (b)(1) states that, "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the 365-day period preceding the vacancy, the person "did not serve in the position of first assistant" to that office or "served in [that] position . . . for less than 90 days." In June 2010, the President directed a senior employee of the National Labor Relations Board to serve as the agency's acting general counsel, a PAS office. In 2011, the President nominated the same employee to fill that position permanently. The Senate took no action on the nomination, and the President withdrew it in 2013. The Court held that subsection (b)(1)'s prohibition on acting service by nominees means that the employee was "prohibited . . . from continuing his acting service" when the President nominated him to fill that position permanently and, therefore, the employee's "continued service" as acting general counsel "violated the FVRA."

50. ***SCA Hygiene Prods. v. First Quality Baby Prods.*, No. 15-927 (Fed. Cir., 807 F.3d 1311; cert. granted May 2, 2016; argued Nov. 1, 2016). Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286.**

Decided Mar. 21, 2017 (580 U.S. __). Federal Circuit/Vacated in part and remanded. Justice Alito for a 7-1 Court (Breyer, J., dissenting). The Court held that laches cannot bar claims for legal relief brought within the six-year limitations period in the Patent Act, 35 U.S.C. § 286. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), the Court held that laches was not available as a defense against claims for legal relief brought within the Copyright Act's three-year limitations period, reasoning that applying laches within a limitations period specified by Congress would give judges a "legislation-overriding role." *Id.* at 1674. "The same reasoning applies in this case." Thus, because Congress established a six-year limitations period under 35 U.S.C. § 286, "we infer that this provision represents a judgment by Congress that a patentee may recover damages for any infringement committed within six years of the filing of the claim."

51. ***Beckles v. United States*, No. 15-8544 (11th Cir., 616 F. App'x 415; cert. granted June 27, 2016; argued Nov. 28, 2016). The Questions Presented are: (1) Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which deemed unconstitutionally vague the residual clause of the Armed Career Criminal Act, applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in the career-offender provision of the U.S. Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2). (2) Whether *Johnson*'s constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review. (3) Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*.**

Decided Mar. 6, 2017 (580 U.S. __). Eleventh Circuit/Affirmed. Justice Thomas for a 5-2 Court (Kennedy, J., concurring; Ginsburg, J., concurring in the judgment; Sotomayor, J., concurring in the judgment; Kagan, J., took no part in the case). The Court held that the advisory federal Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. In 2015, the Court held that the "residual clause" in the Armed Career Criminal Act was unconstitutionally vague. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). That clause defined the phrase "violent felony" for purposes of determining whether a defendant was subject to a mandatory minimum sentence of fifteen years in prison. In this case, petitioner argued that an identical clause in the 2006 version of the career-offender Sentencing Guideline, U.S.S.G. § 4B1.2(a) (2006), was likewise unconstitutionally vague. (The residual clause was removed from the career-offender Sentencing Guideline in 2016.) The Supreme Court rejected petitioner's argument, reasoning that, unlike the mandatory minimum in the Armed Career Criminal Act, the Sentencing Guidelines do not "fix the permissible sentences" that a judge may impose. Instead, under *United States v.*

Booker, 543 U.S. 220 (2005), the Sentencing Guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Accordingly, the Sentencing Guidelines "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." The Court emphasized precedent holding that sentencing courts have "almost unfettered discretion to select the actual length of a defendant's sentence within the customarily wide range" permitted by Congress. Because a judge's "unfettered discretion" at sentencing cannot render a sentencing scheme void for vagueness, the advisory Sentencing Guidelines "are not amendable to a vagueness challenge" either.

52. ***Pena-Rodriquez v. Colorado*, No. 15-606 (Colo., 350 P.3d 287; cert. granted Apr. 4, 2016; argued Oct. 11, 2016; SG as amicus, supporting respondent). Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.**

Decided Mar. 6, 2017 (580 U.S. __). Colo./Reversed and remanded. Justice Kennedy for a 5-3 Court (Thomas, J., dissenting; Alito, J. dissenting, joined by Roberts, C.J., and Thomas, J.). The Court held that the "no-impeachment rule"—which provides that a final verdict may not later be called into question based on comments made during jury deliberations—must give way under the Sixth Amendment when a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant. All fifty states, the District of Columbia, and the federal system have some version of the no-impeachment rule, and the Court has twice refused to create a constitutional exception to the rule. First, in *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that the Sixth Amendment does not require an exception when evidence shows that some jurors were under the influence of drugs and alcohol during trial. Second, in *Warger v. Shauers*, 135 S. Ct. 521 (2014), the Court rejected a constitutional challenge to the no-impeachment rule when evidence from jury deliberations indicates that a juror had lied during *voir dire* to conceal pro-defendant bias. The "imperative to purge racial prejudice from the administration of justice" requires a different result, because racial bias presents a more pervasive and graver systemic threat to the jury system than the "anomalous" behaviors in *Tanner* and *Warger*. Although "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar," that bar must fall where, as here, a juror's statement "tend[s] to show that racial animus was a significant motivating factor in the juror's vote to convict."

53. ***Bethune-Hill v. Va. State Bd. of Elections*, No. 15-680 (E.D. Va., 2015 WL 6440332; probable jurisdiction noted June 6, 2016; argued Dec. 5, 2016; SG as amicus, supporting vacatur in part and affirmance in part). The Questions Presented are: (1) Whether the court below erred in holding that race cannot predominate even where it is the most important consideration in drawing a given district unless the use of race results in "actual conflict" with traditional districting criteria. (2) Whether the court below erred by concluding that the admitted use of a one-size-fits-all 55% black voting age**

population floor to draw twelve separate House of Delegates districts does not amount to racial predominance and trigger strict scrutiny. (3) Whether a court may disregard the admitted use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts. (4) Whether racial goals must negate all other districting criteria in order for race to predominate. (5) Whether the Virginia General Assembly's predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest.

Decided Mar. 1, 2017 (580 U.S. __). E.D. Va./Affirmed in part, vacated in part, and remanded. Justice Kennedy for a 7-1 Court (Alito, J., concurring in part and concurring in the judgment; Thomas, J., concurring in the judgment in part and dissenting in part). The Court held that the district court incorrectly applied the racial predominance standard for racial gerrymandering articulated in *Miller v. Johnson*, 515 U.S. 900 (1995), as to eleven of twelve challenged state legislative districts, but that the district court correctly concluded that the twelfth district was constitutional because, though race was a predominate factor in drawing it, the use of race was narrowly tailored to the compelling state interest of ensuring compliance with Section 5 of the Voting Rights Act of 1965. Plaintiffs challenging voting districts on the basis of racial gerrymandering must show that race was the "predominant factor" in drawing the district. Here, the district court erred in holding that plaintiffs could meet that standard only if there is an "actual conflict between traditional redistricting criteria and race" because, as the Court explained, plaintiffs also can show racial predominance through circumstantial evidence, such as the shape of a district or its demographics. On the other hand, the district court correctly concluded that the legislature's use of race in drawing the twelfth challenged district was narrowly tailored to a compelling state interest, because a 55% racial target was necessary for the district to avoid diminishing the ability of black voters to elect their preferred candidates, which would violate Section 5 of the Voting Rights Act of 1965. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

54. ***Buck v. Davis*, No. 15-8049 (5th Cir., 623 F. App'x 668; cert. granted June 6, 2016; argued Oct. 5, 2016). Whether the Fifth Circuit imposed an improper and unduly burdensome Certificate of Appealability ("COA") standard that contravenes the Supreme Court's precedent and deepens two circuit splits when it denied the petitioner a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that the petitioner was more likely to be dangerous in the future because he is black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing.**

Decided Feb. 22, 2017 (580 U.S. __). Fifth Circuit/Reversed and remanded. Chief Justice Roberts for a 6-2 Court (Thomas, J., dissenting, joined by Alito, J.). The Court held that the Fifth Circuit erred in denying petitioner a COA under 28 U.S.C. § 2253(c)(2)—which requires "a substantial showing of the denial of a constitutional right"—because petitioner had demonstrated both ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and

entitlement to reopen his habeas case under Federal Rule of Civil Procedure 60(b)(6). The Fifth Circuit "placed too heavy a burden on the prisoner at the COA stage" by "essentially deciding the case on the merits" rather than correctly asking whether "jurists of reason could disagree with the district court's resolution" of petitioner's ineffective-assistance claim and his claim that "extraordinary circumstances" warranted reopening habeas proceedings under Rule 60(b)(6). The Court also addressed the merits of petitioner's claim, and concluded that he was denied effective assistance of counsel because, during his capital sentencing hearing, his attorney called a psychologist to testify that petitioner was likely to act violently in the future because he is black. "No competent defense attorney would introduce such evidence about his own client." Further, relying on race to impose a criminal sanction "poisons public confidence" in the criminal justice system, warranting extraordinary relief under Rule 60(b)(6).

55. ***Fry v. Napoleon Cmty. Schools*, No. 15-497 (6th Cir., 788 F.3d 622; CVSG Jan. 19, 2016; cert. supported May 20, 2016; cert. granted June 28, 2016; argued Oct. 31, 2016; SG as amicus, supporting petitioners). Whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit brought under the Americans with Disabilities Act and the Rehabilitation Act that seeks damages—a remedy that is not available under the Individuals with Disabilities Education Act.**

    Decided Feb. 22, 2017 (580 U.S. __). Sixth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court (Alito, J., concurring in part and concurring in the judgment, joined by Thomas, J.). The Court held that exhaustion of the administrative procedures set out in the Individuals with Disabilities Education Act ("IDEA") is unnecessary when the "gravamen" of a plaintiff's lawsuit is something other than denial of the IDEA's core guarantee of a "free appropriate public education" ("FAPE"). Under 42 U.S.C. § 1415(l), plaintiffs suing under the IDEA to enforce the federal rights of children with certain disabilities must first exhaust the IDEA's administrative procedures. In this case, plaintiffs sued for money damages and a declaration that a school district had violated Title II of the Americans with Disabilities Act ("ADEA") by refusing to permit a child with a disability to use a service animal in school. The Court held that the exhaustion requirement of § 1415(l) might not apply if the "gravamen" of plaintiffs' lawsuit was a request for money damages or other relief that has "nothing to do with the provision of educational services." Because the Sixth Circuit did not analyze whether the gravamen of the complaint sought relief under the ADEA for a FAPE, or instead sought money damages or other non-FAPE relief, the Court remanded the case for a determination of whether "the gravamen of [the plaintiffs'] complaint is indeed the denial of a FAPE," which would "necessitat[e] further exhaustion."

56. ***Life Technologies Corp. v. Promega Corp.*, No. 14-1538 (Fed. Cir., 773 F.3d 1338; CVSG Oct. 5, 2015; cert. supported in part May 11, 2016; cert. granted in part June 27, 2016; argued Dec. 6, 2016; SG as amicus, supporting petitioners). Whether supplying a single, commodity component of a multi-component invention from the United States is an infringing act under**

35 U.S.C. § 271(f)(1), exposing the manufacturer to liability for all worldwide sales.

Decided Feb. 22, 2017 (580 U.S. __). Federal Circuit/Reversed and remanded. Justice Sotomayor for a 7-0 Court (Thomas and Alito, J.J., joining as to all but Part II-C; Alito, J., concurring in part and concurring in the judgment, joined by Thomas, J.; Roberts, C.J., took no part in the decision). The Court held that supplying a single component of a multicomponent invention for combination abroad does not give rise to liability under Section 271(f)(1) of the Patent Act, which prohibits supplying "all or a substantial portion of the components of a patented invention" for combination abroad. 35 U.S.C. § 271(f)(1). Promega Corporation sublicensed a patent to Life Technologies for the manufacture of a genetic testing toolkit that contains five components. Life Technologies manufactured one of those components in the United States and then shipped it to the United Kingdom for combination with the other four components. Promega Corporation sued for patent infringement under § 271(f)(1), claiming that Life Technologies was unlawfully supplying "all or a substantial portion of the components of" the toolkit for combination abroad. The Court held that no liability could attach under § 271(f)(1) because "a substantial portion" refers to a *quantitative* measurement, not a *qualitative* measurement; thus, as a matter of law, one component of a five-component invention is not "a substantial portion" of it. The text of § 271(f)(1) compels this conclusion because the words "all" and "portion" "convey a quantitative meaning," and "there is nothing in the neighboring text to ground a qualitative interpretation."

57. ***Lightfoot v. Cendant Mortg. Corp.*, No. 14-1055 (9th Cir., 769 F.3d 681; CVSG Oct. 5, 2015; cert. supported May 23, 2016; cert. granted June 28, 2016; argued Nov. 8, 2016; SG as amicus, supporting petitioners). The Questions Presented are: (1) Whether the phrase "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal" in Fannie Mae's charter confers original jurisdiction over every case brought by or against Fannie Mae to the federal courts. (2) Whether the majority's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), should be reversed.**

Decided Jan. 18, 2017 (580 U.S. __). Ninth Circuit/Reversed. Justice Sotomayor for a unanimous Court. The Court held that the charter of the Federal National Mortgage Association ("Fannie Mae"), which authorizes Fannie Mae "to sue and be sued . . . in any court of competent jurisdiction, State or Federal," does not confer subject-matter jurisdiction on federal courts. 12 U.S.C. § 1723a(a). The Court rejected the positions of the Ninth and D.C. Circuits, which had read *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), as establishing a rule that any express reference to the federal courts in a sue-and-be-sued clause automatically creates federal subject-matter jurisdiction. Instead, the Court explained that the phrase "any court of competent jurisdiction" plainly constitutes "a reference to a court with an existing source of subject-matter jurisdiction," and thus requires a preexisting and independent jurisdictional basis.

58. ***Shaw v. United States*, No. 15-5991 (9th Cir., 781 F.3d 1130; cert. granted Apr. 25, 2016; argued Oct. 4, 2016). Whether, for purposes of subsection**

(1) of the bank-fraud statute, 18 U.S.C. § 1344, a "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as the majority of circuits—nine of twelve—have held and as petitioner Lawrence Shaw argued before the Ninth Circuit, which instead joined the minority view in affirming his convictions for a scheme directed at a non-bank third party.

Decided Dec. 12, 2016 (580 U.S. __). Ninth Circuit/Vacated and remanded. Justice Breyer for a unanimous Court. The Court held that 18 U.S.C. § 1344(1), which makes it a crime to "knowingly execut[e] a scheme . . . to defraud a financial institution," applies to a defendant who intended to cheat only a bank depositor, not a bank. Lawrence Shaw was convicted of violating § 1344(1) after using a bank customer's personal information to transfer funds from the customer's account into other accounts from which Shaw withdrew the funds. He asserted that the statute does not apply to him because it requires "a specific intent . . . to cheat[] a *bank*," rather than "a *non-bank* third party." The Court rejected Shaw's arguments, explaining that the bank had property rights in the customer's account because the bank owned the funds in the account and could loan them out, and that Shaw's ignorance of that interest was immaterial. The Court also dismissed Shaw's contention that he did not intend to harm the bank, concluding that the statute requires only that the bank lose its right to use the property, not that it suffer ultimate financial loss, and that the plain language of the statute requires knowledge that the bank's property interest may be harmed, not the intent to harm that interest. The Court further concluded that applying § 1344(1) to Shaw's conduct was not precluded by a similar prohibition in § 1344(2), which makes it a crime to use "false or fraudulent pretenses" to obtain "property . . . under the custody or control of" a bank, because a plausible reading of § 1344(2) could apply "to circumstances significantly different from those at issue here." The Court refused to apply the rule of lenity because the statute is sufficiently clear.

59. ***Salman v. United States*, No. 15-628 (9th Cir., 792 F.3d 1087; cert. granted Jan. 19, 2016; argued Oct. 5, 2016). Whether the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), requires proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit has held, or whether it is enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held below.**

Decided Dec. 6, 2016 (580 U.S. __). Ninth Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that a tipper's gift of confidential information to a relative or a friend who trades on that information can suffice for insider-trading liability even when the tipper does not receive any tangible thing of value in exchange for the tip. Under the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5, a tippee is liable for securities fraud when he receives and trades on inside information knowing that the tipper disclosed the information in a breach of fiduciary duty. Here, an investment banker disclosed inside information as a gift to his brother, who then shared the information with a friend, petitioner. Knowing the origins of the inside

information, petitioner traded on it and ultimately was convicted of securities fraud. The Ninth Circuit rejected petitioner's argument that the investment banker who initially disclosed the inside information had not breached a fiduciary duty because he had not received money or some other tangible benefit in return. The Supreme Court affirmed, explaining that its decision in *Dirks v. SEC*, 463 U.S. 646 (1983), "resolves this case." In *Dirks*, the Court held that a tipper breaches a fiduciary duty by making a "gift of confidential information to a trading relative or a friend." 463 U.S. at 664. In such situations, the "tip and trade resemble trading by the insider followed by a gift of the profits to the recipient," and thus there is no need for an additional showing that the tipper received money or other personal benefit. *Id.* Accordingly, in this case, the investment banker who initially gifted inside information to his brother breached a fiduciary duty regardless of whether he received money or other value in exchange, and petitioner committed securities fraud by trading on the information knowing that it had been improperly disclosed. Moreover, the *Dirks* gift-giving framework is not so unclear as to be unconstitutionally vague or require applying the rule of lenity.

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60. ***Samsung Elecs. Co. v. Apple Inc.*, No. 15-777 (Fed. Cir., 786 F.3d 983; cert. granted Mar. 21, 2016; argued Oct. 11, 2016; SG as amicus, supporting neither party). Where a design patent is applied to only a component of a product, should an award of an infringer's profits be limited to those profits attributable to the component?**

Decided Dec. 6, 2016 (580 U.S. __). Federal Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that where infringement of a design patent involves a multicomponent product, the relevant "article of manufacture" used to calculate damages under 35 U.S.C. § 289 does not necessarily refer to the end product sold to consumers, but may instead refer to only the infringing component of the product. Apple sued Samsung for infringement of patents relating to the outward design of the popular iPhone, alleging that Samsung's smartphones infringed Apple's design patents. A jury agreed with Apple and awarded $399 million in damages for patent infringement—a sum equal to Samsung's profit from selling the infringing smartphones. The Federal Circuit affirmed the judgment, reasoning that limiting damages to only the infringing component of the smartphone was not required because the infringing component—the aesthetic design of the smartphone—could not be sold separately from the "innards" of the phone. The Supreme Court disagreed, emphasizing the plain language of § 289. The statutory phrase "article of manufacture" that serves as the basis for damages "encompasses both a product sold to a consumer and a component of that product" because the word "article" simply means "a particular thing." As such, that an article is integrated into a larger product "does not put it outside the category of articles of manufacture." This reading of § 289 is consistent with 35 U.S.C. §§ 101 and 171(a), which extend design patent protection to components of end products. The Court remanded the case for the Federal Circuit to consider in the first instance whether the relevant "article of manufacture" in this case is the smartphone as a whole or a particular component of the smartphone.

61. ***State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, No. 15-513 (5th Cir., 794 F.3d 457; CVSG Jan. 11, 2016; cert. opposed Apr. 15, 2016; cert. granted in part May 31, 2016; argued Nov. 1, 2016; SG as amicus, supporting respondents). What standard governs the decision whether to dismiss a relator's claim for violation of the False Claims Act's seal requirement?**

Decided Dec. 6, 2016 (580 U.S. __). Fifth Circuit/Affirmed. Justice Kennedy for a unanimous Court. The Court held that the False Claims Act ("FCA") does not mandate dismissal for violations of the requirement that relator complaints "remain under seal for at least 60 days." 31 U.S.C. § 3730(b)(2). The FCA authorizes private parties, called relators, to seek recovery from persons who submit false or fraudulent claims for payment to the Government. In this case, the relators provided information about their lawsuit to several news outlets and government officials while the complaint was still under seal pursuant to § 3730(b)(2)—a provision that "creates a mandatory rule" but says nothing about a remedy. Absent congressional guidance regarding a remedy, the Court is reluctant to adopt a rule requiring "loss of all later powers to act." *United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990). Further, other FCA provisions expressly require dismissal of a relator's action, and Congress "would have said so" had it intended to impose the same remedy under § 3730(b)(2). District courts therefore have "discretion" to determine whether dismissal or some other sanction is an appropriate remedy for violations of the FCA's seal requirement.

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62. ***Bravo-Fernandez v. United States*, No. 15-537 (1st Cir., 790 F.3d 41; cert. granted Mar. 28, 2016; argued Oct. 4, 2016). Whether, under *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), a vacated, unconstitutional conviction can cancel out the preclusive effect of an acquittal under the collateral estoppel prong of the Double Jeopardy Clause.**

Decided Nov. 29, 2016 (580 U.S. __). First Circuit/Affirmed. Justice Ginsburg for a unanimous Court (Thomas, J., concurring). The Court held that the issue-preclusion component of the Double Jeopardy Clause does not bar retrial of a criminal defendant when the jury returns inconsistent verdicts of conviction and acquittal, even if the convictions are later vacated on appeal. The only contested issue at petitioners' criminal trial was whether they had committed bribery in violation of 18 U.S.C. § 666, as petitioners had conceded the "agreement" and "travel" elements of related charges for conspiring to violate § 666 and traveling in interstate commerce to violate § 666. A jury nonetheless returned "irreconcilably inconsistent" verdicts, convicting petitioners of bribery under § 666, but acquitting them of the conspiracy and traveling charges. After the First Circuit vacated the bribery convictions because of an error in the jury instructions unrelated to the verdict's inconsistency, petitioners argued that the Double Jeopardy Clause barred retrial on the bribery charge. The Court rejected that argument, explaining that a criminal defendant claiming issue preclusion bears the burden of demonstrating that a prior jury "actually decided" the issue in favor of acquittal. Here, petitioners could not possibly meet that burden because the jury returned "contradictory determinations" on whether petitioners committed bribery. The First Circuit's invalidation of the § 666 convictions did not "erase or

reconcile that inconsistency," or otherwise prove that the jury actually acquitted petitioners of the § 666 charge. As such, petitioners "cannot establish the factual predicate necessary" for issue preclusion under the Double Jeopardy Clause.

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

    Restored to the calendar for reargument in October Term 2017.

64. ***Sessions v. Dimaya*, No. 15-1498 (9th Cir., 803 F.3d 1110; cert. granted Sept. 29, 2016; argued Jan. 17, 2017). Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.**

    Restored to the calendar for reargument in October Term 2017.

Cases Determined Without Argument

1. ***Bosse v. Oklahoma*, No. 15-9173 (Okla. Crim. App., 360 P.3d 1203; Vacated and remanded Oct. 11, 2016)**. Per Curiam (Thomas, J., concurring, joined by Alito, J.). The Court held that the Oklahoma Court of Criminal Appeals erred in concluding that *Payne v. Tennessee*, 501 U.S. 808 (1991), "implicitly overruled" the entire holding of *Booth v. Maryland*, 482 U.S. 496 (1987), which held that the Eighth Amendment bars capital sentencing juries from considering victim-impact testimony as well as opinion testimony from a victim's family members about the crime, the defendant, and the appropriate punishment. In particular, the Court held that *Payne* overruled only *Booth*'s holding concerning victim-impact testimony; it did not overrule any other aspect of *Booth*. Accordingly, the Oklahoma Court of Criminal Appeals wrongly concluded that *Payne* "implicitly overruled" the portions of *Booth* regarding opinion testimony from a victim's family members about the crime, the defendant, and the appropriate punishment. Only the Supreme Court can overrule its own holdings, and unless that occurs, the Court's opinions remain binding precedent "regardless of whether subsequent cases have raised doubts about their continuing vitality."

2. ***Ivy v. Morath*, No. 15-486 (5th Cir., 781 F.3d 250; CVSG Feb. 29, 2016; cert. opposed May 20, 2016; cert. granted June 28, 2016; SG as amicus, urging vacatur and dismissal for mootness; Vacated and remanded Oct. 31, 2016)**. Judgment vacated and remanded with instructions to dismiss the case as moot pursuant to *United States v. Munsingwear*, 340 U.S. 46 (1950).

3. ***White v. Pauly*, No. 16-67 (10th Cir., 814 F.3d 1301; Vacated and remanded Jan. 9, 2017)**. Per Curiam (Ginsburg, J., concurring). The Court held that the Tenth Circuit erred in concluding that Officer Ray White was not entitled to qualified immunity on the ground that White violated clearly established law when he "arrived late at an ongoing police action" and failed to identify himself before shooting an armed suspect. White was the third officer to arrive on scene to an ongoing police action outside a house. Soon after arriving, someone inside the house shouted: "We have guns." Someone else fired two shotgun blasts. White assumed that his fellow officers outside the house had announced their presence, and he took cover behind a rock wall. When someone inside the house opened a window and pointed a gun towards White, White shot and killed the occupant without warning. The occupant's estate brought an excessive-force claim under 42 U.S.C. § 1983. The Court held that White was entitled to qualified immunity insofar as he failed to identify himself as a police officer, explaining that the law did not "clearly establish" that an officer in White's position was required to second guess whether his fellow officers had already announced their presence. The Court rejected the Tenth Circuit's reliance on "general" excessive-force principles, reminding lower courts that "clearly established law" should not be defined at too high a level of generality. The Court remanded for further proceedings on whether White could be denied qualified immunity on other theories of liability.

4. ***Gloucester Cnty. Sch. Bd. v. G. G.*, No. 16-273 (4th Cir., 822 F.3d 709; cert. granted in part Oct. 28, 2016; Vacated and remanded Mar. 6, 2017)**. Judgment vacated and remanded for further consideration in light of the guidance documents issued by the Department of Education and Department of Justice on February 22, 2017.

5. ***Rippo v. Baker*, No. 16-6316 (Nev., 368 P.3d 729; Vacated and remanded Mar. 6, 2017)**. Per Curiam. The Court held that the Nevada Supreme Court applied the wrong legal standard in determining whether the Due Process Clause required the judge at petitioner's trial to recuse himself. Petitioner was convicted of first-degree murder and sentenced to death. At the time of trial, the judge was under a federal bribery investigation, and the district attorney's office prosecuting petitioner also was participating in the investigation. Petitioner sought post-conviction relief, arguing that the investigation of the judge showed that the judge was biased in favor of the district attorney's office. The Nevada Supreme Court denied post-conviction relief, reasoning that petitioner had not shown that the judge was "actually biased." Reversing, the Court explained that the "actually biased" standard was the wrong one. The Due Process Clause requires recusal when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Because the Nevada Supreme Court did not apply that standard, the Court granted the petition for a writ of certiorari, vacated the judgment below, and remanded for application of the correct standard.

6. ***North Carolina v. Covington*, No. 16-1023 (M.D.N.C., 316 F.R.D. 117; Vacated and remanded June 5, 2017)**. Per Curiam. The Court held that the district court erred in crafting relief for unlawful racial gerrymandering without undertaking the required case-specific balancing of equitable considerations. The district court determined that the North Carolina General Assembly had unconstitutionally gerrymandered on the basis of race. Although the district court did not require the General Assembly to redraw the legislative districts before an upcoming election, it did shorten the term from two years to one year for all elected state legislators from the unconstitutionally drawn districts, and required special elections to elect new representatives at the end of the one-year term. The district court ordered this relief after reasoning that the costs of the special election '"pale in comparison"' to the prospect that citizens will be "'represented by legislators elected pursuant to a racial gerrymander."' That "cursory" balancing of the equities would require a special election "in *every* racial-gerrymandering case—a result clearly at odds with our demand for careful case-specific analysis."

7. ***Virginia v. LeBlanc*, No. 16-1177 (4th Cir., 841 F.3d 256; Reversed June 12, 2017)**. Per Curiam (Ginsburg, J., concurring in the judgment). The Court held that the Fourth Circuit erred in concluding that a Virginia trial court unreasonably applied clearly established federal law when it ruled that the Commonwealth's geriatric release program, which allows older inmates to receive conditional release under normal parole factors, provides a meaningful opportunity for juvenile nonhomicide offenders to receive conditional release. Respondent, a juvenile at the time of his offense, was sentenced to life in prison for raping a 62-year old woman. A few years later, the Court in *Graham v. Florida*, 560 U.S. 48

(2010), held that the Eighth Amendment prohibits sentencing a juvenile offender convicted of a nonhomicide crime to life in prison without parole. Respondent moved to vacate his sentence. A Virginia trial court denied the motion, reasoning that Virginia's geriatric release program satisfies *Graham* by providing juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Respondent then filed for federal habeas relief. The district court granted relief, and the Fourth Circuit affirmed, reasoning that the Virginia trial court unreasonably applied *Graham*. The Supreme Court reversed, emphasizing that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a "difficult standard" for awarding habeas relief: a state court's ruling must be "objectively unreasonable, not merely wrong." Because reasonable jurists could disagree about whether the geriatric release program satisfies the Eighth Amendment, the Virginia trial court did not unreasonably apply the rule established in *Graham*.

8. ***Jenkins v. Hutton*, No. 16-1116 (6th Cir., 839 F.3d 486; Reversed and remanded June 19, 2017)**. Per Curiam. The Court held that a habeas petitioner could not obtain review of his procedurally defaulted challenge to a jury instruction in his capital case because "a properly instructed jury could have recommended death." The defendant argued in his habeas proceeding, but not on direct appeal, that the trial court had wrongly failed to instruct the penalty-phase jury that it could consider only the two aggravating factors found by the guilt-phase jury. The court of appeals reached the merits of that procedurally defaulted claim under the miscarriage-of-justice exception established in *Sawyer v. Whitley*, 505 U.S. 333 (1992). Attempting to follow *Sawyer*, the court of appeals asked "whether . . . the (alleged) *improper* instructions . . . might have affected the jury's verdict." The proper *Sawyer* analysis, however, asks "[w]hether, given *proper* instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances." Under that proper test, the interests-of-justice exception does not apply because the defendant has not shown '"by clear and convincing evidence that'—if properly instructed—'no reasonable juror would have' concluded that the aggravating circumstances in [this] case outweigh the mitigating circumstances." *Sawyer*, 505 U.S. at 336. After all, the trial court and two state appellate court each independently weighed those factors, and concluded that the death penalty was justified.

9. ***Pavan v. Smith*, No. 16-992 (Ark., 505 S.W.3d 169; Reversed and remanded June 26, 2017)**. Per Curiam for a 6-3 Court (Gorsuch, J., dissenting, joined by Thomas and Alito, J.J.). The Court held that a state violates the Constitution when it denies married same-sex couples the same state-law right of married opposite-sex couples to have the name of the biological mother's spouse entered as the second parent on a child's birth certificate. Arkansas Code § 20-18-401 provides that, if a child's biological mother was married at the time of conception or birth, the biological mother's "husband shall be entered on the certificate as the father of the child," even if the couple conceived the child via an anonymous sperm donor. Petitioners are two married same-sex couples who conceived children through anonymous sperm donation, and then sought to have both spouses listed as parents on the birth certificates. Relying on Arkansas Code

§ 20-18-401, Arkansas issued birth certificates bearing only the biological mothers' names. Petitioners sued, arguing that the statute is unconstitutional. The Court agreed. Relying *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court observed that the Arkansas statute unconstitutionally permits state officials to omit a married woman's female spouse's name from a child's birth certificate, but the officials could not do the same thing for an opposite-sex couple. Such disparate treatment runs afoul of *Obergefell*'s requirement that states provide same-sex couples the full "constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct. at 2601. Furthermore, because Arkansas uses birth certificates to give married parents a form of legal recognition not available to unmarried parents, Arkansas may not deny married same-sex couples that same recognition.

10. ***Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (9th Cir., 847 F.3d 1151; 4th Cir., 857 F.3d 554; Stay granted in part June 26, 2017)**. Per Curiam (Thomas, J., concurring in part and dissenting in part, joined by Alito and Gorsuch, J.J.). The Court granted certiorari in this case involving the validity of President Trump's executive order concerning the entry of foreign nationals into the United States, and partially stayed preliminary injunctions that had blocked enforcement of certain provisions of the order. Among other things, the order temporarily suspends entry into the United States by nationals of six Middle Eastern countries with links to terrorist activity. Many groups and individuals filed suit, and federal district courts in Maryland and Hawaii issued nationwide preliminary injunctions blocking portions of the order. The en banc Fourth Circuit affirmed the Maryland court's injunction on the theory that the order likely violates the Establishment Clause, and the Ninth Circuit affirmed the Hawaii court's injunction on statutory grounds. The Court agreed to hear both cases and, after weighing the equities of awarding interim relief, granted partial stays of the injunctions. In doing so, the Court distinguished between foreign nationals who can and cannot credibly claim a "bona fide relationship" with a person or an entity in the United States. Staying the injunction with regard to foreign nationals who *cannot* credibly claim such a "bona fide relationship" is appropriate because (i) no American party would be harmed by the exclusion of such foreign nationals under the order; (ii) such foreign nationals might not suffer any legally relevant harm; and (iii) the Executive's authority—and the Government's interest—were at their peak in enforcing the order against such foreign nationals. Thus, the Court stayed the injunction for individuals without the requisite "bona fide relationship," but preserved the injunction as to foreign nationals with such a relationship.

Pending Original Cases

1. ***Florida v. Georgia*, No. 22O142 (Original Jurisdiction; CVSG Mar. 3, 2014; leave to file a bill of complaint opposed Sept. 18, 2014; leave to file a bill of complaint granted Nov. 3, 2014). Whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.**

2. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; CVSG Oct. 20, 2014; leave to file bill of complaint opposed May 12, 2015; leave to file bill of complaint granted June 29, 2015). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's border. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.**

3. ***Delaware v. Pennsylvania & Wisconsin*, No. 22O145 (Original Jurisdiction; leave to file a bill of complaint granted Oct. 3, 2016; consolidated with *Arkansas v. Delaware*, No. 22O146). Whether check-like instruments that function like a money order or traveler's check, issued in relatively large amounts by a bank or other financial institution, are governed by the Disposition of Abandoned Money Orders and Traveler's Checks Act of 1974, 12 U.S.C. § 2501 *et seq.*, and which state has authority to claim ownership of such instruments that go unclaimed.**

Cases To Be Argued In October Term 2017

1. ***Epic Sys. Corp. v. Lewis*, No. 16-285 (7th Cir., 823 F.3d 1147; consolidated with *Ernst & Young LLP v. Morris*, No. 16-300 and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307; cert. granted Jan. 13, 2017). Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.**

2. ***Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299 (6th Cir., 817 F.3d 261; cert. granted Jan. 13, 2017). Whether the U.S. Court of Appeals for the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F), the portion of the Clean Water Act's judicial review provision that requires that agency actions "in issuing or denying any permit" under Section 1342 be reviewed by the court of appeals, to decide petitions to review the waters-of-the-United-States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.**

3. ***District of Columbia v. Wesby*, No. 15-1485 (D.C. Cir., 765 F.3d 13; cert. granted Jan. 19, 2017). The Questions Presented are: (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state. (2) Whether,**

even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

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

5. ***Artis v. District of Columbia*, No. 16-460 (D.C., 135 A.3d 334; cert. granted Feb. 27, 2017). Whether the tolling provision in 28 U.S.C. § 1367(d) suspends the limitations period for the state-law claim while the claim is pending and for 30 days after the claim is dismissed, or whether the tolling provision does not suspend the limitations period but merely provides 30 days beyond the dismissal for the plaintiff to refile.**

6. ***Hamer v. Neighborhood Housing Servs. of Chicago*, No. 16-658 (7th Cir., 835 F.3d 761; cert. granted Feb. 27, 2017). Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the U.S. Courts of Appeals for the Second, Fourth, Seventh, and Tenth Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the U.S. Courts of Appeals for the Ninth and District of Columbia Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine.**

7. ***Wilson v. Sellers*, No. 16-6855 (11th Cir., 834 F.3d 1227; cert. granted Feb. 27, 2017). Whether the court's decision in *Harrington v. Richter* silently abrogates the presumption set forth in *Ylst v. Nunnemaker*—that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision—as a slim majority of the en banc U.S. Court of Appeals for the Eleventh Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply.**

8. ***U.S. Bank, N.A. v. The Village at Lakeridge, LLC*, No. 15-1509 (9th Cir., 814 F.3d 993; CVSG Oct. 3, 2016; cert. opposed Feb. 13, 2017; cert. granted Mar. 27, 2017). Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh, and Tenth Circuits, or the clearly erroneous standard of review adopted by the Ninth Circuit.**

9. ***Leidos, Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581 (2d Cir., 818 F.3d 85; cert. granted Mar. 27, 2017). Whether the U.S. Court of Appeals for the Second Circuit erred in holding—in direct conflict with the decisions of the U.S. Courts of Appeals for the Third and Ninth Circuits—that Item 303 of Securities and Exchange Commission Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.**

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10. ***Jesner v. Arab Bank, PLC*, No. 16-499 (2d Cir., 822 F.3d 34; cert. granted Mar. 27, 2017). Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.**

11. ***Ayestas v. Davis*, No. 16-6795 (5th Cir., 826 F.3d 214; cert. granted Mar. 27, 2017). Whether the U.S. Court of Appeals for the Fifth Circuit erred in holding that 18 U.S.C. § 3599(f) withholds "reasonably necessary" resources to investigate and develop an ineffective-assistance-of-counsel claim that state habeas counsel forfeited, where the claimant's existing evidence does not meet the ultimate burden of proof at the time the Section 3599(f) motion is made.**

12. ***Patchak v. Zinke*, No. 16-498 (D.C. Cir., 828 F.3d 995; cert. granted May 1, 2017). Whether a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this court's determination that the "suit may proceed")—without amending the underlying substantive or procedural laws—violates the Constitution's separation of powers principles.**

13. ***Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, No. 16-784 (7th Cir., 830 F.3d 690; cert. granted May 1, 2017). Whether the safe harbor of Section 546(e) of the Bankruptcy Code prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the U.S. Courts of Appeals for the Second, Third, Sixth, Eighth, and Tenth Circuits, but contrary to the decisions from the U.S. Courts of Appeals for the Seventh and Eleventh Circuits.**

14. ***SAS Institute Inc. v. Lee*, No. 16-969 (Fed. Cir., 825 F.3d 1341; cert. granted May 22, 2017). Whether 35 U.S.C. § 318(a), which provides that the Patent Trial and Appeal Board in an inter partes review "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner," requires that Board to issue a final written decision as to every claim challenged by the petitioner, or whether it allows that Board to issue a final written decision with respect to the patentability of only some of the patent claims challenged by the petitioner, as the U.S. Court of Appeals for the Federal Circuit held.**

15. ***Husted, Ohio Sec. of State v. Randolph Institute*, No. 16-980 (6th Cir., 838 F.3d 699; cert. granted May 30, 2017). Whether 52 U.S.C. § 20507 permits Ohio's list-maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the National Voter Registration Act of 1993 and the Help America Vote Act of 2002.**

16. ***Carpenter v. United States*, No. 16-402 (6th Cir., 819 F.3d 880; cert. granted June 5, 2017). Whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of a cell-phone user over the course of 127 days is permitted by the Fourth Amendment.**

17. ***Oil States Energy Servs. LLC v. Greene's Energy Grp., LLC*, No. 16-712 (Fed. Cir., 639 F. App'x 639; cert. granted June 12, 2017). Whether inter partes review, an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.**

18. ***Gill v. Whitford*, No. 16-1161 (W.D. Wis., 218 F. Supp. 3d 837; jurisdiction postponed June 19, 2017). The Questions Presented are: (1) Whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis. (2) Whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles. (3) Whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*. (4) Whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed. (5) Whether partisan-gerrymandering claims are justiciable.**

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

whether new bond hearings must be afforded automatically every six months.

20. ***Sessions v. Dimaya*, No. 15-1498 (9th Cir., 803 F.3d 1110; cert. granted Sept. 29, 2016; argued Jan. 17, 2017; restored for reargument June 26, 2017). Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.**

21. ***Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (Colo. App., 370 P.3d 272; cert. granted June 26, 2017). Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.**

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

23. ***Trump v. Int'l Refugee Assistance Project*, No. 16-1436 (4th Cir., 857 F.3d 554; consolidated with *Trump v. Hawaii*, No. 16-1540; cert. granted June 26, 2017). The Questions Presented are: (1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable. (2) Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause. (3) Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad. The Court also directed the parties to brief whether the challenges to § 2(c) became moot on June 14, 2017.**

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

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25. ***Christie v. NCAA*, No. 16-476 (3d Cir., 2016 WL 4191891, CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477). Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.**

26. ***PEM Entities LLC v. Levin*, No. 16-492 (4th Cir., 655 Fed. App'x 971; cert. granted June 27, 2017). Whether bankruptcy courts should apply a federal**

rule of decision (as five circuits have held) or a state law rule of decision (as two circuits have held, expressly acknowledging a split of authority) when deciding to recharacterize a debt claim in bankruptcy as a capital contribution.

27. ***Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017). Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether assets are otherwise subject to execution under Section 1610.**

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

Pending Cases Calling For The Views Of The Solicitor General

1. ***Magee v. Coca-Cola Refreshments USA, Inc.*, No. 16-668 (5th Cir., 833 F.3d 530, CVSG Feb. 27, 2017). Whether Title III of the Americans with Disabilities Act of 1990 applies only to physical spaces that people can enter.**

2. ***Snyder v. Doe*, No. 16-768 (6th Cir., 834 F.3d 696; CVSG Mar. 27, 2017). Whether retroactively applying a sex-offender-registry law that classifies offenders into tiers based on crime of conviction, requires certain offenders to register for life, requires offenders to report in person periodically and within days of certain changes to registry information, and restricts offenders' activities within school zones imposes "punishment" in violation of the ex post facto clause.**

3. ***Rinehart v. California*, No. 16-970 (Cal., 377 P.3d 818; CVSG May 15, 2017). Did the Supreme Court of California err in holding, in conflict with decisions of the Eighth Circuit, Federal Circuit, and Colorado Supreme Court, that the Mining Law of 1872, as amended, does not preempt state bans of mining on federal lands despite being "an obstacle to the accomplishment and execution of the full purposes and objectives" of that law?**

4. ***Clark v. Va. Dep't of State Police*, No. 16-1043 (Va., 793 S.E.2d 1; CVSG May 15, 2017). The Questions Presented are: (1) Whether by enacting 38 U.S.C. § 4323(b)(2) in 1998 Congress lawfully subjected state employees to suit in state court under USERRA pursuant to a valid exercise of the federal legislature's war powers that was consistent with the framework and design of the Constitution. (2) Whether Congress lawfully abrogated any sovereign immunity the Virginia Department of State Police purportedly retained with respect to USERRA actions in state court when the federal legislature enacted 38 U.S.C. § 4323(b)(2) in 1998. (3) Whether the Supreme Court of**

Virginia erroneously affirmed the circuit court's decision to sustain the Virginia Department of State Police's amended special plea of sovereign immunity and dismiss Petitioner's complaint.

5. ***Westerngeco LLC v. Ion Geophysical Corp.*, No. 16-1011 (Fed. Cir., 837 F.3d 1358; CVSG May 30, 2017). Whether the U.S. Court of Appeals for the Federal Circuit erred in holding that lost profits arising from prohibited combinations occurring outside of the United States are categorically unavailable in cases where patent infringement is proven under 35 U.S.C. § 271(f).**

6. ***Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215 (11th Cir., 848 F.3d 953; CVSG June 19, 2017). Whether (and, if so, when) a statement concerning a specific asset can be a "statement respecting the debtor's . . . financial condition" within Section 523(a)(2) of the Bankruptcy Code.**

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7. ***Sokolow v. Palestine Liberation Org.*, No. 16-1071 (2d Cir., 835 F.3d 317; CVSG June 26, 2017). Whether the Fifth Amendment's due process clause precludes federal courts from exercising personal jurisdiction in this suit by American victims of terrorist attacks abroad carried out by the Palestinian Authority and the Palestine Liberation Organization.**

8. ***Samsung Elecs. Co. v. Apple Inc.*, No. 16-1102 (Fed. Cir., 839 F.3d 1034; CVSG June 26, 2017). The Questions Presented are: (1) Whether the court's decisions in *Graham v. John Deere Co.* and *KSR International Co. v. Teleflex Inc.* require a court to hold patents obvious as a matter of law under 35 U.S.C. § 103 where the patents make at most trivial advances over technologies well-known to a person of skill in the art. (2) Whether the court's decision in *eBay Inc. v. MercExchange, L.L.C.* requires application of the four-factor test for injunctions in accordance with traditional equitable principles, and therefore requires more than merely "some connection" between an infringing feature and asserted irreparable harm to support issuance of an injunction for patent infringement. (3) Whether the court's decision in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.* requires evidence that an accused product meets all elements of the relevant claim to support entry of a judgment of patent infringement.**

9. ***Brewer v. Ariz. Dream Act Coal.*, No. 16-1180 (9th Cir., 855 F.3d 957; CVSG June 26, 2017). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the Ninth Circuit erred in creating an immigration-specific rule under which state police power regulations that "arrang[e]" federal immigration classifications are pre-empted, even if pre-emption was not "the clear and manifest purpose of Congress." (2) Whether the Ninth Circuit erred in assuming that the Deferred Action for Childhood Arrivals program, an executive-branch policy of non-enforcement, was valid "federal law" capable of pre-empting a state police power regulation.**

10. ***Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (2d Cir., 837 F.3d 175; CVSG June 26, 2017). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the Second Circuit, in conflict with**

the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits. (2) Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the U.S. Courts of Appeals for the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the U.S. Court of Appeals for the Ninth Circuit). (3) Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Howell v. Howell*, No. 15-1031 (Ariz., 361 P.3d 936; CVSG Apr. 18, 2016; cert. supported Oct. 11, 2016; cert. granted Dec. 2, 2016). Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.**

2. ***Impression Prods., Inc. v. Lexmark Int'l, Inc.*, No. 15-1189 (Fed. Cir., 816 F.3d 721; CVSG June 20, 2016; cert. supported Oct. 12, 2016; cert. granted Dec. 2, 2016). The Questions Presented are: (1) Whether a "conditional sale" that transfers title to the patented item while specifying post-sale restrictions on the article's use or resale avoids application of the patent exhaustion doctrine and therefore permits the enforcement of such post-sale restrictions through the patent law's infringement remedy. (2) Whether, in light of the holding in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), that the common law doctrine barring restraints on alienation that is the basis of the exhaustion doctrine "makes no geographical distinctions," a sale of a patented article—authorized by the U.S. patentee—that takes place outside of the United States exhausts the U.S. patent rights in that article.**

3. ***Sandoz Inc. v. Amgen Inc.*, No. 15-1039 (Fed. Cir., 794 F.3d 1347; CVSG June 20, 2016; cert. supported Dec. 7, 2016; cert. granted Jan. 13, 2017; consolidated with *Amgen Inc. v. Sandoz Inc.*, No. 15-1195). Whether notice of commercial marketing given before FDA approval can be effective and whether, in any event, treating 42 U.S.C. § 262(l)(8)(A) of the Biologics Price Competition and Innovation Act of 2009 as a standalone requirement and creating an injunctive remedy that delays all biosimilars by 180 days after approval is improper.**

4. ***Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017, limited to question 1). The Questions Presented are: (1) Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether assets are otherwise subject to execution under Section 1610. (2) Whether the commercial use exception to execution immunity, codified at 28 U.S.C. § 1610(a), applies to a foreign sovereign's property located in the United States only when the property is used by the foreign state itself.**

5. ***Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15-1439 (Cal. Super. Ct., Unreported Adoption of Oral Ruling (No. CGC-14-538355, Oct. 23, 2015); CVSG Oct. 3, 2016; cert. supported May 23, 2017; cert. granted June 27, 2017). Whether state courts lack subject-matter jurisdiction over "covered class actions"—within the meaning of Section 16 of the Securities Act of 1933, as amended by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p—in which only claims under the 1933 Act are alleged.**

CVSG Cases In Which The Solicitor General Opposed Certiorari

1. ***SmithKline Beecham Corp. v. King Drug Co. of Florence, Inc.*, No. 15-1055 (3d Cir., 791 F.3d 388; CVSG June 6, 2016; cert. opposed Oct. 3, 2016; cert. denied Nov. 7, 2016). Whether the Third Circuit's holding that a patentee's grant of an exclusive license must undergo antitrust scrutiny by courts and juries—even though such a license is specifically permitted under the patent laws—is inconsistent with *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), and decades of earlier precedents.**

2. ***Pa. Higher Educ. Assistance Agency v. Pele*, No. 15-1044 (4th Cir., 628 F. App'x 870; CVSG May 16, 2016; cert. opposed Dec. 6, 2016; cert. denied Jan. 9, 2017; consolidated with *Pa. Higher Educ. Assistance Agency v. United States ex rel. Oberg*, No. 15-1045). Whether the Pennsylvania Higher Education Assistance Agency, a statewide agency located in the capital and unambiguously treated as an arm of the state by Pennsylvania, is an arm of Pennsylvania for purposes of federal law, or is instead an "independent political subdivision" as determined by the Fourth Circuit and its multifactor balancing test.**

3. ***Belize v. Belize Social Dev. Ltd.*, No. 15-830 (D.C. Cir., 794 F.3d 99; CVSG Mar. 28, 2016; cert. opposed Dec. 7, 2016; cert. denied Jan. 9, 2017). The Questions Presented are: (1) Whether, under the doctrine of *forum non conveniens* as applied to a confirmation action to enforce a foreign arbitral award, a foreign forum is *per se* inadequate because specific assets in the United States cannot be attached by a foreign court, as the D.C. Circuit has held; or whether *forum non conveniens* remains a viable doctrine in foreign arbitration confirmation actions if the foreign forum has jurisdiction and there are some assets of the defendant available in the alternative forum, as**

the Second Circuit held. (2) Whether, under Article V(2)(b) of the New York Convention, public policy in favor of arbitration yields where confirmation of an arbitral award would be contrary to countervailing public policies, such as those grounded in constitutional separation of powers principles, combating government corruption, and/or international comity.

4. ***U.S. Bank, N.A. v. The Village at Lakeridge, LLC*, No. 15-1509 (9th Cir., 814 F.3d 993; CVSG Oct. 3, 2016; cert. opposed Feb. 13, 2017; cert. granted Mar. 27, 2017 limited to question 2). The Questions Presented are: (1) Whether an assignee of an insider claim acquires the original claimant's insider status, such that his or her vote to confirm a bankruptcy "cramdown" plan cannot be counted under 11 U.S.C. § 1129(a)(10). (2) Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh, and Tenth Circuits, or the clearly erroneous standard of review adopted by the Ninth Circuit. (3) Whether the proper test for determining non-statutory insider status requires bankruptcy courts to conduct an "arm's length" analysis, as applied by the Third, Seventh, and Tenth Circuits, or to apply a "functional equivalent" test that looks to factors comparable to those enumerated for statutory insider classifications, as applied by the Ninth Circuit.**

5. ***United States ex rel. Advocates for Basic Legal Equality, Inc. v. U.S. Bank, N.A.*, No. 16-130 (6th Cir., 816 F.3d 428; CVSG Oct. 3, 2016; cert. opposed Apr. 14, 2017; cert. denied May 22, 2017). Whether, under the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), a *qui tam* action may proceed when it is based on specific allegations of fraud that were not the subject of prior public disclosures and that add substantial material information to the public disclosures, and when the publicly disclosed allegations "encompass" the *qui tam* allegations only if both sets of allegations are characterized at a very high level of generality.**

6. ***Sw. Sec., FSB v. Segner*, No. 15-1223 (5th Cir., 811 F.3d 691; CVSG Oct. 3, 2016; cert. opposed Apr. 24, 2017; cert. denied May 30, 2017). For the period before a trustee abandons encumbered property, whether, under Section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c), secured creditors are obligated to shoulder the trustee's maintenance costs when retaining encumbered property in the hope of benefiting other creditors.**

7. ***Lenz v. Universal Music Corp.*, No. 16-217 (9th Cir., 815 F.3d 1145; CVSG Oct. 31, 2016; cert. opposed May 4, 2017; cert. denied June 19, 2017). Whether the Ninth Circuit erred in concluding that the affirmation of a good faith belief that a given use of material use is not authorized "by the copyright owner, its agent, or the law," required under Section 512(c) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c), may be purely subjective and, therefore, that an unreasonable belief—such as a belief formed without consideration of the statutory fair use factors—will not subject the sender of a takedown notice to liability under Section 512(f) of the DMCA, 17 U.S.C. § 512(f).**

8. ***Loomis v. Wisconsin*, No. 16-6387 (Wis., 881 N.E.2d 749; CVSG Mar. 6, 2017; cert. opposed May 23, 2017; cert. denied June 26, 2017). The Questions Presented are: (1) Whether it is a violation of a defendant's constitutional right to due process for a trial court to rely on the risk assessment results provided by a proprietary risk assessment instrument such as the Correctional Offender Management Profiling for Alternative Sanctions at sentencing because the proprietary nature of COMPAS prevents a defendant from challenging the accuracy and scientific validity of the risk assessment. (2) Whether it is a violation of a defendant's constitutional right to due process for a trial court to rely on such risk assessment results at sentencing because COMPAS assessments take gender and race into account in formulating the risk assessment.**

9. ***Bulk Juliana v. World Fuel Servs.*, No. 16-26 (5th Cir., 2016 WL 1295041, CVSG Jan. 9, 2017; cert. opposed May 23, 2017; cert. denied June 26, 2017). The Questions Presented are: (1) Whether foreign parties, who have no actual or apparent authority to bind a vessel, can contractually bestow presumptive authority on the time charterer, without the vessel owner's knowledge or involvement, and thereby create a maritime lien that would not otherwise arise without the contract. (2) Whether the exercise of in rem jurisdiction premised on the existence of a maritime lien that only exists by virtue of a contractual choice of U.S. law entered into by parties without authority to bind the vessel, and that would not exist in the absence of the contract, violates the axiom that jurisdiction that would not otherwise exist cannot be conferred by the parties' consent. (3) Whether a contract between a marine fuel supplier and a time charterer selecting U.S. law as the law governing an entirely foreign transaction, for the purpose of creating a maritime lien that would not arise but for the contract, violates the prescription that two contracting parties cannot encumber the property of a third party. (4) Whether the plain and ordinary meaning of the "General Maritime Law of the United States" includes the statutory remedies afforded by the U.S. maritime lien statutes.**

10. ***New Mexico v. Colorado*, No. 22O147 (CVSG Nov. 28, 2016; SG opposed leave to file bill of complaint May 23, 2017; leave to file bill of complaint denied June 26, 2017). The Questions Presented are: (1) Whether Colorado is liable under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a), and common law for all costs, including prejudgment interest, incurred by New Mexico in responding to releases or threatened releases of hazardous substances from the Gold King Mine, the Sunnyside Mine, or the American Tunnel to the date of judgment. (2) Whether Colorado is liable under CERCLA, 42 U.S.C. § 9613(g)(2), and common law, for all response costs that will be incurred by New Mexico in responding to releases or threatened releases of hazardous substances from the Gold King Mine, the Sunnyside Mine, or the American Tunnel. (3) Whether Colorado is in violation of the Resource Conservation and Recovery Act's imminent and substantial endangerment provision, 42 U.S.C. § 6972(a)(1)(B), until it ceases the disposal of hazardous substances from the Gold King Mine and the Sunnyside Mine, including, but not limited to, acid**

wastewater, mine sludge, mine-dump runoff, and metals into the Animas River watershed. (4) Whether Colorado has negligently, recklessly, and willfully authorized and allowed the discharge of toxic mine waste directly into the Animas River in a manner that has injured and continues to threaten the health, safety, and comfort of downstream New Mexico residents. (5) Whether the Court should award New Mexico compensatory, consequential, and punitive damages caused by Colorado's negligent, reckless, and willful conduct, including, but not limited to, investigation, clean-up, and remedial costs, economic loss, diminution in value, and stigma damages. (6) Whether the court should order Colorado to abate the ongoing public nuisance in the Upper Animas Mining District and the Animas River within Colorado. (7) Whether Colorado is liable for all costs incurred and costs that may be incurred by New Mexico to abate the nuisance in the Animas and San Juan Rivers within New Mexico.

11. ***Ali v. Warfaa*, No. 15-1345 (4th Cir., 811 F.3d 653; CVSG Oct. 3, 2016; cert. opposed May 23, 2017; consolidated with *Warfaa v. Ali*, No. 15-1464; cert. denied June 26, 2017). The Questions Presented are: (1) Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiff's allegations that those official acts violated *jus cogens* norms of international law. (2) Whether the Alien Tort Statute, 28 U.S.C. § 1350, confers federal jurisdiction over a claim against a defendant who committed serious violations of international law abroad and later sought safe haven and obtained lawful permanent residency in the United States.**

12. ***BeavEx, Inc. v. Costello*, No. 15-1305 (7th Cir., 810 F.3d 1045; CVSG Oct. 3, 2016; cert. opposed May 23, 2017; cert. denied June 26, 2017). Whether the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1), preempts generally-applicable state laws that force motor carriers to treat and pay all drivers as "employees" rather than as independent contractors.**

13. ***Bank Melli v. Bennett*, No. 16-334 (9th Cir., 825 F.3d 949, CVSG Jan. 9, 2017; cert. opposed May 23, 2017; held for *Rubin* June 27, 2017). The Questions Presented are: (1) Whether Section 1610(g) of the Foreign Sovereign Immunities Act establishes a freestanding exception to sovereign immunity, as the U.S. Court of Appeals for the Ninth Circuit held below, or instead merely supersedes *First National City Bank v. Banco Para El Comercio Exterior de Cuba*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in Section 1610, as the U.S. Court of Appeals for the Seventh Circuit has held and the United States has repeatedly urged. (2) Whether a court should apply federal or state law to determine whether assets constitute "property of" or "assets of" the sovereign under the Terrorism Risk Insurance Act and Section 1610(g), and whether those provisions require that the sovereign own the property in question, as the U.S. Court of Appeals for the District of Columbia Circuit has held and the United States has repeatedly urged, contrary to the decision below.**

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14. ***Christie v. NCAA*, No. 16-476 (3d Cir., 2016 WL 4191891, CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477). Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.**

Petition For Certiorari Dismissed As Improvidently Granted

1. ***Visa Inc. v. Osborn*, No. 15-961 (D.C. Cir., 797 F.3d 1057; cert. granted June 28, 2016; SG as amicus, supporting respondents; cert. dismissed as improvidently granted Nov. 17, 2016; consolidated with *Visa Inc. v. Stoumbos*, No. 15-962). Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as the D.C. Circuit held below, or are insufficient, as the Third, Fourth, and Ninth Circuits have held.**

Supreme Court Statistics:

Gibson Dunn has a longstanding, high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases. During the Supreme Court's 5 most recent Terms, 9 different Gibson Dunn partners have presented oral argument; the firm has argued a total of 18 cases in the Supreme Court during that period, including closely watched cases with far-reaching significance in the class action, intellectual property, separation of powers, and First Amendment fields. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant 20 certiorari petitions since 2006.

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