

GIBSON DUNN

Supreme Court Round-Up

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Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

October Term 2016

Decided Cases

1. ***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



Theodore B. Olson
202.955.8500
tolson@gibsondunn.com



Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com



Michael R. Huston
202.887.3793
mhuston@gibsondunn.com



Brandon L. Boxler
202.955.8575
bboxler@gibsondunn.com

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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.

2. ***Andrew 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.”

3. ***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-



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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.

4. ***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 cause." 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."

5. ***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.”

6. ***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.”

7. ***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.

8. ***Pena-Rodriguez 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.”

9. ***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).

10. ***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).

11. ***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.”

12. ***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.”

13. ***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.

14. ***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.

15. ***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.

16. ***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**



Gibson Dunn
Counsel for
Amicus Curiae
Nike, Inc.

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.

17. ***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



Gibson Dunn
Counsel for
Amicus Curiae
Cato Institute

courts therefore have “discretion” to determine whether dismissal or some other sanction is an appropriate remedy for violations of the FCA’s seal requirement.

18. ***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.

Cases To Be Decided

1. ***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).**
2. ***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.

3. *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.
4. *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.
5. *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.
6. *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.

7. *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.
8. *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.
9. *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.

10. *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?
11. *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.
12. *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.
13. *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.
14. *Lee 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.
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



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



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



Gibson Dunn
Counsel for
Amicus Curiae
Border Scholars

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).

16. *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).
17. *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.
18. *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.
19. *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.
20. *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!”

21. *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.
22. *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.
23. *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.
24. *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.
25. *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



Gibson Dunn
Counsel for
Petitioner



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.

26. *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.
27. *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.
28. *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.
29. *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, and *Dignity Health v. Rollins*, No. 16-258; cert. granted Dec. 2, 2016; argument scheduled 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.
30. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, No. 16-341 (9th Cir., 821 F.3d 1338; cert. granted Dec. 14, 2016; argument scheduled 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.



Gibson Dunn
Counsel for
Amici Curiae
Council for
Christian Colleges
and Universities
et al.



Gibson Dunn
Counsel for
Amici Curiae
Dell Inc. and the
Software &
Information
Industry
Association



Gibson Dunn
Counsel for
Amicus Curiae
The Innocence
Network



Gibson Dunn
Counsel for
Amicus Curiae
SIFMA



Gibson Dunn
Counsel for
Amicus Curiae
Cato Institute

31. *Lee v. United States*, No. 16-327 (6th Cir., 825 F.3d 311; cert. granted Dec. 14, 2016; argument scheduled 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.
32. *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; argument scheduled Mar. 29, 2017). Whether the petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).
33. *Honeycutt v. United States*, No. 16-142 (6th Cir., 816 F.3d 362; cert. granted Dec. 9, 2016; argument scheduled 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.
34. *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (2d Cir., 828 F.3d 60; cert. granted Jan. 13, 2017; argument scheduled 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).
35. *Perry v. Merit Sys. Prot. Bd.*, No. 16-399 (D.C. Cir., 2016 WL 3947838; cert. granted Jan. 13, 2017; argument scheduled 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.
36. *Cal. Pub. Emps.' Ret. v. Anz Sec., Inc.*, No. 16-373 (2d Cir., 2016 WL 3648259; cert. granted Jan. 13, 2017; argument scheduled 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.*).
37. *Henson v. Santander Consumer USA*, No. 16-349 (4th Cir., 817 F.3d 131; cert. granted Jan. 13, 2017; argument scheduled 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.
38. *Kokesh v. SEC*, No. 16-529 (10th Cir., 834 F.3d 1158; cert. granted Jan. 13, 2017; argument scheduled Apr. 18, 2017). Whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to claims for "disgorgement."



Gibson Dunn
Counsel for
Amici Curiae
Association of
Christian Schools
International and
Lutheran Church
—Missouri Synod



Gibson Dunn
Counsel for
Petitioner

39. *Weaver v. Massachusetts*, No. 16-240 (Mass.; 54 N.E.3d 495; cert. granted Jan. 13, 2017; argument scheduled 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.
40. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 15-577 (8th Cir., 788 F.3d 779; cert. granted Jan. 15, 2016; argument scheduled 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.
41. *McWilliams v. Dunn*, No. 16-5294 (11th Cir., 634 F. App’x 698; cert. granted Jan. 13, 2017; argument scheduled 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.
42. *Davila v. Davis*, No. 16-6219 (5th Cir., 2016 WL 3171870; cert. granted Jan. 13, 2017; argument scheduled 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.
43. *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; argument scheduled 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.
44. *BNSF Railway Co. v. Tyrrell*, No. 16-405 (Mont., 373 P.3d 1; cert. granted Jan. 13, 2017; argument scheduled 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.
45. *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; argument scheduled 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.

46. ***Maslenjak v. United States*, No. 16-309 (6th Cir., 821 F.3d 675; cert. granted Jan. 13, 2017; argument scheduled 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.**

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.

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; motion for 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.

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 Questioned 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 Hous.*, 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.

Pending Cases Calling For The Views Of The Solicitor General

1. *Sw. Sec., FSB v. Segner*, No. 15-1223 (5th Cir., 811 F.3d 691; CVSG Oct. 3, 2016). 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.
2. *BeavEx, Inc. v. Costello*, No. 15-1305 (7th Cir., 810 F.3d 1045; CVSG Oct. 3, 2016). 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.

3. *Ali v. Warfaa*, No. 15-1345 (4th Cir., 811 F.3d 653; CVSG Oct. 3, 2016; consolidated with *Warfaa v. Ali*, No. 15-1464). 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.
4. *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). 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.
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). 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. *Lenz v. Universal Music Corp.*, No. 16-217 (9th Cir., 815 F.3d 1145; CVSG Oct. 31, 2016). 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).
7. *New Mexico v. Colorado*, No. 22O147 (CVSG Nov. 28, 2016). 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.

8. *Bulk Juliana v. World Fuel Servs.*, No. 16-26 (5th Cir., 2016 WL 1295041, CVSG Jan. 9, 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.
9. *Bank Melli v. Bennett*, No. 16-334 (9th Cir., 825 F.3d 949, CVSG Jan. 9, 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



Gibson Dunn
Counsel for
Petitioner



the District of Columbia Circuit has held and the United States has repeatedly urged, contrary to the decision below.

10. *Fenkell v. Alliance Holdings*, No. 16-473 (7th Cir., 829 F.3d 803, CVSG Jan. 9, 2017). Whether the Employee Retirement Income Security Act of 1974 permits a cause of action for indemnity or contribution by an individual found liable for breach of fiduciary duty.
11. *Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017). 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.
12. *Christie v. NCAA*, No. 16-476 (3d Cir., 2016 WL 4191891, CVSG Jan. 17, 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*.
13. *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.
14. *Loomis v. Wisconsin*, No. 16-6387 (Wis., 881 N.E.2d 749, CVSG Mar. 6, 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.



Gibson Dunn
Counsel for
Petitioner

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); *Amgen Inc. v. Sandoz Inc.*, No. 15-1195 (Fed. Cir., 794 F.3d 1347). 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.

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).** 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.

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; 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.



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Appellate and Constitutional Law Group Co-Chairs:

Mark A. Perry - Washington, D.C. (+1 202.887.3667, mperry@gibsondunn.com)

James C. Ho - Dallas (+1 214.698.3264, jho@gibsondunn.com)

Caitlin J. Halligan - New York (+1 212.351.4000, challigan@gibsondunn.com)

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