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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 2017

Argued Cases

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; argued on Oct. 2, 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 preventing employers from limiting employees' rights to engage in "concerted activities" in pursuit of their "mutual aid or protection." 29 U.S.C. §§ 102, 157.**

2. ***Sessions v. Dimaya*, No. 15-1498 (9th Cir., 803 F.3d 1110; cert. granted Sept. 29, 2016; argued Jan. 17, 2017; restored for reargument June 26, 2017; argued on Oct. 2, 2017). Whether 18 U.S.C. § 16(b) (defining a "crime of violence"), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.**

Cases Scheduled for Argument

3. ***Gill v. Whitford*, No. 16-1161 (W.D. Wis., 218 F. Supp. 3d 837; jurisdiction postponed June 19, 2017; argument scheduled Oct. 3, 2017). The Questions Presented are: (1) Whether district courts have the authority to entertain statewide challenges to a State's redistricting plan, instead of requiring a district-by-district analysis. (2) Whether Wisconsin's redistricting plan is an impermissible partisan gerrymander. (3) Whether the district court violated *Vieth v. Jubelirer* by adopting a version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*. (4) Whether defendants are entitled to present additional evidence showing that they would have**

prevailed under the district court's test, which the court announced only after the record had closed. (5) Whether partisan-gerrymandering claims are justiciable.

4. ***Jennings v. Rodriguez*, No. 15-1204 (9th Cir., 804 F.3d 1060; cert. granted June 20, 2016; argued Nov. 30, 2016; supplemental briefing ordered Dec. 15, 2016; restored for reargument June 26, 2017; argument scheduled Oct. 3, 2017). The Questions Presented are: (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) as inadmissible aliens must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months. (2) Whether aliens who are subject to mandatory detention under Section 1226(c) as criminals or terrorists 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.**

5. ***District of Columbia v. Wesby*, No. 15-1485 (D.C. Cir., 765 F.3d 13; cert. granted Jan. 19, 2017; argument scheduled Oct. 4, 2017). Police officers found late-night partygoers inside a vacant home belonging to someone else. After giving conflicting explanations for their presence, some partygoers claimed that a person known as "Peaches," who was not at the party, had invited them. The lawful owner told officers that he had not authorized entry by anyone. The officers arrested the partygoers for unlawful entry in violation of D.C. Code § 22-3302 (Supp. 2008). The Questions Presented are: (1) Whether police officers had probable cause to arrest respondents for unlawful entry. (2) Whether, even if the officers lacked probable cause to arrest, they were entitled to qualified immunity because the law was not clearly established.**

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

7. ***Hamer v. Neighborhood Hous. Servs. of Chicago*, No. 16-658 (7th Cir., 835 F.3d 761; cert. granted Feb. 27, 2017; argument scheduled Oct. 10, 2017). Appellants can seek extensions of the time within which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(C), but "[n]o extension . . . may exceed 30 days." Even so, the district court granted petitioner a 60-day extension, and petitioner filed her appeal near the end of that period. Does Rule 4(a)(5)(C) deprive courts of appeals of jurisdiction to hear appeals filed after the 30-day extension period, or is the Rule a non-jurisdictional claim-processing rule that is subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine?**

The preeminence of the group is underscored by its placement on *The National Law Journal*'s **2016 Appellate Hot List**, which recognized 20 firms that "delivered—winning big in federal and state appeals courts across the country"—while "represent[ing] some of the most well-known companies in the land."

Benchmark Litigation in 2017 recognized Gibson Dunn as the **Appellate Firm of the Year**.

Law360 named Gibson Dunn a **2016 Appellate Practice Group of the Year**.

U.S. News - Best Lawyers® "Best Law Firms" recognized Gibson Dunn as the **2016 Law Firm of the Year for its Appellate Practice**.

8. ***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; argument scheduled Oct. 11, 2017). The courts of appeals have jurisdiction under 33 U.S.C. § 1369(b)(1) to review agency actions "in issuing or denying any permit" under Section 1342 of the Clean Water Act. Do courts of appeals have jurisdiction under that provision to review the Clean Water Rule, which defines the scope of the term "waters of the United States" in the Clean Water Act, 33 U.S.C. § 1251, even though it does not "issu[e] or den[y] any permit"?**

9. ***Jesner v. Arab Bank, PLC***, **No. 16-499 (2d Cir., 822 F.3d 34; cert. granted Apr. 3, 2017; argument scheduled Oct. 11, 2017). Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.**

10. ***Ayestas v. Davis***, **No. 16-6795 (5th Cir., 826 F.3d 214; cert. granted Apr. 3, 2017; argument scheduled Oct. 30, 2017). Whether 18 U.S.C. § 3599(f), which authorizes payment of fees for investigative, expert, or other services that are reasonably necessary for the representation of a criminal defendant, authorizes fees regarding an ineffective-assistance-of-counsel claim that state habeas counsel forfeited.**

11. ***Wilson v. Sellers***, **No. 16-6855 (11th Cir., 834 F.3d 1227; cert. granted Feb. 27, 2017; argument scheduled Oct. 30, 2017). A federal court sitting in habeas reviews the last state-court decision on the merits of a petitioner's claims under the deferential standard in 28 U.S.C. § 2254(d). In *Harrington v. Richter*, this Court held that courts must apply this standard even when the state court does not explain its decision, because § 2254(d) requires the federal habeas court to review state courts' "decision[s]," not their reasoning. But if the last state court's summary merits decision was preceded by a lower court's opinion, does the federal habeas court "look through" the last state-court merits decision and review the lower state court's reasoning?**

12. ***U.S. Bank, N.A. v. The Village at Lakeridge, LLC***, **No. 15-1509 (9th Cir., 814 F.3d 993; CVSG Oct. 3, 2016; cert. opposed Feb. 13, 2017; cert. granted Mar. 27, 2017; argument scheduled Oct. 31, 2017). The bankruptcy code contains a non-exhaustive list of persons and entities that are considered "insiders." Creditors not described on that list that have comparably close relationships to the debtor can also be treated as insiders (a "non-statutory insider"). Before a Chapter 11 reorganization plan can be approved, at least one class of impaired claims must vote in favor of the plan, "without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(1). Is a bankruptcy court's determination that a claimholder is a non-statutory insider reviewable *de novo* or for clear error?**

13. ***Artis v. District of Columbia***, **No. 16-460 (D.C., 135 A.3d 334; cert. granted Feb. 27, 2017; argument scheduled Nov. 1, 2017). Whether 28 U.S.C. § 1367, the supplemental jurisdiction statute, tolls the period of limitations to provide a litigant whose claim is dismissed in federal court with 30 days to refile her state-law claim in state court free of an otherwise applicable limitations bar; or whether it stops the clock on the state statute of**

limitations until federal dismissal, then adds 30 days, so that she has 30 days plus the remaining time that she had before filing in federal court.

14. ***Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, No. 16-784 (7th Cir., 830 F.3d 690; cert. granted May 1, 2017; argument scheduled Nov. 6, 2017). Section 546(e) of the Bankruptcy Code prohibits a trustee from avoiding a transfer "by or to (or for the benefit of)" a financial institution. Does that safe harbor provision prohibit avoidance of such a transfer even if the institution has a beneficial interest in the transferred property?**

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15. ***Leidos, Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581 (2d Cir., 818 F.3d 85; cert. granted Mar. 27, 2017; argument scheduled Nov. 6, 2017). Under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, an omission is actionable only if the omitted information is necessary to make an affirmative statement "not misleading." Does Item 303 of Securities and Exchange Commission Regulation S-K create an actionable duty to disclose, even if the alleged omission did not cause any affirmative statement in the filing to be misleading?**

16. ***Patchak v. Zinke*, No. 16-498 (D.C. Cir., 828 F.3d 995; cert. granted May 1, 2017; argument scheduled Nov. 7, 2017). While petitioner's suit was pending in district court, Congress enacted a statute that provides that any action (even a pending action) relating to the land at issue "shall be promptly dismissed." Pub. L. No. 113-179, § 2. Does that statute violate the Constitution's separation of powers principles, even though the statute does not direct that the court make any findings or issue any judgment on the merits?**

17. ***Husted, Ohio Sec. of State v. Randolph Inst.*, No. 16-980 (6th Cir., 838 F.3d 699; cert. granted May 30, 2017; argument scheduled Nov. 8, 2017). The National Voter Registration Act of 1993 requires States to maintain accurate voter rolls by making a reasonable effort to remove ineligible voters, but that maintenance "shall not result in the removal of the name of any person . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). In the Help America Vote Act of 2002, Congress clarified that States are not prohibited from removing individuals from the rolls if they fail to respond to an address-verification notice and then fail to vote during two federal elections. Ohio sends address-verification notices to registered voters who have not voted or otherwise contacted election officials for two years. Does that practice violate the National Voter Registration Act?**

Cases Awaiting an Argument Date

18. ***SAS Inst. Inc. v. Lee*, No. 16-969 (Fed. Cir., 825 F.3d 1341; cert. granted May 22, 2017). Inter partes review is an adversarial process used by the Patent and Trademark Office to analyze the validity of existing patents. Does 35 U.S.C. § 318(a), which provides that in an inter partes review the Patent Trial and Appeal Board "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner," require the**

Board to issue a final written decision as to every claim challenged by the petitioner, or does it allow the Board to address only some of the patent claims challenged by the petitioner?

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

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

21. ***Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111 (Colo. App., 370 P.3d 272; cert. granted June 26, 2017). Colorado's public accommodations law forbids sexual-orientation discrimination by businesses engaged in sales to the public. Does that law impermissibly compel speech when it is applied to a commercial bakery that refuses to sell a wedding cake of any kind to any same-sex couple?**

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

23. ***Trump v. Int'l Refugee Assistance Project*, No. 16-1436 (4th Cir., 857 F.3d 554; consolidated with *Trump v. Hawaii*, No. 16-1540; cert. granted June 26, 2017; argument scheduled Oct. 10, 2017; argument canceled Sept. 25, 2017). The Questions Presented are: (1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780 is justiciable. (2) Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause. (3) Whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad. The Court also directed the parties to brief whether the challenges to § 2(c) became moot on June 14, 2017. On September 25, 2017, the Court removed the case from the oral argument calendar and directed the parties to brief whether the Proclamation issued on September 24, 2017 rendered the cases moot and whether the scheduled expiration of Sections 6(a) and 6(b) of Executive Order 13,780 renders the related parts of the cases moot.**

24. ***Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, No. 15-1439 (Cal. Super. Ct., unreported adoption of oral ruling (No. CGC-14-538355, Oct. 23, 2015); CVSG Oct. 3, 2016; cert. supported May 23, 2017; cert. granted June 27, 2017). Whether state courts lack subject-matter jurisdiction over "covered**

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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—that allege only claims under the 1933 Act.

25. ***Christie v. NCAA*, No. 16-476 (3d Cir., 2016 WL 4191891, CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477). The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.*, prohibits States from "authoriz[ing] by law" sports-wagering schemes. 28 U.S.C. § 3702(1). PASPA also prohibits private persons from operating sports-wagering schemes pursuant to state law. 28 U.S.C. § 3702(2). New Jersey repealed certain of its prohibitions on sports wagering in specified venues in the State, but the Third Circuit held that New Jersey's repeal was unlawful under PASPA. Does PASPA impermissibly commandeer the regulatory power of States, in contravention of *New York v. United States*, by dictating the extent to which States must maintain their prohibitions on sports wagering?**

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26. ***Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017). Victims of a 1997 suicide bombing in Jerusalem seek to collect on a $71.5 million default judgment against the Islamic Republic of Iran as a state sponsor of terrorism. Plaintiffs sought to attach and execute on collections of ancient Persian artifacts located in Chicago museums. A foreign state's property is immune from attachment and execution with few exceptions, and the Seventh Circuit rejected plaintiffs' argument that the Foreign Sovereign Immunities Act provides a free-standing terrorism exception to execution immunity. Does 28 U.S.C. § 1610(g) provide 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 the assets are otherwise subject to execution under Section 1610?**

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

28. ***Murphy v. Smith*, No. 16-1067 (7th Cir., 844 F.3d 653; cert. granted Aug. 25, 2017). The Prison Litigation Reform Act provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). Does the phrase "not to exceed 25 percent" mean any amount up to 25 percent or exactly 25 percent?**

29. ***Dalmazzi v. United States*, No. 16-961 (C.A.A.F., 76 M.J. 1; consolidated with *Cox v. United States*, No. 16-1017 and *Ortiz v. United States*, No. 16-1423; cert. granted Sept. 28, 2017). The Questions Presented are: (1) Whether petitioner's challenge to a judge's continued service on the U.S. Air Force Court of Criminal Appeals (AFCCA) after he was nominated and confirmed**

to the Article I U.S. Court of Military Commission Review (CMCR) was moot because his judicial commission was not signed until after the AFCCA decided her case, even though she moved for reconsideration after his commission was signed. (2) Whether the judge's service on the CMCR disqualified him from continuing to serve on the AFCCA because 10 U.S.C. § 973(b)(2)(A)(ii) requires active-duty military officers to obtain Congressional authorization before holding a "civil office," including positions that require "an appointment by the President by and with the advice and consent of the Senate." (3) Whether the judge's simultaneous service on the CMCR and the AFCCA violated the Appointments Clause. (4) Whether the Court has jurisdiction under 28 U.S.C. § 1259(3) to review this case, *Cox v. United States*, and *Ortiz v. United States*.

30. ***Collins v. Virginia*, No. 16-1027 (Va., 790 S.E.2d 611; cert. granted Sept. 28, 2017). Whether the Fourth Amendment's automobile exception permits a police officer—uninvited and without a warrant—to enter private property, approach a house, and search a vehicle parked a few feet from the house.**

31. ***Hall v. Hall*, No. 16-1150 (3d Cir., 679 F. App'x 142; cert. granted Sept. 28, 2017). In *Gelboim v. Bank of America*, the Court held that in cases consolidated for multidistrict litigation, a judgment entered in a single case is an appealable final order. Is a judgment entered in a single case out of several consolidated in a single district under Federal Rule of Civil Procedure 42 similarly an appealable final order?**

32. ***Encino Motorcars, LLC v. Navarro*, No. 16-1362 (9th Cir., 845 F.3d 925; cert. granted Sept. 28, 2017). The Fair Labor Standards Act generally requires employers to pay time-and-a-half overtime pay for hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1). One of the FLSA's provisions exempts from the overtime pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Must employers pay car dealership "service advisors," whose primary job responsibilities involve identifying service needs and selling service solutions, overtime?**

33. ***Byrd v. United States*, No. 16-1371 (3d. Cir., 679 F. App'x 146; cert. granted Sept. 28, 2017). A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?**

34. ***Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, No. 16-1466 (7th Cir., 851 F.3d 746; cert. granted Sept. 28, 2017). In *Abood v. Detroit Board of Education*, the Court held that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. Should *Abood* be overruled and public-sector agency fee arrangements be declared unconstitutional under the First Amendment?**

35. ***City of Hays, Kansas v. Vogt*, No. 16-1495 (10th Cir., 844 F.3d 1235; cert. granted Sept. 28, 2017). Is the Fifth Amendment violated when the prosecution uses compelled statements in pre-trial proceedings, such as probable cause hearings, or is it violated only when such statements are used at a criminal trial?**

36. ***McCoy v. Louisiana*, No. 16-8255 (La., 218 So.3d 535; cert. granted Sept. 28, 2017). McCoy was charged with first-degree murder. He maintained his innocence to his attorney, Larry English, and opposed English's proposal to concede that he was guilty in hopes of being spared the death penalty. A few days before trial, the trial court denied his request to fire English and represent himself. During trial, and over McCoy's interruptions, English conceded McCoy's guilt, and McCoy was convicted and sentenced to death. Did English's concession of guilt constitute ineffective assistance of counsel?**

37. ***Rosales-Mireles v. United States*, No. 16-9493 (5th Cir., 850 F.3d 246; cert. granted Sept. 28, 2017). Only plain errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" call for a court of appeals to exercise its discretion to remedy the error. What types of plain error meet this 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; 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.

Pending Cases Calling for the Views of the Solicitor General

1. ***Rinehart v. California*, No. 16-970 (Cal., 377 P.3d 818; CVSG May 15, 2017). Whether the Mining Law of 1872, as amended, which was intended to encourage productive mining on federal lands, preempts state bans of mining on federal lands.**

2. ***Clark v. Va. Dep't of State Police*, No. 16-1043 (Va., 793 S.E.2d 1; CVSG May 15, 2017). In 1974, Congress authorized servicemembers to sue state-government employers in federal court for employment discrimination based on military service. 38 U.S.C. § 4323(b)(2). After the Court held in *Seminole Tribe of Florida v. Florida* that Congress may not use its Article I powers to override state immunity in federal court, Congress amended the statute in 1998 to allow servicemembers to sue state employers in state court instead. 38 U.S.C. § 4323(b)(2). Subsequently, however, the Court held in *Alden v. Maine* "that the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. 706, 712 (1999). Is the 1998 amendment constitutional?**

3. ***WesternGeco LLC v. Ion Geophysical Corp.*, No. 16-1011 (Fed. Cir., 837 F.3d 1358; CVSG May 30, 2017). Under 35 U.S.C. § 271(f), it is an act of patent infringement to supply "components of a patented invention," "from the United States," knowing or intending that the components be combined "outside of the United States," in a manner that "would infringe the patent if such combination occurred within the United States." Are lost profits from prohibited combinations occurring outside of the United States categorically unavailable in cases where patent infringement is proven?**

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

5. ***Sokolow v. Palestine Liberation Org.*, No. 16-1071 (2d Cir., 835 F.3d 317; CVSG June 26, 2017). Whether the Fifth Amendment's Due Process Clause allows federal courts to exercise personal jurisdiction over a suit by American victims of terrorist attacks abroad carried out by the Palestinian Authority and the Palestine Liberation Organization.**

6. ***Samsung Elecs. Co. v. Apple Inc.*, No. 16-1102 (Fed. Cir., 839 F.3d 1034; CVSG June 26, 2017). The Questions Presented are: (1) Whether Samsung proved by clear and convincing evidence that two of Apple's patents were obvious as a matter of law. (2) Whether the court of appeals correctly**

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directed entry of a narrowly tailored injunction against infringement by a direct competitor after determining that the four traditional equitable factors, set forth in *eBay Inc. v. MercExchange, L.L.C.*, favored injunctive relief. (3) Whether the jury's verdict of infringement of a now-expired patent was supported by substantial evidence.

7. ***Brewer v. Ariz. Dream Act Coal.*, No. 16-1180 (9th Cir., 855 F.3d 957; CVSG June 26, 2017). Whether the Deferred Action for Childhood Arrivals program preempts Arizona's policy of denying driver's licenses to deferred action recipients.**

8. ***Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (2d Cir., 837 F.3d 175; CVSG June 26, 2017). The Questions Presented are: (1) Whether courts of appeals have jurisdiction under 28 U.S.C. § 1291 to review a pre-trial order denying a motion to dismiss following a full trial on the merits. (2) Whether courts owe deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime. (3) Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.**

9. ***Republic of Sudan v. Harrison*, No. 16-1094 (2d Cir., 802 F.3d 399; CVSG Oct. 2, 2017). Whether a plaintiff suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C. § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs via the foreign state's diplomatic mission in the United States.**

10. ***Virginia Uranium, Inc. v. Warren*, No. 16-1275 (4th Cir., 848 F.3d 590; CVSG Oct. 2, 2017). Whether the Atomic Energy Act of 1954 preempts Virginia's moratorium on uranium mining on nonfederal lands.**

11. ***Washington State Dep't of Licensing v. Cougar Den, Inc.*, No. 16-1498 (Wa., 392 P.3d 1014; CVSG Oct. 2, 2017). An 1855 treaty between the United States and the Yakama Indian Nation provides tribal members with "the right, in common with citizens of the United States, to travel upon all public highways." Can Washington enforce a state tax upon a tribal member for importing fuel into Washington on the public highways?**

CVSG Cases in Which the Solicitor General Supported Certiorari

12. ***Rubin v. Islamic Republic of Iran*, No. 16-534 (7th Cir., 830 F.3d 470, CVSG Jan. 9, 2017; cert. supported May 23, 2017; cert. granted June 27, 2017, limited to question 1). Victims of a 1997 suicide bombing in Jerusalem seek to collect on a $71.5 million default judgment against the Islamic Republic of Iran as a state sponsor of terrorism. Plaintiffs sought to attach and execute on collections of ancient Persian artifact located in Chicago museums. A**

foreign state's property is immune from attachment and execution with few exceptions, and the Seventh Circuit rejected plaintiffs' argument that the Foreign Sovereign Immunities Act provides a free-standing terrorism exception to execution immunity. Does 28 U.S.C. § 1610(g) provide 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 the assets are otherwise subject to execution under Section 1610?

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

CVSG Cases in Which the Solicitor General Opposed Certiorari

14. ***U.S. Bank, N.A. v. The Village at Lakeridge, LLC*, No. 15-1509 (9th Cir., 814 F.3d 993; CVSG Oct. 3, 2016; cert. opposed Feb. 13, 2017; cert. granted Mar. 27, 2017 limited to question 2; argument scheduled Oct. 31, 2017). The bankruptcy code contains a non-exhaustive list of persons and entities that are considered "insiders." Creditors not described on that list that have comparably close relationships to the debtor can also be treated as insiders (a "non-statutory insider"). Before a Chapter 11 reorganization plan can be approved, at least one class of impaired claims must vote in favor of the plan, "without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(1). Is a bankruptcy court's determination that a claimholder is a non-statutory insider reviewable *de novo* or for clear error?**

Gibson Dunn
Counsel for
Respondents

15. ***Bank Melli v. Bennett*, No. 16-334 (9th Cir., 825 F.3d 949, CVSG Jan. 9, 2017; cert. opposed May 23, 2017; held for *Rubin* June 27, 2017). The Questions Presented are: (1) Whether Section 1610(g) of the Foreign Sovereign Immunities Act establishes a freestanding exception to sovereign immunity, 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. (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.**

Gibson Dunn
Counsel for
Petitioner

16. ***Christie v. NCAA*, No. 16-476 (3d Cir., 2016 WL 4191891, CVSG Jan. 17, 2017; cert. opposed May 23, 2017; cert. granted June 27, 2017; consolidated with *New Jersey Thoroughbred Horsemen v. NCAA*, No. 16-477). The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et***

***seq.*, prohibits States from "authoriz[ing] by law" sports-wagering schemes. 28 U.S.C. § 3702(1). PASPA also prohibits private persons from operating sports-wagering schemes pursuant to state law. 28 U.S.C. § 3702(2). New Jersey repealed certain of its prohibitions on sports wagering in specified venues in the State, but the Third Circuit held that New Jersey's repeal was unlawful under PASPA. Does PASPA impermissibly commandeer the regulatory power of States, in contravention of *New York v. United States*, by dictating the extent to which States must maintain their prohibitions on sports wagering?**

17. ***Magee v. Coca-Cola Refreshments USA, Inc.*, No. 16-668 (5th Cir., 833 F.3d 530, CVSG Feb. 27, 2017; cert. opposed July 19, 2017; cert. denied Oct. 2, 2017). Petitioner, who is visually impaired, sued Coca-Cola under Title III of the Americans with Disabilities Act of 1990, claiming that its vending machines are not accessible to individuals with visual impairments. Does Title III, which prohibits public accommodations from discriminating on the basis of disability, apply only to physical spaces that people can enter?**

18. ***Snyder v. Doe*, No. 16-768 (6th Cir., 834 F.3d 696; CVSG Mar. 27, 2017; cert. opposed July 7, 2017; cert. denied Oct. 2, 2017). Whether retroactively applying a sex-offender-registry law that classifies offenders into tiers based on crime of conviction, requires certain offenders to register for life, requires offenders to report in person periodically and within days of certain changes to registry information, and restricts offenders' activities within school zones imposes "punishment" in violation of the Ex Post Facto Clause.**

Petition for Certiorari Dismissed as Improvidently Granted

1. ***PEM Entities LLC v. Levin*, No. 16-492 (4th Cir., 655 Fed. App'x 971; cert. granted June 27, 2017; cert. dismissed as improvidently granted Aug. 10, 2017). Whether bankruptcy courts should apply a federal rule of decision or a state law rule of decision when deciding to recharacterize a debt claim in bankruptcy as a capital contribution.**

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