The Appellate Advocate

State Bar of Texas Appellate Section Report

Articles

Special Feature

Volume 32, Number 1 *Winter 2021*

The Appellate Advocate

State Bar of Texas Appellate Section Report
Vol. 32, No. 1 · Winter 2021

The State Bar of Texas
Appellate Section

Email: TheAppellateAdvocate@gmail.com
Website: www.tex-app.org
Twitter: @AppAdvoc

Chair's Report

Jerry Bullard, Adams, Lynch & Loftin, P.C., Grapevine

As I prepared to assume the role of Section Chair, I knew that I would serve and represent the Texas appellate bar with the support of two incredible immediate past chairs (Kent Rutter and Justice Brett Busby) and an uber-talented and dedicated group of officers (Dylan Drummond, Lisa Hobbs, Kirsten Castañeda, and Bill Chriss), Council members (Justice Gina Benavides, Tom Leatherbury, Rich Phillips, Raffi Melkonian, Jason Boatright, Rachel Ekery, Lucy Forbes, Andrew Johnson, and Jennie Knapp), and numerous committee chairs and volunteers. I could not imagine leading this wonderful organization during such a challenging and tumultuous time without the help of these terrific servant-leaders.

Our Section faces a unique opportunity—an opportunity to develop innovative ways to serve our members and to expand our footprint in order to reach practitioners in underserved geographical areas and other practice groups, as well as diversify our membership, in ways that we never thought of before. As appellate practitioners, we pride ourselves on innovating and solving problems for clients and colleagues, so I had a hunch that this Section would rise to the challenge and take advantage of the opportunities to serve our members, our colleagues, and our communities in new and effective ways. And I'm proud to say that, just four short months into my term as Chair, our Section members did not disappoint!

Here are some of the great things that our Section members have done thus far, and planned for this Section year:

Bench Bar Liaison Committee – Through the efforts of Co-Chairs Jason Boatright and Justice Beth Watkins, and Council member Tom Leatherbury, our Section and the Texas Supreme Court Historical Society co-sponsored "An Evening with the Texas Supreme Court", which allowed participants to virtually mingle with Supreme Court justices and hear their answers to questions about the Court, its history, and other

appellate-related topics.

CLE Committee – Co-Chairs April Farris and Steven Knight served as program directors for the "Handling Your First (or Next) Fifth Circuit Civil Appeal" course, which was a terrific TexasBarCLE online event co-sponsored by the Section and the Bar Association of the Fifth Federal Circuit. April and Steve assembled an all-star cast of speakers, including Fifth Circuit judges, the Clerk of Court, and experienced advocates, to help practitioners successfully navigate the appellate process.

Diversity Committee – In October, Co-Chairs Justice Gina Benavides and Joseph Vale, along with committee members Justice Erin Nowell, Kirsten Castañeda, and Kirk Cooper, joined forces with the Hidalgo County Bar Association Appellate Section to sponsor a free CLE event focused on handling civil and criminal appeals in the Rio Grande Valley. It was one of the best-attended online Section CLE events of the year. Furthermore, the Section recorded this event, and you can find the video on the CLE Video page on the Section's website (www.tex-app.org).

Online CLE Committee – Our Online CLE team (Audrey Vicknair, Marla Broaddus, Parth Gejji, Brandy Manning, and Steve Hayes) continues to ensure that the Section's online CLE library remains populated with quality presentations for Section members to receive CLE and ethics credit by watching videos online for free and from anywhere. As of the writing of this Report, the online video library includes 19 presentations offering over 14 hours of free online CLE, with 7.0 hours of ethics. Offerings cover attorney's fees, advertising, supersedeas, Texas Citizens Participation Act cases, brief writing, appellate ethics in civil and criminal cases, mandamus, judgment formation, error preservation, oral argument, and how to deal with Zoom hearing issues, and they feature Justices from the Texas Supreme Court and courts of appeals, along with noted practitioners and staff attorneys. We add more offerings all the time.

This is just a sampling of the terrific work being done by our Council and committee members. I would love to describe

the achievements of each committee in further detail and brag about the tireless efforts of each committee member, but the limitations of time and space will not allow me to do so. Our Section continues to work on a host of other activities to better serve our members and the legal profession as a whole. I will discuss these activities in future Reports.

Our success as a Section is due to the hard work of many volunteers participating in a wide range of projects. If you are not already involved in the work of the Section, we invite you to join us. I invite you to review the list of committees on our website and contact me or any one of the officers or committee chairs if you are interested in getting involved. We will welcome you gladly.

I look forward to talking to each of you about becoming active in the Section and hearing your ideas on how the Section can best serve our members and our respective communities.

Disclaimer

Contributions to the *Appellate Advocate* are welcome, but we reserve the right to select material to be published. We do not discriminate based upon the viewpoint expressed in any given article, but instead require only that articles be of interest to the Texas appellate bar and professionally prepared. To that end, all lead article authors who submit an article that materially addresses a controversy made the subject of a pending matter in which the author represents a party or amici must include a footnote at the outset of the article disclosing their involvement. Publication of any article is not to be deemed an endorsement of the views expressed therein, nor shall publication of any advertisement be considered an endorsement of the product or service advertised.

The Jurisdiction of Texas Appellate Courts

Daniel Olds, Bickerstaff Heath Delgado Acosta LLP, Austin

"'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'"[1] Indeed, in Texas law, as in federal law, jurisdiction can be a confusing concept, and its finer points are ones over which courts often gloss.[2] In the appellate context, jurisdiction can be even more confusing because, not only is the jurisdiction of the trial court possibly at issue, but so may be the jurisdiction of the appellate court itself separate and apart from the trial court. Indeed, issues that implicate a court's jurisdiction on appeal—i.e., that are "jurisdictional"—in Texas are varied, and their bases may come from different sources. This article examines three different jurisdictional issues that may arise in Texas appeals. In doing so, this article looks at how Texas appellate courts determine whether they have jurisdiction in a given case and how Texas notions of jurisdiction differ from those in federal courts.

A. Different Types of Jurisdiction

When one thinks of the jurisdiction of a court, one typically thinks of it in one of two ways: (1) does the court have personal

[1] *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 102 (Tex. 2012) (Hecht, J., concurring) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996))).

[2] *See, e.g.*, *In re United Servs. Auto Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) ("[W]e, like the U.S. Supreme Court, have recognized that our sometimes intemperate use of the term 'jurisdictional' has caused problems.") (citing *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) and *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis.")).

jurisdiction and (2) does the court have subject-matter jurisdiction?[3] It is axiomatic in American law that in order for a court to exercise authority in a case, it must have authority over the parties to the case and authority over the subject matter of the case; in other words, in order for a court to have jurisdiction in a case, it must have both personal jurisdiction over the parties and subject-matter jurisdiction.[4] This is certainly the case in Texas.[5]

"Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the case in question belongs."[6] As the Texas Supreme Court has recognized, though, "A Texas district court . . . is a court of general jurisdiction."[7] The Texas "Constitution provides that the jurisdiction of a district court 'consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.'"[8] "For 'courts of general jurisdiction, . . . the presumption is that they have subject matter jurisdiction unless a showing can be made to the contrary.'"[9] The following implicate a court's subject-matter jurisdiction in Texas: standing,[10] ripeness,[11] justiciability,[12] and

---

[3] *See, e.g.*, *Rusk State Hosp.*, 392 S.W.3d at 103 (Lehrmann, J., concurring and dissenting).

[4] *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–03 (1982).

[5] *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996).

[6] *Mladenka v. Mladenka*, 130 S.W.3d 397, 400 (Tex. App.—Houston [14th Dist. 2004, no pet.).

[7] *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000).

[8] *Id.* (quoting TEX. CONST. art. V, § 8).

[9] *Dubai Petroleum*, 12 S.W.3d at 75 (quoting 13 Charles A. Wright, Arthur R. Miller & Edward H. Copper, Federal Practice & Procedure § 3522, at 60 (1984)).

[10] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993).

[11] *Waco Ind. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000).

[12] *American K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 252–53

whether a defendant has immunity from suit.[13]

However, unlike personal jurisdiction, which may be waived, subject-matter jurisdiction cannot be waived, and may be raised at any time, including by the court *sua sponte*.[14] In other words, the lack of subject-matter jurisdiction may be raised for the first time on appeal; it is an exception to the ordinary rule that issues not raised in the trial court cannot be raised on appeal.[15] The reason subject-matter jurisdiction may be raised at any time in the appellate process is because it has its basis in the constitution. The Texas Supreme Court has stated that the prohibition on advisory opinions prevents a court from addressing the merits of a case when it lacks subject-matter jurisdiction. If a court issues a judgment when it lacks subject-matter jurisdiction, that judgment does not actually bind the parties, and thus constitutes an advisory opinion.[16] Because the constitution bars advisory opinions, judgments rendered without proper subject-matter jurisdiction are susceptible to attack. In addition, parties cannot consent to jurisdiction.[17] The Texas Supreme Court has articulated three bad outcomes if this rule did not exist: (1) appellate courts could not prevent lower courts from exceeding their constitutional and statutory authority; (2) appellate courts could not "arrest collusive suits"; and, (3) given the doctrines of collateral estoppel and res judicata, judgments entered when a court lacks subject-matter jurisdiction would bar re-litigation of the same case if facts developed that would eventually provide a court with

(Tex. 2018).

[13] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

[14] *See Freeman*, 556 S.W.3d at 260.

[15] *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 764 n.4 (Tex. 2014).

[16] *See Rusk State Hosp.*, 392 S.W.3d at 95 ("So if a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity."); *see also Tex. Air Control Bd.*, 852 S.W.2d at 444 ("An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury.").

[17] *Id.*

subject-matter jurisdiction.[18]

Thus, when subject-matter jurisdiction is raised on appeal, either for the first time or as an appeal of a trial court's determination of subject-matter jurisdiction, the appellate court is essentially determining whether the trial court had subject-matter jurisdiction to hear the case. It becomes a question of whether the trial court had the authority to issue a judgment binding the parties to the suit.

However, appellate courts can and do have their own jurisdiction separate and apart from trial courts' jurisdiction. For example, if a party appeals a trial court's judgment past the deadline to file a notice of appeal, the appellate court will dismiss the appeal for want of jurisdiction.[19] In other words, while a party's failure to timely file a notice of appeal has no bearing on whether the trial court had jurisdiction, it does have bearing on whether the appellate court has jurisdiction. However, this type of jurisdiction does not have its basis in constitutional principles; rather, it comes from the Texas Rules of Appellate Procedure. Rule 26.1 provides for deadlines for filing a notice of appeal.[20]

An appellate court's distinct jurisdiction over an appeal may also concern the finality of the appealed-from order. With the exception of interlocutory orders that may be immediately appealed by grant of statute,[21] Texas courts of appeals generally only have the ability to hear appeals from final judgments of a trial court.[22] When a party appeals a judgment that is not final, the appellate court will dismiss it for want of jurisdiction.[23] The basis for this type of jurisdiction is not as clear; in Texas, it appears to derive largely, if not entirely, from case law.[24]

[18] *Tex. Air Control Bd.*, 852 S.W.2d at 445.

[19] *Florance v. State*, 352 S.W.3d 867, 874–75 (Tex. App.—Dallas 2011, no pet.).

[20] TEX. R. APP. P. 26.1.

[21] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a).

[22] *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

[23] *See, e.g.*, *Reyna v. State Adult Protective Custody & Regulatory*, No. 13-12-00477-CV, 2012 WL 3793153, at *1 (Tex. App.—Corpus Christi-Edinburg 2012, no pet.) (per curiam) (mem. op.).

[24] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) ("Though

B. Determining Jurisdiction

A complicating factor for an appellate court trying to determine if it has jurisdiction is that subject-matter jurisdiction and other jurisdictional issues can be raised for the first time on appeal, including by the court *sua sponte*. If a jurisdictional issue is raised in a trial court, the court has a few options to determine whether in fact it does have jurisdiction. Obviously, it can look to the pleadings to see if it has jurisdiction and act as a fact-finder with regard to jurisdictional facts.[25] But if the court needs more facts to determine whether it has jurisdiction, it can permit more discovery on the issue and hear witness testimony. In other words, it can compile the kind of factual record that is the hallmark of trial courts. Appellate courts, on the other hand, generally are not in the fact-finding business. So, if an appellate court is faced with a jurisdictional question that was not developed in the trial court below, how does the court approach that?

The Texas Government Code provides that Texas courts of appeals and the Texas Supreme Court have "the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction."[26] The statutes' explicit reference to affidavits

its origins are obscure and its rationale has varied over time, the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment."). However, it is important to note that this requirement may sometimes have a basis in statute. *See* TEX. FAM. CODE §109.002(b) (providing that "An appeal may be taken by any party to a suit from a final order rendered under this title."). This rule is referenced in the Texas Rules of Appellate Procedure, although not explicitly provided. *See* TEX. R. APP. P. 25.1 (e) ("The notice of appeal must be served on aall parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding.").

[25] *Klumb v. Hous. Municipal Employees Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015).

[26] TEX. GOV'T CODE § 22.001(d) ("The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction."); *Id.* § 22.220(c) ("Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.").

is noteworthy, as they make clear that Texas appellate courts have the ability to conduct fact-finding with regard to their jurisdiction. This is, of course, a significant departure from the general rule that appellate courts cannot consider evidence outside of the record before them.[27]

Normally, if a court's lack of subject-matter jurisdiction is raised in the trial court, the pleader must allege facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause.[28] "When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts 'construe the pleadings in favor of the plaintiff and look to the pleader's intent.'"[29] But when an appellate court considers a potential lack of subject-matter jurisdiction for the first time on appeal, "it must construe the petition in favor of the party [asserting jurisdiction], and if necessary, review the entire record to determine if any evidence supports standing."[30] That is because, "[w]hen an appellate court questions jurisdiction on appeal for the first time[,] there is no opportunity to cure the defect."[31]

Texas appellate courts' approach to determining whether they have jurisdiction in the other two examples seems to operate somewhat differently than it does for determining whether subject-matter jurisdiction exists. For example, in *Florance v. State*, the Dallas Court of Appeals had to determine whether two orders that had been issued by the trial court were final orders.[32] If they were, that would have started the clock to file an appeal, making the appellant's notices of appeal due

---

[27] *See, e.g.*, *Robb v. Horizon Communities Improvement Ass'n, Inc.*, 417 S.W.3d 585, 589 (Tex. App.—El Paso 2013, no pet.).

[28] *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440 (Tex. 1993).

[29] *Id.* (citations omitted).

[30] *Id. See also Gibson*, 22 S.W.3d at 853 ("As a safeguard then, we construe the petition in favor of the party asserting that the court has subject matter jurisdiction and review the entire record to ascertain if any evidence supports that assertion.").

[31] *Id.*

[32] *Florance*, 352 S.W.3d at 871.

long before he actually filed them.[33] To determine whether it had jurisdiction, the Dallas Court "requested the parties file letter briefs on the issue of whether this Court has jurisdiction over this appeal."[34] The court characterized these letter briefs as "jurisdictional briefs."[35] Similarly, in *W.F.S. v. Texas Department of Family and Protective Services*, the First Court of Appeals in Houston questioned whether it had jurisdiction over an appeal because it was unclear whether the order from which the appellant appealed was a final order.[36] The court stated that "the Clerk of this Court notified appellants, in both appeals, that their appeals were subject to dismissal for want of jurisdiction unless they timely responded and showed how this Court had jurisdiction over their appeals."

In short, Texas appellate courts seem to go about determining whether they have subject-matter jurisdiction differently than they do in determining whether they have other types of jurisdiction. When the jurisdiction is based in a rule or case law, appellate courts seem to engage in an even-handed evaluation of whether jurisdiction exists and do not construe pleadings in favor of jurisdiction, as is the case with questions of subject-matter jurisdiction.[37] Ironically, if the legislature were to amend the Government Code to narrow the ways in which an appellate court could determine its own jurisdiction, appellate courts would at least arguably be able to retain more flexibility in determining subject-matter jurisdiction because that jurisdiction is based in the state constitution.[38]

---

[33] *Id.* at 871–72.

[34] *Id.* at 871.

[35] *Id.* at 873 n.4; 874 n.5.

[36] *W.F.S. v. Tex. Dep't of Fam. and Protective Servs.*, No. 01-15-00689-CV, No. 01-15-01028-CV, 2016 WL 828171, at *2 (Tex. App.—Houston [1st Dist. 2016, no pet.) (per curiam) (mem. op.).

[37] *See Florance*, 352 S.W.3d at 871 ("Appellate jurisdiction is never presumed.") (citing *Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.) (dealing with whether appeal was timely filed)).

[38] *See Cramer v. Sheppard*, 167 S.W.2d 147 (Tex. 1942) ("Certainly a statute cannot override the Constitution.").

C. Divergence from Federal Approach

All three preceding examples of different types of jurisdiction are "jurisdictional" in Texas, meaning that a case may be dismissed for want of jurisdiction if there is a defect. Those issues may also be raised at any time, including by the court *sua sponte*. However, the Texas approach now appears out of line with the federal approach. While the federal approach to subject-matter jurisdiction is similar to the Texas approach in that "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action,"[39] the approach differs when the rule is found only in the rules of appellate procedure. In recent years, the U.S. Supreme Court has clarified what it means when it says a requirement is "jurisdictional," and has drawn a distinction between jurisdictional rules and "mandatory claim-processing rule." The distinction is key; "[f]ailure to comply with a jurisdictional time prescription . . . deprives a court of adjudicatory authority over the case, necessitating dismissal[.]"[40] As in Texas, if a defect is jurisdictional, it "is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal."[41] Federal courts are also "obliged to notice jurisdictional issues and raise them on their own initiative."[42] By contrast, "[m]andatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited."[43]

Thus, the difference between jurisdictional rules and mandatory claim-processing rules is whether they may be forfeited or waived and whether a court is obliged to raise the defect *sua sponte*. And the Supreme Court has held that "a provision governing the time to appeal in a civil action qualifies

---

[39] *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

[40] *Hamer v. Neighborhood Housing Servs. of Chicago et al.*, 138 S.Ct. 13, 17 (2017).

[41] *Id.* (footnote omitted).

[42] *Id.*

[43] *Id.*

as jurisdictional only if Congress sets the time."[44] If the rule is "court-promulgated," then it is merely a mandatory claim-processing rule.[45] Therefore, if a litigant does not comply with a filing deadline under the Federal Rules of Appellate Procedure, the appellate court will only lack jurisdiction if the deadline is prescribed by statute; if the deadline is simply court-promulgated, it is not jurisdictional and may be waived. This, of course, is different than the Texas rule, in which a party's out-of-time appeal implicates an appellate court's jurisdiction. It remains to be seen whether the U.S. Supreme Court's approach will have an effect on Texas appellate courts' conception of appellate jurisdiction.

D. Conclusion

Jurisdiction in Texas can come from different sources and can operate in different ways. Importantly, though, if a requirement is jurisdictional, it implicates a court's ability to decide the merits of a case. This can be especially confusing in the appellate context, where the appellate court may be called upon to decide whether the trial court had jurisdiction, as well as whether the appellate court itself has jurisdiction, separate and apart from any question of the trial court's jurisdiction. How we conceptualize appellate jurisdiction has important ramifications for whether appellate courts can decide a case.

[44] *Id.*

[45] *Id.*

THE CITES THAT BIND:[1] CITATIONS TO POPULAR MUSIC IN TEXAS CASE LAW

Chad Baruch[2]*, Johnston Tobey Baruch, Dallas*

In a 2018 bankruptcy opinion, Judge Don Willett of the Fifth Circuit cited a lyric from Notorious B.I.G. that "the more money we come across, the more problems we see."[3] This wasn't the first time Judge Willett used music lyrics in an opinion. As a justice on the Texas Supreme Court, in a case involving state licensing of cosmetologists, he noted that "the Attorney General of Texas got all shook up wondering whether Elvis's famous sideburns 'were hair which a cosmetologist might trim, or a partial beard which could be serviced only [by] a barber.' "[4]

This also wasn't the Fifth Circuit's first use of popular music lyrics. In a 2004 decision, Judge Jerry Smith summarized a criminal defendant's choice by quoting lyrics from the hit song *Should I Stay or Should I Go* by the Clash:

> Jackson was thus forced to ask himself what *The Clash* famously asked two decades ago: "Should

---

1 With apologies to Bruce Springsteen. *See* Bruce Springsteen, *The Ties That Bind, on* THE RIVER (Columbia Records 1980).

2 The author gratefully acknowledges two invaluable resources in preparing this article. One was the 2007 survey discussed momentarily and published as Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531, 540 (2007). The other is MARK W. KLINGENSMITH, LYRICS IN THE LAW: MUSIC'S INFLUENCE ON AMERICA'S COURTS (2020). Klingensmith's book, in particular, is a must-read for anyone interested in this topic.

3 *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 386 (5th Cir. 2018) (quoting NOTORIOUS B.I.G., *Mo Money Mo Problems*, *on* LIFE AFTER DEATH (Bad Boy/Arista 1997)).

4 *Patel v. Tex. Dep't of Lic. & Reg'n*, 469 S.W.3d 69, 109 (Tex. 2015) (Willett, J., concurring) (citation omitted) (referring to Elvis Presley, *All Shook Up*, (RCA Victor 1957)).

> I stay or should I go now?" Doubtless Jackson knew that if he stayed on the bus and the dog alerted to him "there would be trouble." But given the officers' ultimate discovery of the cocaine strapped to his waist, the trouble turned out to be "double," notwithstanding his decision to "go."[5]

In another case, the court referenced a hit song by Dire Straits, asking whether a DEA informant received "*Money for Nothin*."[6]

But the Fifth Circuit's most iconic use of rock references was in an opinion containing numerous references to lyrics and songs by the band Talking Heads. Although the opinion—affirming a criminal conviction—does not mention the band or include any citation to its songs, all of the subtitles in the opinion are names of the band's albums or songs.[7] "According to published reports, a law clerk of Judge Garza's included more than twenty-five references to Talking Heads ouvre in an unsuccessful attempt to get some free concert tickets."[8] And, allegedly, the judge credited with writing the opinion knew nothing about it.[9]

Despite these previous references, Judge Willett's citation nevertheless is rare in its citation of an artist of color—and a rapper at that. As will be discussed, most citations of popular music have been to "classic rock." But as our judiciary grows younger, the diversity of these citations expands.

---

[5] *United States v. Jackson*, 390 F.3d 393, 396 n.3 (5th Cir. 2004) (quoting The Clash, *Should I Stay or Should I Go*, *on* COMBAT ROCK (Epic 1982)).

[6] *United States v. Santisteban*, 833 F.2d 513, 515 (5th Cir. 1987) (referring to Dire Straits, *Money for Nothing*, *on* BROTHERS IN ARMS (Warner Bros. 1985)).

[7] *United States v. Abner*, 825 F.2d 835 (5th Cir. 1987).

[8] *See* Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869, 887–88 (1993) (citation omitted).

[9] *See id.* (citation omitted).

Would you believe in a love at first [cite]?:[10]
The National Trend Toward Citation of Rock Lyrics

Judicial citations to music are nothing new. Historically, judges often cited opera and musical theater lyrics in their opinions. For example, in 1968, the Fifth Circuit cited a Victorian-era comic opera by Gilbert and Sullivan.[11] But in the past 20 years, the number of judicial citations to popular music—and particularly classic rock—has grown dramatically across the country.

A 2007 nationwide survey confirmed that references to popular music lyrics have become increasingly common both in judicial opinions and scholarly legal articles.[12] This reliance is hardly surprising. "Popular music, in its many forms, covers the spectrum of human emotions and situations."[13] And, because the best songwriters really are poets, it should not be surprising that they often express even complex notions simply and poignantly. For example, this classic lyric from Bob Dylan lends itself to almost any dispute about the necessity for expert-witness testimony:

> You don't need a weatherman to tell you which
> way the wind blows.[14]

But Judge Willett's reference is unique because it cites a rap artist. Generally, judicial citations to popular music overwhelmingly favor classic-rock and folk artists. According to the 2007 survey, the ten artists cited most frequently are:

---

[10] *See* The Beatles, *With A Little Help from My Friends, on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol Records 1967).

[11] *See, e.g.*, *Woodward Iron Co. v. United States*, 396 F.2d 552, 553 (5th Cir. 1968) (citing Gilbert and Sullivan, *The Pirates of Penzance*, Act II (1879)).

[12] Long, *supra* note 1, at 540.

[13] *Id*. at 534.

[14] Bob Dylan, *Subterranean Homesick Blues*, *on* BRINGING IT ALL BACK HOME (Columbia Records 1965).

1. Bob Dylan
2. The Beatles
3. Bruce Springsteen
4. Paul Simon
5. Woody Guthrie
6. The Rolling Stones
7. The Grateful Dead
8. Simon & Garfunkel
9. Joni Mitchell
10. R.E.M.

(Johnny Cash, Pink Floyd, and Billy Joel barely missed the cut).[15]

Several things about this list are striking. First, Elvis Presley—the King of Rock and Roll—is conspicuously absent. Second, Joni Mitchell is the only woman who made the cut. Third, with the exception of R.E.M., every artist on the list falls into either the classic rock or folk category; there are no country artists. And finally, not a single artist of color appears on the list.

But this is a national list, and it includes scholarly citations as well as citations in judicial opinions. What about judicial opinions here in Texas? Bob Dylan is reputed to have said that judges don't listen to country music.[16] Is that really true here in the Lone Star State? The next section of this article chronicles citations to popular music in Texas state and federal judicial opinions.[17]

---

[15] Long, *supra* note 1, at 540.

[16] Long, *supra* note 1, at 549 (citation omitted).

[17] In searching for "citations," I did not count cases where the lyrics were at issue in the case. So, for example, I ignored cases quoting lyrics that were the subject of a copyright dispute. Similarly, a number of criminal cases refer to lyrics in the context of disagreements or physical altercations over the lyrics. I ignored these as well. And so on. You get the idea. Of course, my compilation here almost surely missed numerous citations. Judges sometimes quote the lyrics without mentioning the artist. Those types of citations are nearly impossible to locate through a search. But I did my best.

Like other states, Texas has citations to several of the artists on the national list. While Simon & Garfunkel, Woody Guthrie, Joni Mitchell, and R.E.M. do not appear to be cited in any Texas opinions, the remaining artists on the list—Dylan, Springsteen, the Beatles, the Rolling Stones, and the Grateful Dead all have been cited by Texas judges.

A federal judge deciding a reapportionment case noted "the inescapable conclusion that a Latino opportunity district will be possible in Harris County in the foreseeable future," and cited Bob Dylan in concluding that "the times, they are a changing' . . . ."[19]

In confirming a reorganization plan, a federal bankruptcy judge predicted that "neither party will get what they want, but both will get what they need" and cited the famed Rolling Stones lyric: "You can't always get what you want, but you get what you need."[20]

A Dallas appellate judge paid homage to Bruce Springsteen in a parental-rights termination case, noting that: "While it is true that this child was 'Born in the U.S.A.' his heritage and culture are Hispanic."[21]

Perhaps not surprisingly, the Beatles garnered multiple Texas citations. In a concurrence defending the manner in which the Texas Court of Criminal Appeals performs its review of applications for habeas relief, Judge Barbara Hervey quoted

---

[18] *See* Johnny Cash, *The Man Comes Around, on* THE MAN COMES AROUND (American Recordings 2002).

[19] *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 805 (S.D. Tex. 2013) (citing Bob Dylan, *The Times They Are a-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964)).

[20] *In re SCC Kyle Partners, Ltd.*, No. 12-11978-HCM, 2013 WL 2903453, at *1 (W.D. Tex. June 14, 2013) (citing The Rolling Stones, *You Can't Always Get What You Want*, *on* LET IT BLEED (London Records 1969)).

[21] *In re S.H.A.*, 728 S.W.2d 73, 97 (Tex. App.—Dallas, 1987, writ ref'd n.r.e.) (McClung, J., dissenting) (referring to Bruce Springsteen, *Born in the U.S.A.*, *on* BORN IN THE U.S.A. (Columbia Records 1984)).

a lengthy passage from *Revolution*:

> You say you want a revolution
> Well, you know
> We all want to change the world
> You tell me that it's evolution
> Well, you know
> We all want to change the world
> But when you talk about destruction
> Don't you know that you can count me out
> Don't you know it's gonna be
> All right, all right, all right.[22]

Former Texas Supreme Court Justice James Baker used one of the most famous of the Fab Four's lyrics as the header to the closing section of a dissenting opinion, prefacing it with the header: "Yesterday … I believe in yesterday."[23]

And Chief Justice Brian Quinn of the Amarillo court of appeals cited John Lennon in a criminal appeal:

> At the suppression hearing, the trooper was asked: "So you're telling the Court that because you see a van, it's clean and it's got two people in it, that [sic] was indicators of potential criminal activity for you?" The trooper answered: "Yes, sir, they are. They—in and of themselves are nothing, but in the total—when you start adding them all together, they can be." When two people in a clean car indicate criminal activity then the words of John Lennon have come to fruition ... "Strange days indeed—most peculiar, mama."[24]

---

[22] *Griffith v. State*, 507 S.W.3d 720, 724 (Tex. Crim. App. 2016) (Hervey, J., concurring) (citing The Beatles, *Revolution*, *on* The Beatles (Apple Records 1968)). This, of course, is better known as "the White Album."

[23] *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 200 (Tex. 2002) (orig. proceeding) (Baker, J., dissenting) (citing The Beatles, *Yesterday*, *on* Help! (Capitol Records 1965)).

[24] State v. Cortez, 482 S.W.3d 176, 178 (Tex. App.—Amarillo 2015) (citing

The King of Rock and Roll also makes an appearance in Texas case law. In addition to the citation by Judge Willett previously noted, a federal judge cited Elvis Presley (in a trademark-infringement action actually involving his music) in instructing the clerk to provide notice of the decision to the parties:

> If said parties can no longer be reached at their disclosed addresses, the Court further **ORDERS** all correspondence be "Returned to Sender."[25]

Though certainly not in the classic-rock vein, Sonny and Cher also have appeared in Texas case law. A federal judge pointed to one of their best-known songs in reminding the parties of a pretrial conference at the conclusion of an order resolving various motions:

> All other requests for relief are denied. As a reminder, the pretrial conference for this lawsuit is set for June 7, 2013 at 9:00 a.m. *Cf.* Sonny and Cher, *The Beat Goes On, on* In Case You're In Love (Atco Records 1967).[26]

The most frequent single source of classic-rock citations among Texas judges is Chief Justice Quinn in Amarillo, already mentioned for his Lennon citation. When he finds a good line, he sticks to it. In cautioning appraisal districts performing assessments across county lines, Chief Justice Quinn wrote:

> To paraphrase the words of Pink Floyd in its song "Money," appraisal districts assessing property

John Lennon, *Nobody Told Me*, *on* MILK AND HONEY (Polydor 1984)), *vacated*, 501 S.W.3d 606 (Tex. Crim. App. 2016).

[25] *Elvis Presley Enterprises, Inc. v. Capece*, 950 F. Supp. 783, 804 (S.D. Tex. 1996) (citing Elvis Presley, *Return to Sender* (RCA Victor 1962)).

[26] *Kaneka Corp. v. JBS Hair, Inc.*, No. 03:10-cv-01430-P, 2013 WL 12123947, at *18 (N.D. Tex. May 21, 2013).

> crossing county lines are entitled to "share it fairly but don't take a slice of [the other's] pie."[27]

He used the line again in a concurrence defending a trial court's order for joinder of additional parties, predicting that the non-joined parties would say to the litigating interest-holder "share it fairly but don't take a slice of my pie."[28]

Chief Justice Quinn also has cited the best-known Grateful Dead lyric in at least two opinions. In the first, he described the "odd circumstances" of a probate dispute by noting what "a long strange trip it's been."[29] A few years later, he used the lyric again to describe the tortured proceedings in a criminal appeal:

> "What a long, strange trip it's been." And, it doesn't seem to be over due to the continued meanderings of the cause before us and the arguments posed by appellant and his counsel.[30]

Chief Justice Quinn cited Bob Seger in the well-publicized litigation between former Texas Tech football coach Mike Leach and ESPN commentator Craig James. The chief began his opinion affirming summary judgment for James and ESPN with the quotation: "There I go, turn the page."[31]

---

[27] *Devon Energy Prod., L.P. v. Hockley Cnty. Appraisal Dist.*, 178 S.W.3d 879, 882–83 (Tex. App.—Amarillo 2006, pet. denied) (citing Pink Floyd, *Money*, *on* THE DARK SIDE OF THE MOON (Harvest Records 1973)).

[28] *Crawford v. XTO Energy, Inc.*, 455 S.W.3d 245, 249 (Tex. App.—Amarillo 2015) (Quinn, C.J., concurring) (citing Pink Floyd, *Money*, *on* THE DARK SIDE OF THE MOON (Harvest Records 1973)), *rev'd* 509 S.W.3d 906 (Tex. 2017).

[29] *In re Estate of Catlin*, 311 S.W.3d 697, 703 (Tex. App.—Amarillo 2010, pet. denied) (citing The Grateful Dead, *Truckin'*, *on* AMERICAN BEAUTY (Warner Bros. Records 1970)).

[30] *Denton v. State*, 478 S.W.3d 848, 849–50 (Tex. App.—Amarillo 2015, pet. ref'd) (citing The Grateful Dead, *Truckin'*, *on* AMERICAN BEAUTY (Warner Bros. Records 1970).

[31] *Leach v. James*, 455 S.W.3d 171, 173 (Tex. App.—Amarillo 2014, pet. denied) (citing Bob Seger, *Turn the Page*, *on* BACK IN '72 (Capitol Records 1973)).

Finally, in an opinion interpreting a less-than-clear statutory provision, Chief Justice Quinn cited:

> Years ago, a famed rock and roll band sang, "I'm just a soul whose intentions are good. Oh Lord, please don't let me be misunderstood." No doubt the intentions of the Texas legislature were good in enacting the statutes at play here, and we endeavor to not misunderstand what they were. Yet, the juxtaposition of words within a statute do not always result in clarity. Should our disposition of this appeal fall short of capturing what the legislature intended, we would welcome its clarification of the matter.[32]

The nationwide list of cited musicians includes a heavy folk influence including Joni Mitchell and Woody Guthrie. But James Taylor is the only folk singer cited in Texas case law. In an environmental organization's challenge to a freeway project, a federal judge noted that: "'Ten years of extreme floods, droughts, blizzards, fires and hurricanes give new meaning to 'I've seen fire and I've seen rain.' "[33]

So, just as in other states, Texas has its share of classic-rock and folk references including Dylan, the Rolling Stones, the Beatles, and Springsteen. But what about Dylan's alleged claim that judges don't listen to country music? Well, Bob, here in Texas, they do.

The masterpiece of Texas judicial decisions using country music actually relied on the music rather than any lyrics. Judge Jerry Buchmeyer decided a lawsuit filed by LeAnn Rimes seeking to void her contract with Curb Records. In transferring the case to Tennessee under a forum-selection clause, Judge

---

[32] *Davis v. Highland Coryell Ranch, LLC*, 578 S.W.3d 242, 248–49 (Tex. App.—Amarillo 2019, pet. denied) (citing The Animals, *Don't Let Me Be Misunderstood*, *on* ANIMAL TRACKS (American version) (MGM 1965).

[33] *Aquifer Guardians in Urban Areas v. Fed. Hwy. Admin.*, 779 F. Supp. 2d 542, 558–59 (W.D. Tex. 2011) (citing James Taylor, *Fire and Rain*, *on* SWEET BABY JAMES (Warner Bros. Records 1970)).

Buchmeyer wrote his entire opinion—start to finish—in the form of a country song, with instructions that each section be sung to the tune of a different Rimes recording. Here is a brief sampling:

STATEMENT OF FACTS
(To be sung to the tune of LeAnn Rimes, "How Do I Live." © & ® 1997 Curb Records, Inc.)

LeAnn Rimes
A very rich and famous star
Wasn't so rich in times afar
But what a talent she had!
Enter Curb
To sign a contract, they hoped
After her talent they scoped
They saw the cash in her eyes
But LeAnn
Who at twelve was hardly dumb herself
Wanted to retain her future wealth
Oh
If you could have seen
Baby those attorneys changed everything
But so many lines!
They missed one thing.
CHORUS # 1:
Why did you sign, LeAnn Rimes?
So long ago
Off on that choice of forum?
Your attorneys didn't know?
They made lots of changes, but one thing survived....
Forum clause, to that clause, what weight do we give?
INSTRUMENTAL INTERLUDE . . . .[34]

[34] *Rimes v. Club Records, Inc.*, 129 F. Supp. 2d 984 (N.D. Tex. 2001) (internal footnotes omitted).

In a concurring opinion complaining of his colleagues' willingness to overlook a convict's failure to follow the rules of appellate procedure, Chief Justice Tom Gray of the Waco court of appeals cited country music (and sausage) legend Jimmy Dean:

> "Never mind the rules just play to win. And hate your neighbor for the shade of his skin. Skip a rope . . . ."[35]

But this reference also demonstrates the potential pitfalls in citing these types of lyrics. In a motion for rehearing, the convict complained that the reference was racially offensive. This prompted a pointed rebuttal from Chief Justice Gray:

> Long was apparently confused by my use of lyrics from an old country and western song to support my legal argument … As I said in my concurring opinion, I like rules that apply to everyone, and I do not like it when rules are ignored. Thus, I used the lyrics of a once popular song to draw attention to the majority's willingness to ignore the rules just to get to a quick disposition of Long's original proceeding.
>
> Long also complains about the line "Skip a rope." The lyrical expression "Skip a rope" was intended to convey that some people just continue to play along, being good ole' boys, and that they do not worry about following the rules. And that is the attitude to which I responded, that "I am not very good at skipping rope." I prefer to follow the rules to protect litigants and the system, even if it is more difficult and time consuming.[36]

---

[35] *In re Long*, 215 S.W.3d 483, 484 (Tex. App.—Waco 2006, orig. proceeding) (mem. op.) (Gray, C.J., concurring) (citing Jimmy Dean, *Skip a Rope*, *on* A THING CALLED LOVE (RCA 1968)).

[36] *In re Long*, 215 S.W.3d 484, 485 (Tex. App.—Waco 2007, orig. proceeding (Gray, C.J., concurring in denial of reh'g) (internal footnote omitted).

Another recidivist lyric-citer was former Justice Michael Massengale of the Houston court of appeals. But Justice Massengale's citations crossed the lines of popular music. In a criminal case, he noted that taking an affidavit literally would mean the affiant had been drinking in the morning. Justice Massengale conceded that drinking so early in the day was "not entirely unheard-of" and in support cited a popular country music song by Alan Jackson and Jimmy Buffet.[37]

Justice Massengale's peak surely came in his opinion from another criminal case. Deeming insufficient a police officer's suspicion of narcotics activity based solely on the suspect leaving and returning to his apartment in the middle of the night, Justice Massengale managed to work in references to no fewer than four songs—from vastly different popular music genres, including country and rap—in a single sentence. He noted that these late-night comings and goings were equally consistent with "walkin' after midnight, working a hard day's night, drinking champagne 'til early morning, or just staying up all night for good fun."[38]

Justice Massengale has cited rap lyrics in at least two other cases as well. In the first, which involved a dispute over possession of a Chrysler 300, he dropped a footnote explaining the iconic status of the car and quoting popular rapper Drake:

> Always saw you for what you could've been
> Ever since you met me
> Like when Chrysler made that one car that looked
> just like the Bentley.[39]

[37] *Somoza v. State*, 481 S.W.3d 693, 705 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (Massengale, J., concurring) (citing Alan Jackson & Jimmy Buffet, *It's Five O'Clock Somewhere*, *on* GREATEST HITS VOLUME II (Arista Nashville 2003)).

[38] *McClintock v. State*, 405 S.W.3d 277, 286–87 (Tex. App.—Houston [1st Dist.] 2015) (citing Patsy Cline, *Walkin' After Midnight* (Decca 1957); The Beatles, *A Hard Day's Night*, *on* A HARD DAY'S NIGHT (Parlophone 1964); Cal Smith, *Drinking Champagne*, (Kapp 1968); George Strait, *Drinking Champagne*, *on* LIVIN' IT UP (MCA 1990); and Daft Punk (featuring Pharrell Williams), *Get Lucky*, *on* RANDOM ACCESS MEMORIES (Columbia Records 2013)), *vacated*, 444 S.W.3d 15 (Tex. Crim. App. 2014)).

In the other, he explained a reference to marijuana as "kush" by citing the song of the same name by Dr. Dre.[40]

In yet another instance of recidivist citation, Judge Sam Lindsay of the Northern District has in three different cases cited Willie Nelson in imploring litigants to give up the ghost and realize the litigation is over. Here is an example:

> Plaintiff and his counsel need to heed the words of Willie Nelson's classic country and western song: "Turn out the Lights, the Party's Over." No further warning will be given to Plaintiff or his counsel regarding attempts to vacate the judgment. The court will not replow this ground. If Plaintiff or his counsel file another frivolous motion, the sanctions machine will be in full operation.[41]

Other country artists made the cut as well. Kenny Rogers and Dolly Parton got a shout-out for their cover of the Bee Gees song *Islands in the Stream*:

> Island in the stream?
> Is that where it belongs?
> Is there water in between?
> To whom does it belong?[42]

---

[39] *Akers v. Patja, Ltd.*, No. 01-16-00945-CV, 2018 WL 3431801, *1 & n.1 (Tex. App.—Houston [1st Dist.] July 17, 2018, no pet.) (mem. Op.) (citing Drake, *Keep the Family Close*, on VIEWS (Young Money Entertainment *et al.* 2016)).

[40] *Ramos v. State*, No. 01-14-00831-CR, 2015 WL 6486647, at *1 (Tex. App.—Houston [1st Dist.] Oct. 27, 2015, no pet.) (mem. op.) (citing Dr. Dre, *Kush* (Interscope Records 2010).

[41] *Hill v. Schilling*, No. 3:07-CV-2020-L, 2014 WL 12717234, at *3 (N.D. Tex. Apr. 17, 2014); see also *Tex. Clinical Labs, Inc. v. Johnson*, No. 3:06-CV-1861-L, 2011 WL 3330889, at *14 (N.D. Tex. July 29, 2011); *Steele v. Quantum Servicing Corp.*, No. 3:12-CV-2897-L, 2013 WL 3196544, at *11 (N.D. Tex. June 25, 2013) (all citing Willie Nelson, *The Party's Over*, *on* THE PARTY'S OVER (RCA Victor 1967)).

[42] *Turner v. Mullins*, 162 S.W.3d 356, 359 (Tex. App.—Fort Worth 2005,

Similarly, in an opinion concerning settlement of a school-related religion case, Judge Fred Biery quoted country artist Kenny Chesney:

> Not wanting their existence to end, *Homo sapiens* developed a multitude of theories and hopes, encompassed in thousands of religions, of how they can avoid simply returning to the Earth from whence they and other species came. Or, as the country western song says: "Everybody wanna go to heaven, but nobody wanna go now."[43]

Though it wasn't a citation, Judge Willett—in a dissenting opinion during his tenure on the Texas Supreme Court—identified country music legends Bob Wills and George Strait as being among the "sources of Lone Star pride."[44]

Finally, one would hope that any listing of country-music citations in Texas would include the Man in Black. And sure enough, in a case involving alleged copyright infringement relating to the movie "Cowboys & Aliens," Judge Sam Sparks began his opinion by gently adapting a Johnny Cash song:

> "An old cowpoke went ridin' out, one dark and windy day. Upon a ridge he rested as he went along his way. When all at once a [flying saucer, zooming above] he saw, a-plowing through the ragged skies, and up a cloudy draw." JOHNNY CASH, (Ghost) Riders in the Sky, on SILVER (Columbia Records 1979) (aliens added).[45]

---

no pet.) (citing Kenny Rogers & Dolly Parton, *Islands in the Stream*, *on* EYES THAT SEE IN THE DARK (RCA Records 1983)).

[43] *Schultz v. Medina Valley I.S.D.*, No. SA-11-CA-422-FB, 2012 WL 517518, at *14 (W.D. Tex. Feb. 9, 2012) (citing Kenny Chesney, *Everybody Wants to go to Heaven*, *on* LUCKY OLD SON, (BNA Records 2008)).

[44] *In re Reece*, 341 S.W.3d 360, 378 (Tex. 2011) (Willett, J., dissenting).

[45] *Busti v. Platinum Studios, Inc.*, No. A-11-CA-1029-SS, 2013 WL 12121116, at *1 (W.D. Tex. Aug. 29, 2013) (citing Johnny Cash, *Ghost Riders in the Sky*, *on* SILVER (Columbia Records 1979)).

Conclusion: *It's Like That*[46]

So, like their peers across the country, Texas judges seem to be citing popular music lyrics with increasing frequency. As one might expect, the Texas citations differ from the national trend in the greater prevalence of citations to country artists like Willie Nelson, Dolly Parton, and Johnny Cash.

But many people might be surprised to find out that Texas judges also distinguish themselves by their repeated citations to artists of color, including rappers Notorious B.I.G. and Drake. And this probably will become even more prevalent as the Texas judiciary grows more diverse and fills with judges who grew up in the 1980s and 1990s, as rap ascended in popularity. As this trend continues, and with apologies to REO Speedwagon: *Keep on Citin'*.[47]

---

[46] *See* Run-DMC, *It's Like That, on* RUN-DMC GREATEST HITS (Arista 2002).

[47] *See* REO Speedwagon, *Roll with the Changes, on* YOU CAN TUNE A PIANO, BUT YOU CAN'T TUNA FISH (Epic Records 1978).

HON. MICHAEL H. SCHNEIDER, SR.[1]

The following is an excerpt of an interview of Judge Michael Schneider (**MS**) conducted on August 30, 2002, by Justice Margaret Mirabal (**MM**).

Judge Schneider was interviewed as part of a tradition at the First Court of Appeals to preserve the experience and reflections of a departing justice for the future generations of the court, the future judges of the court, and the future attorneys of the court.

This excerpt is published here as part of an ongoing effort by the Appellate Section of the State Bar to preserve and document matters of historical interest to members of the bar. To watch the video of Judge Schneider's oral history, go to the Section website at http://www.tex-app.org/, click on the Awards & History tab, then on the Judicial Oral Histories tab in the drop-down menu, and then look for Judge Schneider in the "search" feature.

MM: As chief justice, we know you have pearls of wisdom to share.

MS: Yeah, I do.

[laughter]

MM: You were sworn in as Chief Justice of the First Court of Appeals on—

[1] Judge Schneider served as a United States District Judge for the Eastern District of Texas from 2004-2016, previously serving as a Justice of the Texas Supreme Court from 2002-2004. Judge Schneider began his judicial career as the Judge of the 157th District of Harris County from 1990-1996. He served as Chief Justice of the First Court of Appeals from 1996-2002.

MS: February 20, . 1996. Yes. It was a cold day.

Let me see if I can get this right. This is my famous saying that I was saving for the Legislature. Just remember this—not everything that counts can be counted, and not everything that can be counted counts. And what really is important is what's in your heart and the will to do right.

MM: As you think back on the last six years, what was the most fun? Did you have any fun?

MS: The holiday party is a great tradition and I've always had a feeling at the holiday party, a feeling that I just talked about a while ago, about this court and the people who worked on it. It's a gratifying feeling and it's fun, it's fantastic. And that's what I enjoyed.

MM: Do you have any specific recommendations, based on your experience, how to get a consensus out of a nine-judge court, how to keep there from being a mutiny, for example.

MS: Well, yeah, I can wrap it up in three words: change the subject. That seemed to work with you guys.

[Unidentified speaker]:

I feel we didn't have a mutiny because we had a chief that we could trust and we always thought that he had the interest of the court in heart all the time, that you were mainly concerned about what was good for the court and we really appreciate that, Chief.

MS: Thank, you. I appreciate that.

MM: What do you think going from being the chief justice,

the head honcho, to the guy who has to make the coffee for the rest of the judges on the Supreme Court?

MS: I think that it's gonna be fun. I think it will be, it will be interesting, I am gonna have to do what I always tell new judges to do—the first few weeks, let the other judges talk. So, we'll wait and see how that goes.

It's gonna be interesting. I'm not against electing judges. I don't think that's the enemy, I don't think that's the culprit. I think it's the way we retain our judges that's the real problem. Because I think we've selected people through election and appointment, they've done a good job on that, by and large. As I talk to people around the state, we've got 14 different appellate courts. I know it sounds like a political speech, but with 14 appellate courts, we've got 14 approaches to the law, and I think the Supreme Court can, should spend a good bit of its time trying to clear up the conflicts and then let the Legislature do what they're going to do about any other problems.

Anyway, I hope that I can remain on the sidelines and not make too much noise about that, but I'm a believer in that. Also, a big believer that the cases ought to stay within their district and that the people who try cases, and the trial judges, ought to know which appellate court it's going to.

I don't think you meant for me to be this serious, but I'm just answering your questions.

Justice Murry Cohen:

Justice Mirabal, may I say something? I've seen a number of chief justices of this court come and go and I have never seen one who poured more of his heart

and soul and sweat into the job, than this one. He had a greater appreciation of the court as an institution, not simply a mechanism of deciding a particular case or even every case correctly, but as an advocate of establishing systems to be sure that that would be done as well as to be seen to be done. And I want to thank the Chief for that dedication, and for the stability that you brought. Chief justice is kind of measured much differently than that of a justice. I think a justice's contribution is measured in terms of what did she do, show me her work product. Certainly, in this court the chief has the same workload as anybody else. But the Chief's report card as much consists of what didn't happen on his shift and there were no scandals; there were no explosions; there were no mutinies; and it was for the reasons that Justice Jennings set out and that everybody was confident that the helm of the ship was well-handled.

Justice Davie Wilson:

I'd like to add my ditto to that. If you speak about it objectively, when Mike came I think we had over two thousand cases on the docket. And we were strangled in cases and when he leaves us now with just slightly less, I think, than a thousand with systems in place that I think will carry us down to where we'll finally reach an optimal level before too awful long. We decided a lot of very big cases during his tenure and to the best of my knowledge, I don't think we were splashed on the newspapers as total and complete fools at any time during the procedures. Everything that came our way that had the potential of being in the newspapers or things of that nature, I think we handled well and professionally and correctly as the time went on, and it's been an obvious pleasure for me to serve with him. I wish him well.

[Unidentified speaker]:

Judge Cohen and Judge Wilson came in at the beginning, I came in at the end, so this is the only court that I have served on and I haven't seen any of the bad things that happen in other courts. I've seen only a court that is cohesive, that's collegial, where the work is the highest quality, where all the judges participated in doing this and I put that down to the Chief. If we didn't have an outstanding chief justice, we could not have efficiently turned out high-quality work product that we do in an atmosphere of collegiality. And I feel tremendously honored to be on this court, tremendously honored to have served with Chief Justice Schneider and I wish him, as we all do, the absolutely tremendously best. We're gonna miss him; we don't want him to go. It will be a tough act to follow and I guess it's up to us to try to carry on so that we can maybe present him a good report card in the years to come that we learned well from him. We wish you, I know we all do, the absolute very best in your new career.

MM: How many chief staff attorneys have you had since you've been here?

MS: One!

I've been talking about the judges here and I'm glad you reminded me because I forget how valuable she is all the time. Janet [McVea Williams] has been fantastic, she and I worked great together. She seems to know what I'm thinking and, fortunately, doesn't tell me that, but she knows where I'll come down on most things.

I've never had, in my lifetime, things happen so well as what happened here at the First Court of Appeals with all the people I've worked with being so good. And I want to tell you this, in my lifetime, in my history, I've not always had it that way and it's been a true blessing

and I appreciate it.

I want to say another thing about the great time. I think the task-force year was a fun year, too, don't you? We literally made history, with 1900 dispositions or something like that; it was unbelievable. It was a great year and actually we had a better record this year. Another wonderful thing about working here has been, we've been able to integrate our senior judges into the rotation. The public likes it because they're all so well-respected, they gave to us a sense of history of the court and respect and another perspective.

So long, and it has been and will be fun, thank you.

Hon. John E. Powers[2]

The following is an excerpt of an interview of Justice John E. Powers (**JEP**) conducted on October 30, 2015, by JoAnn Storey (**JS**).

Justice Powers' interview is part of an ongoing effort by the Appellate Section of the State Bar to preserve and document matters of historical interest to members of the bar. To watch the video of Justice Powers' oral history, go to the Section website at http://www.tex-app.org/, click on the Awards & History tab, then on the Judicial Oral Histories tab in the drop-down menu, and then look for Justice Powers in the "search" feature.

JS: If you don't mind, will you give us a little bit of your background, are you a native Texan, where you grew up, where you went to college and that sort of thing.

[2] Justice John Powers is a native of Fort Worth. He obtained a degree in finance from The University of Texas and, in 1968, he graduated from The University of Texas School of Law. Justice Powers served as a justice on the Austin Court of Appeals from 1980 until his retirement in 2004.

JEP: I was born in Fort Worth and lived there until age 14 when our family moved to Lubbock. I graduated from Lubbock High School, went one year to Texas Tech, then came down to Austin where my brother lived. He had gone to UT. And so I enrolled in UT the summer of '55.

In October 1958, I was drafted, which was a blessing because I didn't have enough money to buy textbooks. I served two years in the Army. Came back and got my degree in finance from UT then was ordered to active duty again for another year in the Cuban missile crisis. Came back; found a job with the Highway Department; met my wife; got married. Went to law school beginning in 1965; graduated in 1968 from UT Law School.

I had clerked while in school with a firm called Cofer and Cofer, two very fine attorneys in Austin, and they rented me an office after I graduated. I began doing various kinds of cases: divorces, personal injury, anything I could get, and they referred me some clients, too.

JS: What motivated you to go to law school?

JEP: I knew I didn't have what it took to be a physician or some kind of scientist. I thought a business degree from UT would be most useful in practicing law and so that's why I decided to go to law school. I thought I had to have an advanced degree to make a living and, of course, I had a new wife. She worked while I was in law school, for UT, and I worked for Cofer and Cofer.

JS: So, in 1968, you hung out your shingle and pretty much took anything that came in the door?

JEP: Yeah, that's about it. And I had an office practice, too. Wills and probate and conveyances.

JS: So about 1980 or so you decided to run for office on the [Austin] Court of Appeals. What motivated you to do that?

JEP: I had tried a case in San Angelo involving the bank in San Angelo that sued my client on a negotiable note. The law said at that time, and I'm sure it's still the same, if you sue on a negotiable note you have to produce the original. I objected at all stages until the judge told me to not to raise that objection anymore.

I lost the case in trial court and appealed to the Austin Court of Appeals and I had about three or four points of error. The first one was they didn't produce the note. The judge who wrote the opinion for the court of appeals didn't even mention my first point of error and held against me. The Texas Supreme Court declined to hear my appeal.

I said well, if that's the sort of judge that writes opinions for the Court of Appeals, I can do better than that. And that's why I decided to run.

And incidentally, I didn't realize this until later, but I was the only Democrat running for an office with a jurisdiction that exceeded one county and the only Democrat to win that year. 1980 was the year President Reagan was elected and had a landslide here in Texas.

JS: So when you went on the bench in 1980 the courts of appeals had jurisdiction only of civil cases. When the courts got jurisdiction of criminal cases, how did that change what you had been doing for a couple of years on the bench?

JEP: We had what was called a flush back. The Court of Criminal Appeals divvied up their backlog and flushed

them back to the courts of appeals. I think it took us almost, at least a year and a half to get rid of those cases. Judge Shannon, the Chief Justice, and I worked diligently. I worked nights and I think he did too, to get those cases, to make decisions in those cases and get them so they could be appealed back to the Court of Criminal Appeals.

JS: One of the things you saw, correct me if I'm wrong, was a change in the Rules.

JEP: Yeah [chuckling]. There was a judge on the Dallas Court of Appeals named [Justice] Clarence Guittard. A good judge. But he had an inclination in cases that didn't seem to go right in his eyes, he'd go get the rules changed. So it seemed that way anyway. The rules were changing rapidly and so it seemed like every year there would be some big change in the rules and that made it hard to keep up.

JS: During your tenure on the bench, was there anything that you saw that you would say you liked or didn't like and could use as a teaching moment for others?

JEP: One, which involved a young lady. I remember that it was a will contest or an estate proceeding of some kind and that was the best brief I ever read. It was to the point; the authorities were there; there was no repetitious argument. It was just a pleasure to read. And her argument was much the same. I think the worst thing I ever saw in a brief—and it was so common—was they repeated the same thing over and over.

JS: For you personally, did oral argument ever change your mind?

JEP: I do recall a couple of arguments did change my mind. I

guess in those two or three cases I had not understood the briefs completely and argument did make a difference.

JS: What advice would you give to a young lawyer coming up today? What tips, advice, things to do, not to do, that sort of thing?

JEP: I'd always shoot straight with the court about your case, and not make frivolous arguments, not make a whole lot of arguments unless they're all good and under some pretty strict standard. And view your argument and your brief from the standpoint of a stranger to the case.

If the case is a little weak, okay, that's fine, or a point is a little weak, don't try to bamboozle the court. Be honest with your opponent and be courteous.

JS: When you were on the bench, if you every got an occasional advocate who might have not been quite as honest as he or she should have been with the record or the law, did y'all talk about that among yourselves?

JEP: Yeah.

JS: Let's talk a little bit about your years after you retired. What makes you happy, what keeps you busy?

JEP: What makes me happiest is my 10 grandchildren. I love seeing them; spending time with them. Fortunately, they all live close here to Austin.

And I have to say I'm proud of my two daughters because all 10 of those grandchildren are home-schooled.

JS: What keeps you busy besides the grandchildren?

JEP: I've published a couple books since then.

JS: Tell us about those.

JEP: We got interested in Texas painters, early Texas painters, impressionists from the '40s, '30s, '20s, back there. And we compiled a book of those painters—a biographical dictionary they call them.

JS: What's the name of that book?

JEP: It's *Texas Painters, Sculptors and Graphic Artists.* And then I wrote a book about the first Texas Navy.

JS: My goodness. What's the name of that book?

JEP: *The First Texas Navy*. And let's see. I paint. I like to paint pictures.

JS: What do you use, water colors, oil?

JEP: Oil. I've done water colors and pastels. There's one on the wall over there, the old bridge across the Colorado.

JS: Do you sell your works?

JEP: No. My children tend to confiscate them. My children, mainly, and friends.

JS: We're probably about ready to wrap it up, but I have one question: Do you have an opinion on how we select our judges in Texas?

JEP: Yeah, I don't think it makes any difference. It may just be the luck of the draw what you get, you know. If you're a big contributor to a political party, you can probably get an appointment that pretty much assures your reelection. If you're a political animal, you know, you like to campaign and that sort of thing, you can probably

get elected, but it takes a lot of money and that sort of thing. The Federal system of strictly appointing depends on money, too. And, unfortunately, I think maybe you tend to have two kinds of candidates. I think you'll have the political kind whether it's funded, based on money, or whether it's based on political connections like in the Federal system, appointed.

JS: Is there anything that you would like people to know that I haven't asked you?

JEP: I can't think of anything.

Hon. John R. Roach, Sr.

The following is an excerpt of an interview of Justice John R. Roach, Sr. (**JRR**), conducted on October 30, 2015, by Jim Pikl (**JP**).

Justice Roach's interview is part of an ongoing effort by the Appellate Section of the State Bar to preserve and document matters of historical interest to members of the bar. To watch the video of Justice Roach's oral history, go to the Section website at http://www.tex-app.org/, click on the Awards & History tab, then on the Judicial Oral Histories tab in the drop-down menu, and then look for Justice Roach in the "search" feature.

JP: Justice Roach, you were district attorney, you were a state district judge, you were a justice of the court of appeals, and you were in private practice. What practice did you like best, and why?

JRR: Well, I've been a lawyer for more than 35 years. I spent 21 years as a judge, and then I spent another 8 years as the district attorney in Collin County. I would say that as I held each of those jobs, that was the one I liked the most

at the time. Being a district judge and an appellate-court judge and being district attorney were all personally fulfilling to me, and they were just at the right time and something that I was very glad to do.

JP: How did you manage to have such a cordial, friendly relationship with members of the bar, especially in your positions when you were a judge and a DA? How did you pull that off?

JRR: Well, it was easier as a judge because being a judge has a certain aspect to it that people naturally respect. I thought it was very important to behave and work and preside as a professional and to treat the lawyers that came before me that same way. If a judge is respectful to the attorneys before him, it inures to that lawyer's benefit in the eyes of his client. Treated like a professional, he looks like a professional; his client thinks he's a professional.

I also never referred to anyone by their first name—not even my clerks or my coordinators. Everyone was "Mr." or "Miss." I think that went a long way to demonstrating my respect for them as individuals, and the fact that I also expected to be referred to by my title all the time.

JP: How many years have you been retired?

JRR: Almost five.

JP: What do you miss most about not actively practicing law?

JRR: I would say mostly the intellectual challenge of practicing law. I really like the give-and-take of trial. I like the give-and-take with my colleagues on the court of appeals in particular. And I like the idea of making important decisions, like I did when I was a judge and

when I was the district attorney in Collin County. So I would say that the intellectual challenge is what is most appealing to me about the law. And I want to point out too that when I was on the court of appeals, I worked with 12 *really* smart people. That was one of the most enjoyable times of my life, being around all those smart people.

JP: What advice would you give young lawyers concerning their relationship with other lawyers?

JRR: Well, you see this all the time in the Bar Journal, and lawyers always talk about being professional and being ethical. You should *be* professional and *be* ethical and *be* courteous, but have a plan to kill everybody in the room.

JP: (Laughs.)

JRR: And by that, I mean to win your case. You've got to be within a context here. You don't have to be *un*ethical or *un*professional or *dis*courteous in order to win.

JP: What advice would you give to young lawyers on how they should treat the court—the judges?

JRR: Well, there is no question about it. You cannot win anything from a judge who you do not show respect to. He will bow up—most judges will—and you know, you get to a point where you can't be trusted, or they have no respect for you. Then they're likely to find themselves on the wrong end of close questions. So being respectful to the court and, also, take victory with magnanimity. You do that, and you'll have a judge's respect.

JP: This is a very difficult profession on a family. What advice would you give lawyers on the relationship with

their families, so they don't explode?

JRR: Well, I'll tell you what happened to me. When I came back from Vietnam, I went straight into college. I went to school at night and worked full-time during the day, and I was married and had two children. I got through college in 2½ years. My third child was born before I graduated from college. My fourth child was born my first year of law school. And I got through law school in 2½ years. I moved my family to Texas to have a residence to be able to take the bar exam the following January. And of course, I went right to work, I became Assistant DA and then got into politics, and got into being a judge and all that sort of thing. And then one day, I looked up, and I don't remember anything that happened about my family. I did not see my kids grow up.

Now, I'm a hard worker, and I'm glad I did *that*, but I should have looked up once in a while so I could see how my family was. And fortunately, we're a very strong family, and we have a lot of respect and love for one another, and so not a terrible lot of harm was done, except to *me*. *I* didn't see my children grow up.

JP: So, stop and smell the roses.

JRR: That's exactly right.

JP: Where did you go to high school? Where did you grow up?

JRR: Well, I grew up in a lot of places, actually. I was born in Olney, Texas—that's Young County, out near Graham and Archer City, Wichita Falls—that area. My dad was born there, I was born there, my sister was born there. But we moved to Oklahoma City, and I lived in Oklahoma City for six years or more. We moved to Arkansas,

Mississippi, and finally Alabama, which is where I met my wife in the 11th grade, in Mrs. Walker's Civics class, at Sidney Lanier High School in Montgomery, Alabama.

JP: (Laughs.) Still married, right?

JRR: Still married. Remember the day, just like it was yesterday.

JP: Where did you go to college?

JRR: I went to Auburn University in Montgomery, and then I went to the University of Alabama Law School.

JP: We elect our judges in Texas. Do you think that's a good idea or bad idea, and why?

JRR: I think it's a good idea to elect our judges. Judges have a great deal of power and authority. In fact, I used to say district judges are the most powerful people in all of Texas—not politically powerful, but legally powerful. And it seems to me that the people of Texas ought to have some say-so in who exercises that power and that authority. I've always supported the election of judges. I don't have any quarrel with the federal system, where the judges are appointed. But I think elections are important, given the power that judges wield.

JP: Do you like to travel?

JRR: Very much.

JP: Where do you like to go?

JRR: I like traveling in the western United States. I like to drive, and I like to drive long distances, and it's a beautiful part of the world. And I live out there part of the year.

JP: Does your wife travel with you?

JRR: Oh, yes. When I go to Montana to fish, she travels up there and stays in Kalispell while I go out into the wilderness and fish for a week. And I come back and get her, and we drive some more.

JP: What other hobbies do you have?

JRR: I play golf … in a manner of speaking, I play golf. I swim regularly, and I lift weights, and I'm very interested in shooting. I don't like to hunt particularly, but I enjoy guns—*all* kinds of guns—and I spend a lot of time shooting, mainly just for my own pleasure. I don't compete or anything like that.

I like to read. Reading substitutes for that intellectual challenge I was telling you about. I like to read deep stuff, and it helps keep the mind sharp.

JP: What was the last book you read that was a deep book that you enjoyed?

JRR: Well, right now I'm reading *The Meditations of Marcus Aurelius*. I have almost finished a book about objectivism, which is the philosophy of Ayn Rand. I would say those are the two deepest books I've read lately.

JP: How important is it at the district-court level for the lawyers to brief the cases correctly?

JRR: Well, I'm sort of several minds about that. I tried never to ask a lawyer to brief an issue for me. First of all, I came to court prepared. I was as prepared on his case as *he* was. That was a point of pride with me. If I had a question or something, I might say "Look, send me a letter explaining this point." Don't be elaborate. I kind

of followed the Winston Churchill rule—if you can't put it on one piece of paper, I don't want to read it.

JP: As a district judge, you did research?

JRR: A district judge … sure. I wanted to be right. That was the important thing.

JP: When you were on the court of appeals, were you ever reluctant to reverse the district judge's decision?

JRR: Never. The law and the facts dictate the decision. It doesn't make any difference how long I've known that judge, or what I think about him, or anything. I didn't affirm him because I liked him, and I didn't reverse him because I didn't like him. I did it based on the law and the facts. And as long as you do that, you can never have a personal conflict problem as a judge. As long as people understand that you educate yourself, and that you spend the time to learn the case, they'll respect your opinion. Even if they don't agree with it.

JP: Is there anything else you'd like to tell us about what you most liked about your career? What made it the most exciting and interesting for you?

JRR: Well, I think mostly it was pretty much something different every day. And I got to solve problems. I like untying knots. In fact, my favorite thing to do when I was on the court of appeals was to solve procedural questions. Sometimes a trial judge would tie it up in such a knot, it would take some considerable amount of effort to get it undone.

I liked the people I was around, I felt good about the job I had, I tried to do a good job, and I wanted people to respect me as a judge—not me personally—but to have

respect for the dignity and the majesty of the law. And as a judge, you have that responsibility to see to it that people have that opinion, and you do it by the way you act, and the way you behave, and the way you study, and the way you work. And I think the work ethic is a very important part of that. So, that's pretty much it, I think

Hon. Mark Whittington[3]

The following is an excerpt of an interview of Justice Mark Whittington (**MW**) conducted on September 11, 2015, by David Weiner (**DW**).

Justice Whittington's interview is part of an ongoing effort by the Appellate Section of the State Bar to preserve and document matters of historical interest to members of the bar. To watch the video of Justice Whittington's oral history, go to the Section website at http://www.tex-app.org/, click on the Awards & History tab, then on the Judicial Oral Histories tab in the drop-down menu, and then look for Justice Whittington in the "search" feature.

DW: What first made you decide that you would become a lawyer?

MW: My dad was a lawyer and a judge, and I always enjoyed hearing him talk about his profession. I saw how much pleasure he received from it. And so I would say it was probably in the latter part of my undergraduate schooling that I decided I wanted to pursue going to law school and become a lawyer.

DW: Once you became a lawyer, what kind of practice did you

[3] Justice Whittington served as a justice on the Dallas Court of Appeals from 1993-2008. He began his career in the judiciary in 1983, serving until 1986, as County Court at Law Judge in Dallas, Texas. From 1987-1992, Justice Whittington served as the judge of the 160th State District Court in Dallas, Texas.

enter into?

MW: I had a general civil practice. I was with a small firm that is no longer in existence; we did mainly insurance-defense work, but we had some plaintiffs' work as well.

DW: When did you first decide that you might want to be a judge?

MW: To be frank, the political party I was affiliated with at the time had a judge that was an embarrassment to them, and then I was approached by the party officials and asked if I would consider running for the bench. I had not been out of law school a long time. I'd been practicing about five years. But the response was "Well, we think you'll be a good judge."

DW: Which trial court were you elected to?

MW: I started out in a civil county court at law in Dallas. I tried lots and lots of cases, and I think that benefitted me in my judicial experience. We would frequently try two jury trials a week in the county court at law back then. Apparently, I did well enough that I was approached and asked if I would consider running for the state district bench, and I did, and was fortunate to be elected to the state district bench without having an opponent.

DW: What prompted you to make the decision to go to the court of appeals?

MW: Well, state district judges are, in my estimation, the hardest-working judges in the State of Texas. They try major complex litigation. In my case, it was civil litigation, and I did it for six years. And I'll be candid here, too. When I first became a lawyer, there were some judges in Dallas County, truthfully—where I tried most

of my cases—that I thought had been on the bench too long and had gotten sort of grumpy and irascible and hard to deal with. And I just said to myself when I began my judicial career that if I ever started to get bored or tired or flustered by trying cases in the state district court, I'll do something else. I don't want to admit I had gotten to that point, but an opportunity came for me to run for the court of appeals, and I decided to take that opportunity.

DW: Do you remember who some of your colleagues on the court of appeals were when you first got there?

MW: Sure. A judge who took me under his wing and was a mentor to me was Justice James Baker. One of the first rough drafts I ever wrote, he had a program he called "Right Writer." You could put the rough draft of the opinion into the computer, and adjust the grade level for the reader. Judge Baker wanted every opinion to be something that a student in the 10th grade could read and understand. So he started running my opinions—my rough drafts—through "Right Writer."

DW: Did you eventually learn how to write like a 10th grader?

MW: I think so. I think that's one reason I was successful, and I attribute that to Justice Baker.

DW: I want to talk a little bit about the lawyers who practiced before you in the court of appeals. Do you have any suggestions about what attorneys can do to prepare their appellate briefs and to present their cases in the best light?

MW: My number one suggestion—and I think this probably is a suggestion that goes back to Justice Baker—he and I talked about this. Most cases—most appeals—no matter

how complicated, how complex, turn on one or two key issues. And good appellate lawyers can look at a record, or look at a trial if they tried the case, and identify the one or two key issues upon which the case is going to be resolved. Some lawyers can't do that. And when you get a brief with ten or twelve issues that are all given equal weight and time and effort, an appellate justice who's experienced will understand that the lawyer couldn't figure out which one of those issues was the key issue. And of course, you always need to put your key issue first or second in your points to be considered. But that's probably one of the best tips I could give an appellate lawyer, particularly a young appellate lawyer. Don't lose sight of your focus to identify the tree within the forest that's going to resolve that appeal.

DW: What would you tell lawyers to do to prepare for and argue their cases at the court?

MW: Well, one of the deficiencies that will hurt you very quickly is not being absolutely competent and familiar with the record. Good appellate specialists will have read the record backwards and forwards. I always asked questions that were based on the record. Maybe that has partly to do with my experience as a trial judge, because I wanted to make sure that, when a lawyer was arguing for reversal, the complaints were supported by the record. So I think that's one of the most important things that somebody wanting to be a good appellate lawyer needs to understand — have an absolute understanding of what's contained in the record.

DW: Did you ever go into an oral argument thinking that the case would be decided in one way, and then have your mind changed by what happened at oral argument?

MW: Absolutely. But I don't want to over-emphasize that. You

know, I was an appellate court justice for 16 years. So I did that for a long time. And I would say over the course of 16 years I've probably had my mind changed 10 times. But you know, that's enough to make a good effort at doing it. I mean, I had good lawyers, and I was always prepared for oral argument, I had looked at the briefs carefully and looked at the record where I needed to.

I had a technique, I guess you would call it, that may be different than a lot of appellate justices. And I think it sometimes caused consternation. I would come into an appellate argument with a pretty fair idea who I thought would prevail in the case. And you know, that was the lawyer that I would ask questions of, and ask hard questions of, because I wanted to confirm—or was trying to confirm for myself—that I had made the correct decision, or I was leaning the correct way. And I guess the cases where I changed my mind is where I came in thinking one party was going to prevail, and then through asking questions of that party's attorney, it became clear to me that he or she and I weren't thinking along the same lines and weren't getting to the same point the same way. And that would cause me some concern, and I'd go back and look at it.

DW: You told us that Justice Baker was a mentor to you when you came on the court. But certainly there had to be other ways that helped you to learn your role as appellate judge. What were some of those that you recall? As far as training, education, resources that were provided to you?

MW: Two of my close personal friends, [Justice] Deborah Hankinson and [Justice] Joe Morris, served with me, and I can tell you, working with them helped mold and focus my ability to be what I believe was a pretty good appellate justice.

DW: What would you say was the most rewarding aspect of being an appellate judge?

MW: I would say the ability to spend time and focus on the law and be a student of the law. As we all know, the appellate review and authoring of opinions is the application of the law to the facts. And so I always kept that in mind when I was looking at appeals. I'd study the facts carefully. And then that application of the law to the facts is very rewarding. And I want to go back and maybe correct something that I said earlier. I said I only probably changed my mind ten times when I went out and heard an oral argument. I want to add that I also several times can remember changing my mind as I wrote the opinion, or worked with my staff attorneys writing the opinion. And that's the application of the law to the facts. And sometimes you'll get halfway through an opinion and where you're confident you know the answer, and you just realize the law isn't applying to the facts like you thought it was going to. And so I enjoyed the opinion writing as well.

DW: Any additional advice or pointers for anyone who's practicing in appellate law based upon the experiences that you had there at the court of appeals?

MW: Well, let me just go back to what I said earlier. You know, keep it simple. I mean, the worst thing an appellate justice wants to see is a brief with ten or twelve issues that shoot off in ten or twelve different directions. Focus on what's important. You know, you don't necessarily have to write at the 10th-grade level, but you need to remember that—and justices remember this—the real focus of briefs and opinions should be—or largely—can your client clearly understand what you're saying? And when an appellate justice is writing an opinion—this is what Justice Baker always said—he wanted the citizens

of the State of Texas whose livelihood or business was being significantly impacted to understand exactly what he was saying in an opinion, maybe not agree with it, but at least feel like their judicial system had given them a fair shake. So, always remember who your audience is. Now, with appellate attorneys, it's obviously got to be the appellate justices, probably number one. But you want to write an opinion that when your client reads that, will say "My lawyer did a good job for me, presenting my case to the appellate court."

United States Supreme Court Update

Matthew Frederick, Deputy Solicitor General, Office of the Solicitor General of Texas
Andrew Guthrie, Associate, Haynes and Boone, LLP, Dallas
Taylor Whitlow Hoang, Assistant Attorney General, Office of the Attorney General of Texas
Ryan Paulsen, Counsel, Haynes and Boone, LLP, Dallas

Abortion

***June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020)**

Multiple abortion clinics and abortion providers sued in federal court, alleging that Act 620 was unconstitutional because it imposed an undue burden on the right of their patients to obtain an abortion. The district court held that Act 620 was unconstitutional and preliminarily enjoined its enforcement. The Fifth Circuit granted a stay of the district court's injunction. The Supreme Court then issued its own stay, leaving the preliminary injunction in effect. The case was then remanded for reconsideration in light of the Supreme Court's holding in *Whole Woman's Health v. Hellerstedt*, 579 U.S. ____ (2016), that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right" and are unconstitutional. On remand, the district court found that Act 620 offers no significant health benefits and that admitting privileges common to hospitals throughout Louisiana made it impossible for abortion providers to obtain conforming privileges. Because of the substantial obstacle the Act imposes and the lack of any health-related benefit, the district court concluded that the law imposed an undue burden and was unconstitutional. The district court

The Supreme Court held that Louisiana's Act 620, which required abortion providers to hold active admitting privileges at a hospital within 30 miles of the place where abortion providers perform abortions, was unconstitutional.

entered a permanent injunction forbidding enforcement of Act 620. The court of appeals disagreed and reversed. The Supreme Court stayed the Fifth Circuit's judgment, which left the district court's injunction in place. The plaintiffs petitioned for certiorari on the merits. The State filed a cross-petition challenging, for the first time, the plaintiffs' authority to maintain this lawsuit. The Supreme Court granted both petitions.

In an opinion written by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, the plurality reversed. The plurality first determined that by raising the standing issue for the first time in its cross-petition for certiorari, the State waived the argument. And the State had conceded more than five years earlier that the plaintiffs did have standing. Court precedent allowing plaintiffs to assert third-party rights where the enforcement of the challenged restriction against the litigant would result indirectly in the violation of the third parties' rights also supported the plaintiffs' standing in this case. The plurality then turned to the merits, noting that the district court's fact findings must be viewed under a deferential standard and must not be set aside unless clearly erroneous. When reviewing the testimony and evidence, the plurality determined that ample evidence supported the district court's conclusion that, even if Act 620 had a marginal benefit to women's health, the burdens imposed by the Act far outweigh any such benefit and imposes an unconstitutional undue burden.

Chief Justice Roberts concurred in the judgment, agreeing that the abortion providers have standing to assert the constitutional rights of their patients. Additionally, because Act 620 imposes a burden on abortion access just as severe as the Texas law invalidated in *Whole Woman's Health*, Act 620 cannot stand under stare decisis.

Justice Thomas dissented, opining that plaintiffs lack standing under Article III to assert the rights of their potential clients and that no waiver could relieve the Court from an independent obligation to determine whether it has jurisdiction to address the merits of a case.

Justice Alito, joined by Justice Gorsuch and joined in part by

Justices Thomas and Kavanaugh, dissented. Justice Alito opined that the correct legal standard is whether Act 620 places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992), and that the balancing test used in *Whole Women's Health* should be overruled. Justice Alito also asserted that the plaintiffs lacked standing because they failed to satisfy the third-party standing test. Women's interests in the preservation of regulations that protect their health are at odds with abortion providers' financial interest in avoiding burdensome regulations. Additionally, the abortion providers cannot show they have a closeness to the third party or that there is hindrance to the third party's ability to bring suit. The State's failure to raise standing does not deprive the Court of the power to address standing as long as the issue was not decided by the court below.

Justice Gorsuch filed a dissenting opinion, noting that the Court failed to review the legislature's factual findings under a deferential standard. Additionally, the abortion providers did not satisfy the third-party standing requirement, and the plurality incorrectly held that the State waived standing.. Furthermore, when deciding facial challenges to the constitutionality of Act 620, the plurality should have asked whether the law has a substantial number of unconstitutional applications compared to its legitimate sweep rather than asking whether the law will impose a substantial obstacle for a large fraction of women for whom the law is a restriction.

Justice Kavanaugh also wrote a dissenting opinion to emphasize that the Court should remand the case for a new trial and additional factfinding to properly evaluate Act 620.

Administrative Law

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020)

This case is the next in a long line of litigation over the contraceptive mandate. Though contraceptive coverage is

not required by the ACA, the departments charged with administering the program—the Departments of Health and Human Services, Labor, and the Treasury—mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. The Departments also promulgated rules allowing qualifying religious organizations to opt out of providing contraceptive coverage through a "self-certification" process, but the exemptions were challenged on free-exercise grounds and addressed in both *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), and *Zubik v. Burwell*, 578 U.S. ____ (2016). On remand, the Departments promulgated two additional IFRs that served as the impetus for this litigation. In short, these rules broadened the definition of an exempt religious employer—who would not have to participate in the accommodation process—and created a similar "moral" exemption for employers with sincerely held moral (instead of religious) objections to providing contraceptive coverage. Pennsylvania challenged these new IFRs, claiming that they were procedurally and substantively invalid under the Administrative Procedure Act. The district court granted a nationwide injunction against the IFRs. The Third Circuit affirmed and found, among other things, that the Departments lacked authority to craft the disputed exemptions under the ACA.

The Supreme Court reversed in an opinion written by Justice Thomas, joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh. The ACA provides that "with respect to women," "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by" HRSA, an agency of Health and Human Services. The Court determined that this provision grants sweeping

The Supreme Court upheld the agency rules providing religious and moral exemptions to the "contraceptive mandate" under the Patient Protection and Affordable Care Act of 2010 (ACA).

authority and discretion to the Departments to craft a set of standards defining the preventive care that applicable health plans must cover. That means the Departments have discretion to create the religious and moral exemptions at issue. The Court also held that the IFRs were procedurally valid because they contained all the elements of a notice of proposed rulemaking as required by the APA.

Justice Alito and Gorsuch concurred to note that, while they agreed with the Court's decision in full, they would have decided an additional question—whether the Religious Freedom Restoration Act compels the exemption granted by the current rule. Justices Alito and Gorsuch would say it does.

Justice Kagan and Breyer concurred in the judgment, writing separately to note that they would uphold HRSA's statutory authority to create exemptions, but for different reasons, and to question whether the exemptions here can survive administrative law's demand for reasoned decision-making on remand.

Justice Ginsburg and Sotomayor dissented, noting their concerns that the Court's opinion leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets—without justification—on the ground of religious freedom.

Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891 (2020)

In 2012, the Department of Homeland Security ("Department") issued a three-page memorandum creating an immigration program ("DACA") permitting unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Two years later, the Department expanded DACA eligibility and created another program ("DAPA") for the parents of US residents. DAPA and the DACA expansion were successfully challenged in court as a violation of the Immigration and Nationality Act ("INA")

and the nationwide preliminary injunction against their implementation was upheld by an equally divided Supreme Court. In 2017, under a new administration, the Department rescinded the DACA memorandum, relying on the DAPA rulings and a letter from the Attorney General concluding that DACA shared the same legal flaws as DAPA. Several groups of plaintiffs challenged the rescission in federal courts as a violation of the Administrative Procedure Act ("APA") and the Equal Protection Clause. District courts in New York, California, and the District of Columbia ruled for the plaintiffs and issued nationwide injunctions. The government sought review in the various intermediate courts of appeals and simultaneously filed petitions for writ of certiorari. After the Ninth Circuit affirmed the California district-court ruling, the Supreme Court granted certiorari in all three cases.

The Supreme Court ruled for the plaintiffs in an opinion by Chief Justice Roberts. To begin, the Court held that the decision to rescind DACA was subject to APA review and federal-court jurisdiction. Although the APA does not cover discretionary non-enforcement decisions, it does reach administrative actions such as the aspect of DACA authorizing recipients to seek work authorization and benefits under Social Security and Medicare. The Court also held that the provisions of the INA restricting federal-court jurisdiction did not apply because the lawsuits here do not challenge any removal proceedings. Turning to the merits, the Court held that the rescission decision was arbitrary and capricious under the APA. Looking only to the explanation offered at the time, the Court found two errors: the memorandum addressed the unlawfulness of the benefits aspect of DACA without addressing the removal forbearance and it failed to assess the reliance interests and weigh them against other policy concerns. The Court refused to consider additional reasons offered by the Department in a follow-up memorandum because it was not contemporaneous with the rescission decision.

The Supreme Court held that the decision to rescind the DACA program was arbitrary and capricious.

The Chief Justice, joined by Justices Ginsburg, Breyer, and Kagan, further concluded that the plaintiff groups failed to establish that the rescission decision was motivated by animus as required to establish a violation of the Equal Protection Clause.

Justice Sotomayor concurred in part and dissented in part. Justice Sotomayor agreed with the Court that the rescission decision violated the APA, but she would have permitted the plaintiffs to develop their Equal Protection claims further on remand, reasoning that they had done enough at this preliminary stage to allow those claims to go forward.

Justice Thomas, joined by Justices Alito and Gorsuch, concurred in part and dissented in part. The dissenting justices disagreed that the rescission decision was arbitrary and capricious. The Department originally issued DACA without either delegation of authority from Congress or undertaking a rulemaking under the APA. Thus, DACA was unlawful from its inception and, because the Department's determination of illegality was sound, its decision to rescind DACA was reasonable.

Justice Alito concurred in part and dissented in part. Justice Alito agreed with the reasoning expressed in the dissenting opinions of Justice Thomas and Justice Kavanaugh but wrote separately to highlight the use of the judiciary to obstruct rescission of DACA for the entire presidential term without once holding that it could not be rescinded.

Justice Kavanaugh concurred in part and dissented in part. In his view, the later memorandum prepared by the Department to justify rescission qualified as an agency action that should have been included in the Court in its APA review. The cases the Court relied on to treat the later memorandum as a post-hoc justification all involve later arguments provided by agency lawyers or by judges in their opinions.

Alternative Dispute Resolution

GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020)

ThyssenKrupp Stainless USA, LLC entered into three

contracts with F. L. Industries, Inc. for the construction of steel-manufacturing plants. Each contract had an identical arbitration clause. F. L. Industries entered into a subcontract agreement with GE Energy Power Conversion France SAS, Corp., under which GE Energy agreed to design, manufacture, and supply motors. Soon after GE Energy delivered nine motors, Outokumpu Stainless USA, LLC acquired ownership of the plant from ThyssenKrupp. Outokumpu later sued GE Energy and its insurers in Alabama state court, arguing that GE Energy's motors failed. GE Energy removed the case to federal court under 9 U.S.C. § 205, which authorizes removal of an action if the action relates to an arbitration agreement falling under the Convention. The district court granted GE Energy's motion to dismiss and compel arbitration. The Eleventh Circuit reversed, holding that GE Energy was not a signatory to the original contracts that included the arbitration agreement and could not compel arbitration under the Convention. Furthermore, GE Energy could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement as a nonsignatory.

In a unanimous opinion written by Justice Thomas, the Supreme Court reversed and remanded. Because the Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines, such as equitable estoppel, nothing in the Convention could be read as prohibiting applying the equitable-estoppel doctrine. In fact, certain provisions of the Convention contemplate the use of domestic doctrines to fill any gaps. The negotiating and drafting history of the Convention, as well as decisions of the courts of other Convention signatories, also support the Court's interpretation. The Court declined to determine whether the Executive Branch's understanding

The Supreme Court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories.

is entitled to weight or deference because, in this case, the Executive Branch's interpretation aligned with the Court's interpretation.

Justice Sotomayor concurred, opining that while the Convention does not categorically prohibit the application of domestic doctrines, a domestic doctrine must be rooted in the principle of consent to arbitrate in order to apply.

Appointments Clause

Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020)

In response to the Puerto Rico fiscal crisis in 2016, Congress passed the PROMESA Act ("Act"), which created a financial oversight board ("Board") empowered to supervise and modify Puerto Rico's budget and file for bankruptcy on its behalf. Under the Act, the seven voting board members are appointed by the President without advice and consent of the Senate. Once constituted, the Board filed bankruptcy petitions for Puerto Rico and some of its entities. During bankruptcy proceedings, several creditors sought dismissal based on the argument that the process for naming the Board's members violated the Appointments Clause of the Constitution requiring Senate advice and consent to the appointment of all "Officers of the United States." The lower court denied the motions, but the First Circuit reversed.

The Supreme Court held that members of a board created by Congress to direct efforts to deal with a fiscal crisis in Puerto Rico were not governed by the Appointments Clause because they exercised primarily local authority in their duties.

The Supreme Court reversed in an opinion by Justice Breyer. The Appointments Clause provides checks and balances within the federal government by empowering the President to appoint federal officials while enabling the Senate to act as a check on that power by giving or withholding consent. The text, context, and history of the Appointments Clause confirm that it applies to all "Officers

of the United States," including those with supervisory authority over territories of the United States. The clause does not, however, apply to officials who exercise primarily local authority. Congress has long passed federal statutes creating local laws and local offices for the District of Columbia and the territories, including Puerto Rico, using appointment methods different from the method prescribed by the Appointments Clause. Applying these principles, the Court held that appointment of the board members was not unconstitutional because board members exercise primarily local powers and duties. The Act expressly makes the Board an entity of the territorial government and instructs that the Board should not be considered an entity of the federal government. The Board's investigatory powers are backed by Puerto Rico law, and the Board acts on behalf of Puerto Rico in filing for bankruptcy.

Justice Thomas concurred in the judgment. Justice Thomas agreed that the board members' appointment did not violate the Constitution, but he disagreed with the Court's reasoning. Instead of trying to determine the "primary" nature of an official's duties, Justice Thomas would look to the source of the official's authority. Officials who exercise power under Article IV governing territories would not qualify as "Officers of the United States" governed by the Appointments Clause.

Justice Sotomayor concurred in the judgment. Justice Sotomayor wrote separately to raise an issue not addressed by the parties: whether Puerto Rico's constitutional self-governance according to a compact made with Congress impacts officers such as the board members appointed by the federal government.

Article II

Trump v. Vance, 140 S. Ct. 2412 (2020)

The New York County District Attorney served a subpoena on Mazars USA, LLP, the accounting firm of President Trump, seeking financial records of the President and his businesses. The President sought an injunction in federal court barring

enforcement of the subpoena, arguing that he was immune from state criminal process under Article II and the Supremacy Clause of the U.S. Constitution. The district court dismissed the case under the abstention doctrine and alternatively ruled that the President was not entitled to an injunction. The Second Circuit disagreed with the abstention ruling but affirmed the denial of injunctive relief.

The Supreme Court affirmed in an opinion by Chief Justice Roberts. The Court first rejected the argument that the President enjoys immunity from state criminal proceedings. Court precedent going back to the time of Thomas Jefferson confirms that the President is not immune from providing testimonies and documents in federal criminal proceedings. The result is not different when applied to state proceedings. President Trump raised the problem of distraction from his duties, but there is no less danger of distraction in the federal context. The Court concluded that the possibility of stigma was likewise no bar, given the importance of the public duty to cooperate with a criminal investigation. Finally, any danger of harassing investigations is mitigated by existing safeguards provided by state and federal law. The Court also rejected the argument that states must satisfy a heightened standard to serve a subpoena on a President. For private materials, the President stands in nearly the same situation as any other individual, and the Court concluded that there was no showing that under these facts, heightened protection was necessary to allow the President to fulfill his Article II role. As a result, the public interest in effective law enforcement favors access to evidence.

Justice Kavanaugh concurred in an opinion joined by Justice Gorsuch. The concurring justices agreed with the Court that the President is not absolutely immune and that the case should be remanded to allow the President to raise other objections to the subpoena. The concurring justices would have decided

The Supreme Court held that the President cannot claim absolute immunity from, nor is he entitled to a heightened standard governing, the issuance of a subpoena in a state criminal proceeding.

the case on different grounds, however, requiring a showing of a "demonstrated, specific need" for the information sought.

Justice Thomas dissented. While Justice Thomas agreed with the Court that the President is not immune to issuance of the subpoena, he concluded that the President may be entitled to relief against its enforcement. Justice Thomas would have vacated the lower court rulings and remanded for consideration of arguments against enforcement of the subpoena.

Justice Alito dissented. Justice Alito also agreed with the Court's holding that a President is not absolutely protected from state criminal investigations. But, consistent with the Supremacy Clause, he would have imposed a heighted standard to prevent states from undermining the lawful exercise of the President's authority under Article II.

Civil Procedure

United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020)

It is a federal felony to "encourage[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," and there is an enhanced penalty if done for commercial advantage. 8 U.S.C. § 1324. Evelyn Sineneng-Smith operated an immigration consulting firm for labor certifications and was indicted and convicted for multiple violations of 8 U.S.C. § 1324. Though Sineneng-Smith knew her clients did not meet a certain application-filing deadline for becoming lawful permanent residents, she charged each client $6,800.00 apiece to file various applications and collected more than $3.3 million in total. Sineneng-Smith unsuccessfully argued that 8 U.S.C. § 1324 did not cover her conduct, and if it did, that the statute violated the First Amendment as applied. She asserted the same arguments on appeal. The Ninth Circuit concluded that 8 U.S.C. § 1324

The Supreme Court held that the Ninth Circuit's drastic departure from the principle of party presentation was an abuse of discretion.

was unconstitutionally overbroad, an argument raised only by the Ninth Circuit's invited *amici*.

In a unanimous opinion written by Justice Ginsburg, the Court vacated the Ninth Circuit's judgment and remanded for adjudication on the issues raised by the parties. Our adversarial system follows the principle of party presentation, meaning that courts act as neutral arbiters of the matters the parties present. While sometimes it is appropriate for the court to play a "modest initiating role," this case is not one in which extraordinary circumstances justified the Ninth Circuit's departure from the issues presented by the parties.

Justice Thomas filed a concurring opinion, noting that the Ninth Circuit's decision highlighted the troubling nature of the Court's overbreadth doctrine and urged for the need to revisit the doctrine in an appropriate case.

***Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020)**

Arthur Lomax, a prison inmate in Colorado, sued prison officials challenging their decision to expel him from a sex-offender treatment program. He also requested status as an *in forma pauperis* ("IFP") filer because he could not pay the filing fee. The district court denied his request, ruling that because Lomax had filed three suits dismissed for failure to state a claim, he was barred by the Prison Litigation Reform Act ("Act") from obtaining IFP status. The Tenth Circuit affirmed, holding that the previous dismissals of Lomax's lawsuits counted, even though the dismissals were without prejudice.

The Supreme Court held that the Prison Litigation Reform Act bars prisoner litigants from claiming status as *in forma pauperis* filers if they have previously filed three lawsuits that were dismissed for failure to state a claim whether with or without prejudice.

The Supreme Court affirmed in an opinion by Justice Kagan. The Act precludes IFP status for prisoner litigants who "on 3 or more prior occasions . . . brought an action or appeal in a court of the United States that was dismissed on grounds that it is frivolous, malicious, or

fails to state a claim upon which relief may be granted." The Act does not differentiate between dismissals with or without prejudice—the question under the Act is why the dismissal order was issued. Reaching this conclusion, the Court rejected Lomax's arguments for interpreting the Act to refer only to with-prejudice dismissals. Reading that into this provision of the Act would raise inconsistencies with three other provisions containing similar language. And contrary to Lomax's argument, the fact that Federal Rule of Civil Procedure 41(b) treats unspecified dismissals as dismissals with prejudice shows that a dismissal for failure to state a claim refers to dismissals with or without prejudice. Similarly, the fact that the Act refers to dismissal for failure to state a claim in the same phrase as dismissals for frivolous or malicious actions is not dispositive, given that frivolous filings can be dismissed without prejudice.

***Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*,140 S. Ct. 1589 (2020)**

Lucky Brand and Marcel have a long tradition of trademark-infringement litigation. A lawsuit in 2001 culminated in a settlement in which Lucky Brand agreed to stop using Marcel's "Get Lucky" trademark, and Marcel released "any claims regarding Lucky Brand's use of its own trademarks." In a second round of litigation beginning in 2005, Marcel claimed that Lucky Brand violated the terms of the 2003 settlement. Lucky Brand argued that Marcel had released its claims but eventually abandoned the defense, and the case ended with a partial summary judgment and jury decision against Lucky Brand.

In 2011, Marcel sued again, alleging that Lucky Brand's own trademarks using the word "Lucky" impermissibly infringed on Marcel's "Get Lucky" mark. The district court granted summary judgment to Lucky Brand, concluding that Marcel's claims were essentially the same as its counterclaims in the 2005 suit. The Second Circuit vacated the district court's decision because it determined that Marcel alleged violations after the 2005 litigation. On remand, Lucky Brand

asserted its release defense for the first time since 2005. The district court accepted this defense and granted Lucky Brand's motion to dismiss. On appeal, the Second Circuit again vacated the district court's decision and concluded "that a doctrine it termed 'defense preclusion' prohibited Lucky Brand from raising the release defense in the 2011 Action." The Supreme Court granted certiorari to determine "when, if ever, claim preclusion applies to defenses raised in a later suit."

In an opinion by Justice Sotomayor, the Court unanimously held that "defense preclusion" does not exist as a separate form of res judicata independent of either issue preclusion or claim preclusion. It explained that issue preclusion "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment," while claim preclusion "prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." Since the parties agreed that issue preclusion did not apply, the Court determined that Marcel could block Lucky Brand's release defense only on a claim-preclusion theory. But the Court held that "the two suits here were grounded on different conduct, involving different marks, occurring at different times." Thus, neither issue preclusion nor claim preclusion applies, and Lucky Brand had a right to raise its release defense.

Civil Rights

Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020)

All three of the consolidated cases started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status. Each employee sued under Title VII alleging unlawful discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) provides that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The Second, Sixth, and Eleventh Circuits reached conflicting decisions about whether this provision covered the sexual-orientation discrimination alleged in the consolidated cases.

In an opinion written by Justice Gorsuch and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Supreme Court held that Title VII applies in such cases. To reach this result, the Court looked to the ordinary public meaning of Title VII's command at the time of the statute's adoption in 1964. Under that rubric, an employer violates Title VII when it intentionally fires an individual employee based in part on sex. And, the Court concluded, it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Title VII therefore applies.

The Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits an employer from firing an individual for being homosexual or transgender.

Justice Alito dissented, joined by Justice Thomas, to state his views that Title VII does not cover "sexual orientation" or "gender identity," including because congressional amendments to that effect have failed. In holding otherwise, the Court purports to craft new legislation. Justice Kavanaugh also dissented to explain how the majority opinion steps outside its judicial role to rewrite the statute.

Constitutional Law

Chiafalo v. Washington, 140 S. Ct. 2316 (2020)

The State of Washington requires each elector to execute a pledge agreeing to mark his or her ballots for the presidential candidate of the party that nominated the elector. If the elector violates that pledge, the elector faces a sanction of a civil fine up to $1,000. Here, Washington voters chose Hillary Clinton over Donald Trump. Washington appointed the nominees of

the Washington State Democratic Party as its electors, who pledged to support Hillary Clinton in the Electoral College. But three Washington electors voted for Colin Powell for President. Washington fined the electors $1,000 each for breaking their pledges. The electors unsuccessfully challenged their fines in state court.

In an opinion written by Justice Kagan, the Supreme Court affirmed and held that a State may enforce its pledge law against an elector. In *Ray v. Blair*, 343 U.S. 214 (1952), the Court held that neither the language of the Constitution nor the Twelfth Amendment prohibits a state from appointing only electors that commit to vote for a party's presidential candidate. Section 1 of Article II of the Constitution gives states far-reaching authority over presidential electors, including the power of appointment and the power to condition such appointment. These powers also include the power of enforcing a pledge law such as Washington's. The Court rejected the electors' argument that by providing that electors must vote by ballot, the Constitution requires electors to have freedom of choice. Additionally, the Nation's history favors requiring electors to vote for his or her party's nominee because electors only rarely have exercised discretion in casting their ballots for President.

The Supreme Court held that a State may penalize an elector for breaking his or her pledge and voting for something other than the presidential candidate who won his or her State's popular vote.

Justice Thomas, joined in part by Justice Gorsuch, concurred, opining that Article II is silent on the States' power to require electors to vote for their parties' candidate. Because the Constitution is silent on the issue, Justice Thomas would resolve the case by recognizing that all powers that the Constitution does not delegate to the federal government or prohibit to the states are controlled by the states.

***Colo. Dep't of State v. Baca*, 140 S. Ct. 2316 (2020)**

In a per curiam decision, the Court reversed the judgment of the Tenth Circuit for the reasons stated in *Chiafolo v. Washington*.

***Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)**

Two elementary school teachers at Catholic schools sued their schools after they were fired. One teacher claimed a violation under the Age Discrimination in Employment Act of 1967, while the other teacher claimed she was fired after requesting a leave of absence to obtain breast-cancer treatment. In both cases, the religious schools obtained summary judgment under the ministerial exception established by *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The Ninth Circuit reversed both cases, holding that the ministerial exception did not apply.

In an opinion written by Justice Alito, the Supreme Court reversed and held that the First Amendment prohibited court adjudication of the teachers' employment-discrimination claims. The Court first noted that in matters of faith and doctrine, religious institutions are independent and free from court intervention. In *Hosanna-Tabor*, the Court applied the ministerial exception but declined to adopt a rigid formula for determining when an employee qualifies under the exception. But four factors were relevant to the Court's determination: (1) the church had given the teacher the title of minister, and she had a distinct role from most of its other members; (2) the teacher's position reflected a significant degree of religious training; (3) the teacher held herself out as a minister and claimed various tax benefits; and (4) the teacher's job duties included conveying the church's message and carrying out its mission. However, these factors do not have to be met in every case. The critical question is what the employee does — whether the employee is responsible for educating children in their faith. Here, both teachers qualify for the ministerial exception because they performed vital religious duties and educated their students in their faith. That the teachers

The Supreme Court held that the First Amendment prohibits court intervention into disputes between a religious institution and a teacher who is responsible for educating and forming students in the faith.

did not have the title of "minister" or that they had less religious training than the teacher in *Hosanna-Tabor* was irrelevant because their core responsibilities were the same. The Ninth Circuit mistakenly viewed the four factors in *Hosanna-Tabor* as a checklist that must be met before the ministerial exception applies.

Justice Thomas, joined by Justice Gorsuch, filed a concurring opinion to emphasize that the First Amendment requires courts to defer to religious organizations' good-faith claims that an employee's position qualifies as ministerial.

Justice Sotomayor, joined by Justice Ginsburg, dissented. Justice Sotomayor viewed the Court's reframing of the ministerial exception as overly broad and allowing religious institutions to fire employees on grounds irrelevant to their religious beliefs or practices without court intervention. On the summary-judgment record in both cases, the Ninth Circuit correctly concluded that the ministerial exception did not bar the teachers' claims for disability and age discrimination for several reasons. First, neither teacher was represented as a Catholic spiritual leader or minister but rather were represented as lay teachers. Second, neither teacher had a significant degree of religious training nor underwent any formal process of commissioning. Third, neither teacher held herself out as having a leadership role in the faith community. Fourth, while the teachers taught religion for some part of some days of the week, the time the teachers spent on secular teaching far surpassed any time spent on religious teaching.

Criminal Law

Andrus v. Texas, 140 S. Ct. 1875 (2020)

Terence Andrus attempted a carjacking while under the influence of PCP-laced marijuana and fired multiple shots, killing two individuals. The State charged Andrus with capital murder. At the guilt phase of the trial, Andrus' defense counsel declined to present any evidence, and the jury found Andrus guilty of capital murder. At the punishment phase, Andrus'

counsel did not present an opening statement, raised no material objections to the State's evidence, and only briefly cross-examined the State's witnesses. Andrus' counsel called Andrus' mother and biological father to testify but elicited no testimony about the difficult circumstances Andrus faced growing up. After prompting from the court, Andrus' counsel called a doctor to testify on the general effects of drug use on adolescents' developing brains and a prison counselor to testify that Andrus recently began making progress and feeling remorse. Andrus then testified that his mother started selling drugs when he was six years old and that he and his siblings were often home alone growing up. He also stated that he started using drugs at 15 years old. The jury sentenced Andrus to death. Andrus filed a state habeas application, alleging that his trial counsel was ineffective for failing to investigate or present mitigating evidence. The trial court concluded that Andrus' counsel had been constitutionally ineffective and that habeas relief in the form of a new punishment trial was warranted. The Texas Court of Criminal Appeals reversed, holding that Andrus had failed to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that (1) his counsel's representation fell below an objective standard of reasonableness and (2) there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance.

In a per curiam opinion, the Supreme Court noted that to prevail on a Sixth Amendment ineffective assistance of counsel claim, a defendant must show that his counsel's performance was deficient and that such performance prejudiced him. Andrus' counsel performed almost no mitigation investigation and overlooked "vast tranches of mitigating evidence." Because of his failure to investigate, the

The Supreme Court held that the defendant proved that his counsel provided constitutionally deficient performance under *Strickland v. Washington,* 466 U.S. 668 (1984) and remanded for consideration whether the defendant was prejudiced by such deficient performance.

evidence counsel did present ended up supporting the State's aggravation case. Andrus' counsel also failed to adequately investigate the State's aggravating evidence and gave up critical opportunities to rebut the case of aggravation. Taken together, these deficiencies satisfy the first prong under *Strickland*. But the Court noted that it was unclear whether the Texas Court of Criminal Appeals considered the prejudice prong of *Strickland* and remanded for consideration.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented, arguing that the Texas Court of Criminal Appeals clearly held that Andrus failed to show prejudice and that the record contained evidence of Andrus's violent record.

***Kelly v. United States*, 140 S. Ct. 1565 (2020)**

Two New Jersey state officials, Bridget Kelly and William Baroni, reduced the toll-road lanes available for citizens of Fort Lee, New Jersey from three to one in retaliation against their mayor, who refused Kelly's request to endorse the re-election of the then-sitting governor. Their plan required paying an extra toll collector overtime to make sure the single open lane did not shut down. To disguise their plan, they arranged for traffic engineers to collect data about the effect of the traffic changes. Kelly and Baroni were later indicted on federal charges of wire fraud, fraud on a federal entity, and conspiracy. The Third Circuit affirmed the indictments.

The Supreme Court reversed in an opinion by Justice Kagan. The crimes for which Kelly and Baroni were indicted required evidence that they engaged in deception with the object of obtaining money or property. The government argued that this requirement was satisfied in two ways: the scheme sought to commandeer the lanes themselves and deprived the state of the costs for compensating the traffic engineers and backup toll collector. The Court held that

The Supreme Court held that efforts by state officials to reallocate toll-road lanes to spite a local mayor did not constitute fraud because there was no evidence of deception with the intent to obtain government money or property.

neither set of facts qualified as a basis for the fraud indictment. The scheme to reallocate the use of toll lanes was an exercise of regulatory authority that did not take government property. And while the government has a property interest in the time and labor of its employees, this was not the "object" of the defendants' scheme—they were a byproduct of the plan to reallocate the toll lanes.

***Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam)**

Respondents were convicted of federal crimes and sentenced to death. They exhausted their options for both direct and collateral review. Faced with execution by injection with pentobarbital sodium, they challenged the use of the drug as a violation of the Eighth Amendment prohibition on cruel and unusual punishment. The district court entered a preliminary injunction halting the executions, ruling that use of pentobarbital likely violated the Eighth Amendment. The D.C. Circuit refused the Government's motion to vacate the injunction.

The Supreme Court vacated the preliminary injunction in a per curiam opinion. The Eighth Amendment sets a high bar for challenging a chosen method of execution. In fact, the Court has never yet held a method of execution to qualify as cruel and unusual. The use of pentobarbital has been upheld by the Court and many courts of appeals, has been used over 100 times without incident, and is often cited by prisoners as a less painful and risky alternative to other lethal-injunction drugs. Respondents point to expert testimony suggesting the possibility of respiratory distress, but that evidence was disputed and fails to meet the requirements justifying a last-minute stay.

The Supreme Court held that a group of convicted felons sentenced to death failed to show a likelihood of success on their method-of-execution challenge to the lethal-injunction drug chosen by the Government as required to support an injunction barring their executions.

Justice Breyer dissented in an opinion joined by Justice Ginsburg. Justice Breyer highlighted problems with the case of one

of the respondents—Daniel Lee—including the 20-year delay between sentencing and execution, the arbitrary nature of the sentence (his co-defendant was not sentenced to death), and the potential difficulties with the method of execution, as reasons for reconsidering the constitutionality of the death penalty.

Justice Sotomayor dissented in an opinion joined by Justices Ginsburg and Kagan. The dissenting justices emphasized the need for time to resolve the difficult, fact-intensive questions raised by Respondents' arguments rather than resolving them on an emergency motion.

***Banister v. Davis*, 140 S. Ct. 1698 (2020)**

Nearly two decades ago, Gregory Banister was convicted of aggravated assault with a deadly weapon for killing a pedestrian with his car. After exhausting all his direct and collateral appeals at the state level, Banister filed a federal habeas petition alleging ineffective assistance of counsel. The district court rejected his habeas petition on the merits. Within 28 days, Banister filed a Rule 59(e) motion asking the court to alter its judgment, which the district court also rejected on the merits. Within 30 days of the district court's order rejecting his Rule 59(e) motion, but more than 30 days from the district court's order rejecting his habeas petition, Banister appealed to the Fifth Circuit. The Fifth Circuit held that Banister's Rule 59(e) motion constituted an impermissible successive habeas petition because it attacked the district court's decision on the merits. Because the Rule 59(e) motion was invalid, it concluded, it did not toll the appeal deadline, and Banister's appeal was untimely.

The Supreme Court granted certiorari to consider whether "a motion brought under Federal Rule of Civil Procedure 59(e) to alter or amend a habeas court's judgment qualifies as such a successive petition." In an opinion by Justice Kagan, the Court held that a "Rule 59(e) motion is… part and parcel of the first habeas proceeding," and thus for all relevant purposes, it is not a second or successive habeas petition. So Banister's Rule 59(e) petition reset the appeal deadline, and his appeal was timely.

The majority reasoned that the term "second or successive

application" in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) cannot be defined to include every filing that comes after an initial habeas petition. Rule 59(e), it explained, is "tightly tied to the underlying judgment"; it allows a party to "request that a district court reconsider a just-issued judgment," but it does not allow courts to "address new arguments or evidence." And in ordinary civil litigation, the appeal deadline is 30 days after the district court rules on a Rule 59(e) motion, which must be filed within 28 days of the district court's initial judgment. Examining historical precedent and the purpose behind AEDPA, the Court concluded that AEDPA did not eliminate the use of Rule 59(e) motions in habeas proceedings.

Justice Alito dissented, joined by Justice Thomas. Noting that Banister's Rule 59(e) motion would have been rejected if it had been filed under Rule 60(b) or 28 U.S.C. § 2244(b)(1), Justice Alito criticized the majority for allowing Banister to submit a second habeas petition so long as he dishonestly labeled it a Rule 59(e) motion. This was inconsistent, he argued, with *Gonzalez v. Crosby*, when the Court "considered how § 2244(b) applies to a filing that is in essence a second or successive habeas petition but bears a different label." In *Gonzale*s, Court held that a Rule 60(b) motion that addressed the merits of the district court's decision was subject to AEDPA's restrictions on second or successive petitions. He maintained that "nothing in [the Court's] reasoning was tied to any specific characteristics of such a motion, and accordingly, there is no good reason why a Rule 59(e) motion should not be subject to the same rules [as Rule 60(b)]."

ERISA

Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020)

Plaintiffs James Thole and Sherry Smith are two retired participants in U.S. Bank's retirement plan. That retirement plan is a defined-benefit plan, not a defined-contribution plan. In a defined-benefit plan, retirees receive a fixed payment each

month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. Thole and Smith have been paid all of their monthly pension benefits so far, and they are legally and contractually entitled to receive those same monthly payments for the rest of their lives. Yet they filed a putative class-action suit under ERISA against U.S. Bank and others for alleged mismanagement of the defined-benefit plan. The district court dismissed the case, and the Eight Circuit affirmed, on the ground that the plaintiffs lack standing to sue.

The Supreme Court affirmed in an opinion written by Justice Kavanaugh, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. The Court held simply that the plaintiffs lack standing because the outcome of the suit will not affect their future benefit payments. Whether they win or lose, the plaintiffs will receive the same benefits—thus, they have no concrete stake in the lawsuit. While their attorneys have a stake in the lawsuit (for the recovery of attorney's fees), the Court reaffirmed that an attorney's-fee claim cannot create an Article III case or controversy where none exists on the merits.

Justice Thomas concurred and wrote separately, joined by Justice Gorsuch, to emphasize how the Court's precedents have unnecessarily complicated the standing inquiry.

Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan. The dissenters would have held that the alleged breaches of fiduciary duty were enough to confer standing.

The Supreme Court held that two retirees lacked standing to challenge the management of their retirement plan under the Employee Retirement Income Security Act (ERISA) because their benefits had not been affected.

Federal Lands

U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020)

This case involves a natural gas pipeline proposed by

Atlantic Coast Pipeline, LLC (Atlantic) to run under the George Washington National Forest and a portion of the Appalachian Trail passing through the Forest. In 2018, the Forest Service granted Atlantic a special-use permit that included a right-of-way to run the pipeline through the Forest and "place a 0.1-mile segment of pipe approximately 600 feet below the Appalachian Trail." Cowpasture and others appealed the Forest Service's decision to grant the special-use permit to the Fourth Circuit.

The Fourth Circuit "vacated the Forest Service's special use permit after holding that the Leasing Act did not empower the Forest Service to grant the pipeline right-of-way beneath the Trail." The Fourth Circuit's logic was two-fold. First, the Appalachian Trail became land in the National Park Service when the Forest Service delegated its duty to administer the Trail to the Park Service. And second, as land in the National Park Service, the Appalachian Trail was exempt from pipeline rights-of-way provided for in the Mineral Leasing Act.

The Supreme Court granted certiorari to consider "whether the United States Forest Service has authority under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, to grant rights-of-way through lands within national forests traversed by the Appalachian Trail." In an opinion by Justice Thomas, the Court reversed the Fourth Circuit. It held that the George Washington National Forest is under the jurisdiction of the Forest Service, and the Mineral Leasing Act allows the Forest Service to grant rights-of-way for pipelines through federal land, including the George Washington National Forest. While the Secretary of the Interior may enter into right-of-way agreements with other federal agencies to establish the width and location of national trails, the Court explained that right-of-way agreements are non-possessory easements that do not transfer ownership to the party that benefits from the right-of-way. Accordingly, the Forest Service could award the Park Service a right-of way for the Appalachian Trail and award Atlantic a right-of-way for a natural gas pipeline without losing its jurisdiction over the George Washington National Forest.

In a dissent joined by Justice Ginsburg, Justice Sotomayor

argued that the majority had overcomplicated a simple question: "Is the Appalachian National Scenic Trail 'lan[d] in the National Park System'?" The answer was "yes," in the dissent's view, because the National Park Service Organic Act specifies that "lands in the National Park System include any area of land administered by the Park Service." On that understanding, the Forest Service could not grant a pipeline right-of-way under the Appalachian Trail since the Mineral Leasing Act contains an exception for land in the National Park System.

First Amendment

Agency for Int'l Dev. v. Alliance for Open Society, 140 S. Ct. 2082 (2020)

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Act") limited government funding to American and foreign nongovernmental organizations with a policy expressly opposing prostitution and sex trafficking. American organizations successfully challenged this requirement as a violation of their First Amendment rights in *Agency for International Development v. Alliance for Open Society*, 570 U.S. 205 (2013) (*AOSI I*). Those same organizations then filed this suit challenging the funding limitation as applied to their foreign affiliates. The district court ruled that the First Amendment barred application of the limitation under these circumstances, and the Second Circuit affirmed.

The Supreme Court held that foreign affiliates of American parent organizations were not entitled to rely on the First Amendment to escape a statutory bar against funding for organizations lacking an express policy opposing prostitution and sex trafficking.

The Supreme Court reversed in an opinion by Justice Kavanaugh. The Court relied on two fundamental principles to reach its conclusion. First, foreign citizens located outside the United States do not enjoy rights under the Constitution. Second, separately incorporated entities

are separate legal units with separate legal rights and obligations. Taken together, these principles barred the foreign affiliates from claiming First Amendment rights. The Court rejected the argument that the foreign affiliates' speech could be attributed to their American parent organizations because free speech attribution cases deal with the problem of the government compelling entities to associate with each other. The Court also rejected the argument that *AOSI I* decided the issue here because that opinion did not facially invalidate the funding limitation, suggest that foreign affiliates were entitled to exemption, or undercut the two principles governing the Court's holding in this case.

Justice Thomas issued a concurring opinion. Justice Thomas agreed with the Court's holding that the Act's requirements did not violate the First Amendment as to foreign affiliates and its related conclusion that *AOSI I* did not require a different result. He wrote separately to emphasize his continuing disagreement with the initial decision because, in his view, the Act does not require anyone to say anything.

Justice Breyer dissented in an opinion joined by Justices Ginsburg and Sotomayor. The dissenting justices disagreed with the Court's framing of the case, contending that the issue is not about the First Amendment rights of foreign affiliates but rather whether American organizations enjoy the same rights when they speak through clearly identified foreign affiliates. In their view, the same First Amendment rights should apply.

Justice Kagan took no part in the consideration or decision of the case.

Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020)

Four political organizations filed a declaratory action claiming that a federal statutory provision barring robocalls to cell phones with a single exception for calls seeking to collect government debt violated their First Amendment rights. The district court ruled that the restriction was content-based but survived strict scrutiny because the government holds a

compelling interest in collecting debts. The Fourth Circuit vacated the judgment, holding that the law could not survive strict scrutiny. As a result, the Fourth Circuit invalidated and severed the government-debt provision from the rest of the statute.

The Supreme Court affirmed. Justice Kavanaugh wrote an opinion, joined by the Chief Justice, Justice Thomas, and Justice Alito. The plurality concluded that the government-debt exception was a content-based restriction because it favors speech for collecting government debts over other speech. Thus, under well-established precedent, the exception is subject to strict scrutiny, which the government conceded it does not satisfy. The plurality rejected the government's arguments that the exception was not content-based. The provision does not impose distinctions based on speaker, the provision focuses on the speaker's speech, not their economic activity, and the provision does not just impact speech but also specific content and particular speakers.

Justice Kavanaugh, joined by the Chief Justice and Justice Alito, further concluded that the government-debt exception could appropriately be severed from the rest of the statute. The statute contains an express severability provision and the rest of the statute can function independently as a fully operative law.

Justice Sotomayor concurred in the judgment. Justice Sotomayor would have applied intermediate rather than strict scrutiny based on her view that strict scrutiny does not govern all content-based restrictions. But she concluded that the government-debt provision did not survive even that lower burden. She agreed that the provision was severable.

Justice Breyer, joined by Justices Ginsburg and Kagan, concurred in part and dissented in part. The three justices dissented based on their view that the government-debt exception, as a commercial regulation, did not warrant

The Supreme Court held that a statutory provision permitting government debt collectors to make robocalls forbidden to other speakers violated the First Amendment and severed it from the rest of the statute.

strict scrutiny even as a content-based regulation. They would have applied intermediate scrutiny and upheld the provision as narrowly tailored to support the important government interest of collecting debts owed to it. Given the Court's decision, however, the three justices agreed that the provision was severable.

Justice Gorsuch concurred in part and dissented in part, joined in part by Justice Thomas. Justice Gorsuch agreed that the government-debt provision violated the First Amendment. He reasoned that it was a content-based regulation because it allows speech favored by the government while barring other forms of speech. As such, it was subject to strict scrutiny, which it does not satisfy. Turning to remedy, Justice Gorsuch, joined by Justice Thomas, reasoned that the political organizations were entitled to an injunction barring application of the statute against them. This is the typical remedy for First Amendment violations and addresses their injury. The two justices called into question severability doctrine, which fails to provide a remedy and harms individuals not parties to the case.

First Amendment, Federalism

Mckesson v. Doe, No. 19-1108, 2020 WL 6385962 (U.S. Nov. 2, 2020) (per curiam)

The question presented in *Mckesson v. Doe* was whether the First Amendment foreclosed a state-law negligence claim seeking to hold a protest leader liable for injuries inflicted on a police officer by an unidentified protester. Rather than answer that question, however, the Court granted the petition for a writ of certiorari, vacated the judgment below, and remanded with instructions to certify an underlying question of Louisiana law to the Louisiana Supreme Court.

DeRay Mckesson organized a demonstration in Baton Rouge, Louisiana, to protest a police shooting. Mckesson directed protesters to block a highway in front of police headquarters. When officers began to clear the highway, an unidentified person struck an officer in the face with a "piece of concrete or a similar

rock-like object," causing the loss of teeth and brain trauma.

The officer sued Mckesson for damages, claiming that he negligently organized the protest in a manner that resulted in the assault. The district court dismissed the claim, holding that it was barred by the First Amendment. The Fifth Circuit reversed in a divided opinion. Although Louisiana law does not impose a "duty to protect others from the criminal activities of third persons," the majority held that a jury could find that Mckesson breached the "duty not to negligently precipitate the crime of a third party," reasoning that "a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest" onto the highway. It rejected Mckesson's argument that the First Amendment bars liability for speech-related activity that negligently causes a violent act. The dissent argued that the court should have required a "special relationship" between Mckesson and the officer before recognizing such a duty under Louisiana law, and it maintained that the majority's theory of liability was "incompatible with the First Amendment" and squarely foreclosed by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The Fifth Circuit split 8-to-8 on Mckesson's petition for rehearing en banc, and Mckesson filed a petition for a writ of certiorari.

The Supreme Court granted the petition but declined to address the merits. In a per curiam opinion, the Court concluded that "the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented." It noted that the First Amendment issue "is implicated only if Louisiana law permits recovery under these circumstances in the first place." The Court therefore concluded that the Fifth Circuit should have certified the underlying state-law question to the Louisiana Supreme Court. Although certification is discretionary, the Court determined that certification was required by the presence of "novel issues of state law" and the need to "ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." The Court therefore determined that the Fifth Circuit should have certified two questions to the Louisiana Supreme Court: "(1) whether

Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists." Thus, the Court granted the petition for a writ of certiorari, vacated the judgment of the Fifth Circuit, and remanded for further proceedings.

Justice Thomas dissented without opinion. Justice Barrett did not participate.

Free Exercise Clause

***Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246 (2020)**

In 2015, the Montana Legislature enacted a tax-credit program for people who donated to nonprofit scholarship organizations. Families who received scholarships from these organizations could use the money to pay tuition at any qualifying private school, including sectarian schools. But Article X, Section 6 of the Montana Constitution contains a "no-aid" provision barring the State from providing public funds, directly or indirectly, to religious educational institutions. To comply with this no-aid provision, the Montana Department of Revenue enacted Rule 1, which excluded all religiously affiliated schools from the tax-credit program.

Plaintiffs sued the Department after discovering that they could no longer use their scholarship awards to pay tuition at a Christian school. The state trial court enjoined Rule 1 and allowed the tax-credit program to continue without it. The Montana Supreme Court held that Rule 1 was inappropriately promulgated, but it reversed the trial court's holding that the tax-credit program could continue without it. Instead, held that the no-aid provision barred religious schools from participating in the tax-credit program, and because it saw no way to ensure that religious schools would not benefit, it invalidated the entire program.

The Supreme Court granted certiorari to consider whether "the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar

religious schools from the scholarship program." Neither party raised an Establishment Clause claim about Montana's scholarship program, nor would such a claim have been feasible according to Chief Justice Roberts. Writing for a 5-4 majority, Chief Justice Roberts held that the Free Exercise Clause prohibited the Montana Supreme Court from applying the no-aid provision to strike down the scholarship program. As a result, the Montana Supreme Court's decision was reversed, and the case was remanded. Justice Thomas filed a concurring opinion that Justice Gorsuch joined, while Justice Alito and Justice Gorsuch also filed independent concurring opinions. Meanwhile, Justice Ginsburg, Justice Breyer, and Justice Sotomayor all filed dissents. Justice Kagan joined Justice Ginsburg's and Justice Breyer's dissents.

In the opinion of the Court, Chief Justice Roberts looks to the plain text of the no-aid provision and accepts the Montana Supreme Court's interpretation of state law that the no-aid provision should apply to the scholarship program. Robert's concludes that "strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status." Robert's takes care to emphasize that *Trinity Lutheran* controls here, not *Locke v. Davey*. In *Locke*, the state of Washington protected a "historic and substantial state interest" by preventing public funds from being used to support the "essentially religious" education of training clergy. Here, the no-aid clause is not supported by a historical and substantial state interest, and it discriminates on the basis of religious *status,* not religious *use*. Before moving on, Roberts pauses to reject the context-specific analyses favored by the dissenters, noting that these "dissents follow from prior separate writings, not from the Court's decision in *Trinity Lutheran* or the decades of precedent on which it relied."

Applying strict scrutiny, Roberts rejects the three main arguments offered in support of the no-aid provision. The Montana Supreme Court held that the no-aid provision "serves Montana's interest in separating church and State 'more fiercely' than the Federal Constitution," but Roberts invalidates

this reason because the purported greater separation comes at the expense of free-exercise rights. Similarly, Roberts rejects the Department's argument that the no-aid provision enhances freedom of religion by disentangling Montana's government from religious organizations because the "Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices." Lastly, Roberts rejects the Department's argument that the no-aid provision protects Montana's public-school funding because the no-aid provision singles out religious schools without addressing other private schools.

While concluding, Roberts addresses the contention that the Montana Supreme Court successfully eliminated any free-exercise concerns by ending the entire scholarship program. Roberts responds that the invalidation of the whole program resulted from a prior misapplication of law. Had the Montana Supreme Court applied federal law correctly to begin with, they would not have had cause to eliminate the scholarship program. Thus, it was wrong to judicially terminate the legislatively enacted scholarship program.

In a concurring opinion joined by Justice Gorsuch, Justice Thomas expressed his dissatisfaction with the Court's Establishment Clause jurisprudence. Although the Establishment Clause was not explicitly at issue, Thomas argued that the Court's "overly expansive understanding of the [Establishment] Clause has led to a correspondingly cramped interpretation of the [Free Exercise Clause]." Citing *Locke v. Davey*, among other cases, he criticized the Court's latent hostility to religion. In his view, "the Establishment Clause does not prohibit States from favoring religion," and the Court should amend its jurisprudence so that "robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level."

Justice Alito wrote separately to explore the anti-Catholic history of Montana's no-aid provision. Although Alito dissented from the Court's exploration of a law's original motivation in

Ramos, he now embraces it as precedent, and indicates that it is especially important here. After walking through anti-Catholic bias in the 19th century, Alito stresses, "Under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons." For Alito, the regrettable history of Montana's no-aid provision deserved discussion as another reason to strike it down, especially since the other Justices did not properly address it.

Also joining the majority opinion, but writing alone in his concurrence, Justice Gorsuch questions the Court's distinction between discrimination based on religious status and discrimination based on religious conduct. To begin with, he argues that line drawing between religious status and religious conduct is quite challenging, because even here, discrimination based on religious conduct plays a larger role than the Court gives it credit for. But more importantly, Gorsuch emphasizes that the Free Exercise Clause, and the Court's jurisprudence on the topic, explicitly protects religious conduct, not only religious status. Gorsuch therefore contends that while the Court was right to hold Montana's no-aid provision unconstitutional for discriminating on the basis of religious status, the Court should reach the same result even if a challenged statute only discriminated on the basis of religious conduct.

In her dissent, joined by Justice Kagan, Justice Ginsburg finds fault with the Court's logic on two related, but distinct issues. As a foundational point, Ginsburg believes that "[t]he no-aid provision can be implemented in two ways. A State may distinguish within a benefit program between secular and sectarian schools, or it may decline to fund all private schools." Ginsburg first argues that the Montana Supreme Court's decision to invalidate the entire scholarship program did not impermissibly discriminate on the basis of religion; now, neither parents wanting to send their children to private religious schools, nor parents wishing to send their children to private secular schools, can collect a government benefit which they were never entitled to receive. And second, because the Montana Supreme Court implemented the no-aid provision

by adopting the latter permissible option, Ginsburg contends "there was no reason for this Court to address the alternative" question of whether the no-aid provision, or any statute, may distinguish within a benefit program between secular and sectarian schools. By her estimation, the Court "seems to treat the no-aid provision itself as unconstitutional" even though "Petitioners…disavowed a facial First Amendment challenge, and the state courts were never asked to address the constitutionality of the no-aid provision divorced from its application."

In his dissent, Justice Breyer disagrees with just about every point raised by the majority. In the first part of his dissent, joined by Justice Kagan, Justice Breyer argues that the *Locke* standard should apply here, not the *Trinity Lutheran* standard. Disagreeing with the Court, Breyer believes the discrimination at issue stems from religious use of funds, not religious status. In his view, states have a legitimate Establishment Clause interest in avoiding religious entanglements, and Montana's handling of the scholarship program legitimately furthers that interest. Going a step further, Breyer posits that the distinction between use and status is meaningless in the context of religious schools. Breyer references *Hosanna-Tabor* to note that many teachers at religious schools see themselves as "ministers" for their faith and "religious schools seek generally to inspire religious faith and values in their students." Thus, sharply contrasting the majority, Breyer believes a state that has committed to support nonpublic education should be allowed to "disqualify some private schools solely because they are religious." Writing alone in the second part of his dissent, Breyer argues that the Court should allow for more "play in the joints" between the Establishment Clause and the Free Exercise Clause. As a result, Breyer does not believe that the Court should mandate "strict" or "rigorous" scrutiny in cases like this. Rather than the rigid standard promoted by the majority, Breyer would allow for deference to state legislators and encourages "the exercise of legal judgment." Lastly, Breyer also considers some of the negative repercussions of the Court's decision.

In her dissent, Justice Sotomayor writes alone, but raises points similar to the topics addressed by the other dissenters. Justice Sotomayor, like Justice Ginsburg, believes that the Court should not have even considered the petitioners' as-applied challenge. Because the Montana Supreme Court's ruling ended the scholarship program, she thinks "[n]either differential treatment nor coercion exists here." Moreover, the Montana Supreme Court reached its decision by only relying on state law, so Sotomayor believes it is inappropriate for the Court to intervene. Furthermore, by apparently "transforming petitioners' as-applied challenge into a facial one," Sotomayor argues that Court fails its Article III mandate, incorrectly decides the issue, and introduces confusion with its final order. On the merits, Sotomayor agrees with Justice Breyer that the *Locke* standard should apply. Also like Breyer, Sotomayor believes that the state governments can justifiably exclude religious groups from their funding programs due to Establishment Clause concerns because a "decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination." Lastly, Sotomayor pointedly asks whether the "Court just announced its authority to require a state court to order a state legislature to fund religious exercise…?" Ultimately, Sotomayor's substantive and procedural critiques end with an attack on the Court's final order as vague and a potential abuse of power. As she puts it, the "Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place."

Foreign Sovereign Immunity

Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020)

In 1998, al Qaeda operatives simultaneously detonated truck bombs outside the United States Embassies in Kenya and Tanzania. Hundreds died; thousands were injured. In time, victims and their family members sued the Republic of Sudan in federal court, alleging that it had helped al Qaeda perpetrate

the attacks. While the lawsuit was pending, Congress amended the FSIA to remove an earlier bar on punitive damages. Among other things, Congress created a federal cause of action that expressly allows suits for damages, including punitive damages. 28 U.S.C. §1605A(c). Then, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in §1605A. Following these amendments, the plaintiffs amended their complaint to include this new federal cause of action. Sudan did not appear in district court, resulting in a damage award of more than $10 billion, including $4 billion in punitive damages. On appeal, Sudan appeared and argued that the 2008 amendments do not allow plaintiffs to proceed under the new cause of action—or recover punitive damages—for conduct that occurred before the amendments. The D.C. Circuit agreed, at least as to punitive damages.

The Supreme Court held that Congress's 2008 amendments to allow for punitive damages under the Foreign Sovereign Immunities Act (FSIA) applied retroactively.

The Supreme Court reversed in a unanimous opinion by Justice Gorsuch. The Court held that the 2008 amendments applied retroactively to the conduct at issue. After noting the parties' disputes over the proper interpretive framework for retroactivity in the context of the FSIA, the Court concluded that Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct. Specifically, Congress (1) expressly authorized punitive damages under a new cause of action; and (2) explicitly made that new cause of action available to remedy past acts of terrorism. Nothing more was required.

Justice Kavanaugh took no part in the consideration or decision of this case.

Immigration

Nasrallah v. Barr, 140 S. Ct. 1683 (2020)

Nidal Khalid Nasrallah is a native and citizen of Lebanon. He came to the United States on a tourist visa and later became

a lawful permanent resident. In 2013, Nasrallah pled guilty to two counts of receiving stolen property and was sentenced to 364 days in prison. Based on this conviction, the Government initiated deportation proceedings. Nasrallah applied for CAT relief to prevent his removal to Lebanon. The Immigration Judge determined that Nasrallah was removable and that, based on his experience and the current political conditions in Lebanon, he would likely be tortured if returned to Lebanon. The Immigration Judge ordered Nasrallah removed but granted CAT relief and blocked his removal to Lebanon. The Board of Immigration Appeals disagreed and ordered Nasrallah removed to Lebanon. The Eleventh Circuit declined to review Nasrallah's factual challenges.

In an opinion written by Justice Kavanaugh, the Court held that when a noncitizen is removable because he committed a crime specified in §1252(a)(2)(C), a court of appeals may review constitutional or legal challenges to a final order of removal but is barred from reviewing factual challenges. But a CAT order is not a final order of removal because it is not an order concluding that a noncitizen is deportable or ordering deportation. A CAT order means only that the noncitizen may not be removed to the designated country of removal but may be removed to another country where the noncitizen is unlikely to be tortured. While a CAT order may be reviewed together with the final order of removal, the CAT order is distinct and does not affect the validity of the final order of removal. Yet judicial review of factual challenges to CAT orders is highly deferential and subject to the substantial-evidence standard.

The Supreme Court held that, in a case involving a noncitizen who committed a crime specified in 8 U.S.C. § 1252(a)(2)(C), a court of appeals should review the constitutional, legal, and factual challenges to a Convention Against Torture ("CAT") order, though the factual challenges should be reviewed deferentially.

Justice Thomas, joined by Justice Alito, dissented, opining that because Nasrallah's removal proceedings were instituted under § 1252, the limitations on judicial review also apply to the CAT

claim. Additionally, because a final order of removal is required if a court is to review a CAT order, the CAT order is reviewable as part of the final order of removal.

***Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020)**

Vijayakumar Thuraissigiam, a native of Sri Lanka, was apprehended just 25 yards after crossing the border of the United States without an entry document. After he was detained for expedited removal, an asylum officer rejected his claim in a decision upheld by an administrative supervisor and an Immigration Judge. Thuraissigiam then filed a federal habeas corpus petition, arguing for the first time that he had a reasonable fear of persecution based on his ethnicity and political views. The district court dismissed the petition based on federal statutory limitations on the scope of habeas corpus in the context of asylum determinations, but the Ninth Circuit reversed, holding that those limitations violated the Suspension and Due Process Clauses of the Constitution.

The Supreme Court reversed in an opinion by Justice Alito. As interpreted by earlier precedent, the Suspension Clause protects the writ of habeas corpus as it existed at the time the Constitution was adopted. At that time, habeas corpus provided a means to seek release from unlawful detention, but Thuraissigiam sought an additional chance to seek asylum, taking him outside the traditional scope of habeas corpus relief. Reaching this conclusion, the Court rejected Thuraissigiam's attempts to rely on case law from before the Founding because these cases dealt with aliens seeking release. The cases cited by Thuraissigiam from the turn of the 20th century were likewise inapplicable because they relied on statutory habeas jurisdiction, not the Suspension Clause. Finally, more recent precedent does not

The Supreme Court held that federal statutory law limiting the scope of habeas review of asylum decisions did not violate the Constitution's Suspension Clause and that the asylum decision did not violate Due Process requirements.

apply to the facts of Thuraissigiam's case. The Court also held that there was no violation of the Due Process Clause. An alien like Thuraissigiam seeking initial entry to the United States receives due process when an administrative officer decides claims acting within powers conferred by Congress.

Justice Thomas concurred in the judgment. Justice Thomas agreed with the result reached by the Court but wrote separately to express his understanding of the Suspension Clause. The Founders understood the writ of habeas corpus to protect against discretionary detention. Thus, suspension of the writ of habeas corpus would be a statute enabling detention without bail or trial on suspicion of a crime. Thus understood, the statutory limitation on habeas corpus relief at issue would not qualify as a suspension.

Justice Breyer concurred in an opinion joined by Justice Ginsburg. The concurring justices agreed with the Court's conclusion as applied in this case. But they cautioned against making broader conclusions about the application of the Suspension Clause in the removal context and stated their belief that the Due Process Clause was not directly implicated in the case.

Justice Sotomayor dissented in an opinion joined by Justice Kagan. The dissenting justices found fault with the Court's interpretation of Thuraissigiam's claims and argued that it misapplied past precedent to reach its conclusions. The dissenting justices would have held that Thuraissigiam had a right to pursue habeas relief and raise due-process claims.

Qualified Immunity

Taylor v. Riojas, No. 19-1261, 2020 WL 6385693 (U.S. Nov. 2, 2020) (per curiam)

Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, in September 2013, correctional officers confined him in a prison cell that was covered, nearly floor to ceiling, in "massive amounts" of feces. Fearing that his food and water would be

contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily waste. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage. The Fifth Circuit held that these conditions violated the Eighth Amendment. But it also held that the prison officials were entitled to qualified immunity on the theory that they did not have "fair warning" these acts were unconstitutional.

The Supreme Court reversed in a per curiam opinion. It held, in short, that no reasonable correctional officer could have concluded that it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such a long time. While an officer-by-officer analysis will be necessary on remand, the Court noted record evidence suggesting that some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells.

The Supreme Court held that prison officials were not entitled to qualified immunity for holding a prisoner, for nearly a week, in a pair of "shockingly unsanitary cells."

Justice Thomas dissented without comment.

Justice Alito concurred in the judgment, writing to note that, while he agreed with the Court's conclusion on qualified immunity, he would not have granted review on this narrow case-specific question because it adds nothing to the law.

Securities Law

Liu v. SEC, 140 S. Ct. 1936 (2020)

Under the EB–5 Immigrant Investor Program, which permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises, Charles Liu and his wife, Xin (Lisa) Wang, solicited investment

for a cancer-treatment center and raised millions of dollars from foreign nationals. But rather than using the money as promised, the couple "spent nearly $20 million of investor money on ostensible marketing expenses and salaries" while diverting "a sizable portion of those funds to personal accounts and to a company under Wang's control."

The SEC uncovered the couple's misdeeds and brought a civil action against them. The district court barred Mr. Liu and Mrs. Wang from participating in the EB–5 Program, imposed the highest civil penalty authorized, and "ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project." The Ninth Circuit affirmed. The Supreme Court granted review to consider whether disgorgement qualifies as equitable relief and, if so, under what conditions it is permissible.

In an opinion by Justice Sotomayor, the Court held that disgorgement is a permissible remedy in equity so long as its implementation does not transform it into a penalty. The statute at issue, 15 U.S.C. § 78u(d)(5), identifies "equitable relief" as a permissible remedy that the SEC may seek in civil actions. The Court concluded that disgorgement was a widely available remedy in equity, but courts historically exercised caution to ensure that they did not exceed their equitable authority by imposing a penalty. The Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims" is not a penalty and is therefore permissible. The Court rejected Liu's argument that disgorgement was precluded by *Kokesh v. SEC*, which held that disgorgement constituted a penalty under the applicable statute of limitations, 28 U.S.C. § 2462. The Court explained that *Kokesh* was limited in scope and did not resolve the issue before the Court.

The Court addressed three subsidiary questions about disgorgement remedies but left their determination to the lower courts. First, the Court emphasized that money recovered through disgorgement must benefit defrauded victims, but it did not decide whether the SEC's current practice of depositing funds into a centralized Treasury fund rather than returning

them to victims satisfied this requirement by indirectly benefiting victims. Second, the Court held that the district court incorrectly held Mr. Liu and Mrs. Wang jointly and severally liable for disgorgement because joint-and-several liability was not historically imposed by courts of equity; however, since common law courts imposed partnership liability, the district court could decide whether to assess disgorgement against Mr. Liu and his wife individually or as a partnership. Third, the Court vacated the disgorgement award and instructed the district court to consider whether it should be discounted to exclude funds spent for legitimate ends.

In his dissent, Justice Thomas disagreed that disgorgement was a traditional equitable remedy. In his view, because "disgorgement is a creation of the 20th century" and was not "a form[] of equitable relief available in the English Court of Chancery at the time of the founding," it cannot be awarded as equitable relief by a modern court. Justice Thomas also finds fault with the majority's reticence to address the subsidiary issues. He would strictly enforce the "traditional rules of equity" by imposing specific limits on any award: "First, the order should be limited to each petitioner's profits. Second, the order should not be imposed jointly and severally. Third, the money paid by petitioners should be used to compensate petitioners' victims."

Separation of Powers

Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020)

In the wake of the 2008 financial crisis, Congress established the CFPB, an independent regulatory agency tasked with ensuring that consumer-debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for

a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. After receiving a civil investigative demand from the CFPB, the petitioner—Seila Law LLC—objected that the structure of the agency violated the separation of powers. The district court disagreed and ordered Seila Law to comply with the demand. The Ninth Circuit affirmed, concluding that the CFPB fit within precedents upholding for-cause removal provisions for certain executive officers.

The Supreme Court reversed in an opinion written by Chief Justice Roberts and joined in part by Justices Thomas and Gorsuch and in full by Justices Alito and Kavanaugh. The Court found that the structure of the CFPB—which is led by a single individual removable only for inefficiency, neglect, or malfeasance—violates the separation of powers. Simply put, the executive power of the Presidency generally includes the ability to remove executive officials. While the Court has upheld for-cause removal provisions in two circumstances—one for multimember expert agencies that do not wield substantial executive power and one for inferior officers with limited duties and no policymaking or administrative authority—the Court held that neither exception applied here. And the Court determined that it would not extend those precedents to the CFPB because an independent agency led by a single director has no basis in history and no place in our constitutional structure. The Court also held that the for-cause removal provision was severable from the other provisions of the Dodd-Frank Act that establish the CFPB.

The Supreme Court held that a statute restricting the President's power to remove the director of the Consumer Financial Protection Bureau (CFPB) violates the separation of powers.

Justice Thomas concurred in part and dissented in part, joined by Justice Gorsuch, to state his belief that the Court should not have addressed severability in this case.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in the judgment as to severability, but dissented as to the constitutionality of the

President's removal power. In short, the dissenters would hold that Congress has the authority to limit such removal authority and often does.

Trump v. Mazars USA, LLP

In *Trump v. Mazars USA, LLP*, the Court considered whether subpoenas issued by congressional committees seeking financial information about the President, his family, and affiliated businesses exceeded the House's constitutional authority. The case arose from four subpoenas issued by three House committees to third parties, including two banks and Mazars USA, LLP, the President's personal accounting firm. The President sued in his personal capacity to challenge the subpoenas on grounds that they had no legitimate legislative purpose and violated separation-of-powers principles. The President did not assert executive privilege. The lower courts refused to prevent compliance with the subpoenas, and the Supreme Court granted certiorari.

In an opinion by Chief Justice Roberts, the Court vacated and remanded with instructions to consider the separation-of-powers concerns presented by congressional subpoenas for the President's personal information. It began by noting that the Court had "never considered a dispute over a congressional subpoena for the President's records." Although congressional demands for presidential records began during George Washington's presidency, they had been resolved by Congress and the President through "negotiation and compromise." Considering the implications of such disputes, the Court hesitated to disturb that longstanding practice.

While the Constitution does not grant Congress the power to conduct investigations or issue subpoenas, that power has been implied as necessary to the legislative process. But the power is limited, and congressional subpoenas are valid only if "related to, and in furtherance of, a legitimate task of the Congress." That means Congress may not issue subpoenas for purposes of law enforcement, to try persons for crimes or wrongdoing, or to punish persons under investigation.

Neither the President nor the House provided an approach to the problem that sufficiently accounted, in the majority's view, for concerns about the separation of powers. The President argued that the subpoenas should be subject to the same demanding standard that applies to congressional subpoenas for documents subject to executive privilege. The House would have given no weight to the President's position, "leaving essentially no limits on the congressional power to subpoena the President's personal records."

The majority held that "courts must perform a careful analysis" that accounts for the separation-of-powers principles, "the significant legislative interests of Congress, and the 'unique position' of the President." It identified four specific considerations.

First, courts must "carefully assess . . . the asserted legislative purpose" to avoid unnecessary confrontation between the Executive and the Legislative branches. Congress may not use the President as a "'case study' for general legislation," and it may not seek from the President information available from other sources.

Second, courts should ensure that a congressional subpoena is "no broader than reasonably necessary to support Congress's legislative objective."

Third, courts should favor "detailed and substantial" evidence to establish a valid legislative purpose. Congress must explain both "its aims" and "why the President's information will advance its consideration of the possible legislation."

Fourth, courts must carefully scrutinize "the burdens imposed on the President by a subpoena" because Congress is "a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage."

The Court allowed that other factors might bear on the permissibility of congressional subpoenas, but it did not try to catalogue them because "one case every two centuries does not afford enough experience for an exhaustive list." The Court therefore vacated the judgments below and remanded with

instructions to "take adequate account" of "special concerns regarding the separation of powers."

In a dissenting opinion, Justice Thomas maintained that "Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not." In his view, Congress may attempt to obtain documents to investigate the President only if it proceeds under its impeachment power. But he denied that Congress had any authority to issue legislative subpoenas for private, non-official documents.

In a separate dissent, Justice Alito contended that congressional subpoenas for a President's personal documents, if not barred entirely, are nonetheless "inherently suspicious"—"seldom of any special value in considering potential legislation," and "easily . . . used for improper non-legislative purposes." In his opinion, the House had not made a sufficient showing to justify the subpoenas, and the record contained "disturbing evidence of an improper law enforcement purpose." Before allowing the House to subpoena the President's personal documents, Justice Alito would require it to describe "the type of legislation being considered," identify its constitutional authority to enact that legislation, and explain why the subpoenaed information is unavailable from other sources.

Trademark Law

U.S. Patent & Trademark Office v. Booking.com B.V., 140 S. Ct. 2298 (2020)

Under the Lanham Act, which governs federal trademark registration, a generic name—the name of a class of products or services—is ineligible for trademark registration because it is not distinctive enough. Booking.com is a digital travel company that provides hotel reservations and other services under the brand "Booking.com," which is also the domain name of its website. Booking.com filed applications to register four marks in connection with travel-related services, each with different

visual features but all containing the term "Booking.com." Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board concluded that the term "Booking.com" is generic for the services at issue and is therefore unregistrable. "Booking," the Board observed, means making travel reservations, and ".com" signifies a commercial website. The district court disagreed, concluding that consumers identify "Booking.com" with the services provided at that domain name. The Fourth Circuit affirmed.

The Supreme Court affirmed in an opinion written by Justice Ginsburg, joined by Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh. The Court held that the bottom-line question in determining eligibility for trademark registration turns on the mark's capacity to distinguish goods in commerce. Based on that and related principles, whether "Booking.com" is generic turns on whether that term, taken as a whole, signifies to consumers an entire class of online hotel-reservation services or the specific domain at issue. The Court held that "Booking.com" is not a generic name to consumers and therefore subject to protection. The Court rejected the PTO's per se rule that would render every "generic.com" term as unprotectable because it conflicts with both PTO practices and with trademark law and policy.

Justice Sotomayor concurred, writing separately to note her views on consumer surveys and the lower court findings in this case.

Justice Breyer dissented and would have held that adding ".com" to an otherwise generic term cannot yield a protectable trademark.

The Supreme Court held that the URL "booking.com" is not generic and can be eligible for federal trademark registration.

Tribal Law

McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)

Jimmy McGirt was convicted of three serious sexual offenses in Oklahoma state court. He argued in post-conviction

proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. The federal Major Crimes Act (MCA) subjects Indians to federal trials for crimes committed on tribal lands. But states generally have no jurisdiction to try Indians for conduct committed on tribal lands. The question raised by this appeal, then, was whether McGirt committed his crimes on land reserved to the Creek Indian Tribe, as he claimed. The Oklahoma courts rejected these arguments and upheld his conviction.

The Supreme Court reversed in an opinion written by Justice Gorsuch, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court found it obvious that Congress originally established the disputed land as a reservation for the Creeks in a series of 19th-century treaties. Although Congress has since broken many promises to the Tribe—including the extent to which it would be permitted to govern itself—the Court held that Congress has never withdrawn the promised reservation. And without such an explicit withdrawal, the reservation continues to belong to the Tribe. As the Court held: "If Congress wishes to break the promise of a reservation, it must say so."

Chief Justice Roberts authored a dissenting opinion, joined by Justices Alito, Kavanaugh, and Thomas. According to the dissenters, the Court's opinion will hobble the State's ability to prosecute serious crimes and raises the risk of undermining decades of past convictions—all without justification, because a reservation did not exist when McGirt committed his crimes.

The Supreme Court held that a large portion of Northeastern Oklahoma is an Indian reservation for purposes of federal criminal law—meaning the State of Oklahoma has no jurisdiction to prosecute Indians for crimes committed in the area.

***Sharp v. Murphy*, 140 S. Ct. 2412 (2020)**

Murphy was convicted of murder in Oklahoma state court and sentenced to death. He applied for state post-conviction relief, arguing that the Oklahoma state courts lacked jurisdiction

to try him because the MCA provides for exclusive federal jurisdiction to prosecute certain crimes, including murder, committed by Indians in Indian country. The Oklahoma state courts concluded that jurisdiction was proper because the crime did not occur in Indian country. Murphy then sought federal habeas relief. The Tenth Circuit held that the crime occurred on the Creek Reservation and that, as a result, the Oklahoma state courts lacked jurisdiction.

In a per curiam opinion, the Supreme Court affirmed for the reasons stated in *McGirt v. Oklahoma*. Justices Thomas and Alito dissented.

The Supreme Court held that for purposes of the Major Crimes Act (MCA), land reserved for the Creek Nation is "Indian country."

Fifth Circuit Update

Natasha Breaux, Ryan Gardner, & Ryan Philip Pitts
Haynes and Boone, LLP

Appellate Procedure

***Edwards v. 4JLJ, L.L.C.*, 976 F.3d 463 (5th Cir. 2020)**

This case was tried before a jury, which returned a verdict for the defendant. After the jury verdict, the plaintiffs filed a motion for judgment as a matter of law or alternatively a new trial on March 12, 2020. Without addressing that motion, the district court entered final judgment on March 27. That operated as an implicit denial of the motion. The plaintiffs then refiled an identical motion on April 10, which the district court denied. The plaintiffs filed a notice of appeal on June 12.

The Fifth Circuit dismissed the appeal for lack of jurisdiction because the notice of appeal was not timely filed. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Usually the notice of appeal must be filed within 30 days of the entry of the judgment or order being appealed, but certain motions delay the appeal deadline. But after a motion is denied, a second one based on the same ground will not further delay the appeal deadline.

Here, the deadline for filing the notice of appeal was 30 days after the entry of judgment. The plaintiffs did not appeal by the deadline. Because the second motion for judgment as a matter of law was identical to the first, it did not extend the deadline. Thus, the Fifth Circuit lacked jurisdiction.

While certain motions extend the deadline for filing a notice of appeal, refiling a motion previously denied will not.

Empower Texans, Inc. v. Geren, 977 F.3d 367 (5th Cir. 2020)

This case concerns media pass cards for access to the Texas House of Representatives' chamber floor for the regular legislative session held January 8 through May 27, 2020. The Chairman of

the Committee on House Administration of the Texas House of Representatives refused to issue media pass cards to reporters of Empower Texans, Inc. Empower applied for the media pass cards on January 3. Over the next several months, the application remained under review while the parties engaged in extended communications and the Chairman requested more information. On April 16, Empower sued without having received a final determination on its application. On May 15, it filed a motion for temporary restraining order and preliminary injunction. On May 23, the district court granted the Chairman's motion to dismiss based on legislative immunity. On June 21, Empower appealed.

The Fifth Circuit dismissed the appeal because the case had become moot. Because the legislative session was over at the time of appeal, Empower relied on the "capable of repetition, yet evading review" mootness exception, which applies only in exceptional situations if (1) the action is too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same party will be subject to the same action again. The Court explained that such exceptional circumstances will be less likely found when the party seeking review failed to utilize the procedures that had been available to obtain review sooner. In other words: "A party seeking to continue litigation after time has run out should not be allowed to do so when it failed to use the time it had."

Empower failed to meet this exception because it did not seek review with enough haste. The Court pointed to the fact that it waited just eleven days before the regular legislative session ended to seek injunctive relief in the district court, and it did not appeal until almost a month after the district court dismissed the case. And most "crucially," Empower never moved for an expedited appeal.

Although several other circuit courts agree, the circuits are not unanimous. In the Third Circuit, failure to seek expedited review carries no weight in the mootness analysis.

The mootness exception for cases that evade review does not apply when the party does not use procedures to obtain review sooner, such as requesting an expedited appeal.

***Richardson v. Flores*, 979 F.3d 1102 (5th Cir. 2020)**

This case brought against the Texas Secretary of State concerns the constitutionality of a signature-verification process for voting ballots in Texas. The plaintiffs moved for partial summary judgment and injunctive relief against the Secretary. Around the same time, litigants from a different but similar case moved to intervene. While the district court granted the plaintiffs' motion for partial summary judgment and injunctive relief, it denied the litigants' motion to intervene. The Texas Secretary of State appealed. The litigants appealed the denial of their intervention. The litigants also moved to intervene in the Texas Secretary of State's appeal.

The Fifth Circuit denied intervention. While no appellate rule generally permits intervention (with one exception under FED. R. APP. P. 15(d)), intervention on appeal has still been permitted in rare cases. While caselaw is scarce, the rule is that motions to intervene on appeal should be reserved for "truly exceptional" cases and "imperative" reasons. The standard must be steep to prevent litigants from using procedural gamesmanship to skirt unfavorable standards of review. Here, the movants did not meet this high standard. Procedurally, the appeals (which are from the same order) are docketed under the same case number, so the merits panel will consider both the merits and the alleged need for intervention below. And if the movants want to be heard in the Secretary's appeal, it is proper to move to appear as *amici curiae*, not for intervention. While intervention was denied, the movants were sua sponte authorized to file an *amici* brief.

Intervention on appeal is reserved for truly exceptional cases to prevent procedural gamesmanship.

CONSTITUTIONAL LAW

***Garza v. Escobar*, 972 F.3d 721 (5th Cir. 2020)**

The plaintiff was a coordinator of a district attorney's crime victims unit, who helped victims secure counseling services

and prepared them to testify at trial. As the coordinator, she generally led her unit, supervised employees, and dealt with grant matters. The plaintiff had worked on the district attorney's reelection campaigns and had been placed in a position of confidence with him. The relationship between the plaintiff and the district attorney soon deteriorated, however. The plaintiff's sister ran for political office, which interfered with the district attorney's political plans, and their political views diverged. The plaintiff was eventually fired. She sued alleging political retaliation in violation of the First Amendment. The district court dismissed the case, and the plaintiff appealed.

The Fifth Circuit affirmed. First, the district court did not err by performing the balancing test for First Amendment retaliation claims under *Pickering v. Board of Education*, 391 U.S. 563 (1968), at the motion-to-dismiss stage. Second, the plaintiff's firing fell under the "patronage dismissal" exception to the First Amendment's protections. If an employee's private political views would interfere with the discharge of public duties, the First Amendment may yield to the state's interests in maintaining governmental effectiveness and efficiency. It is relevant whether the employee holds "policymaking" or "confidential" roles. Here, Garza functioned as both a policymaker and confidential employee as the coordinator of the crime victims unit. And her political affiliations were disruptive to the performance of her vital statutory duties, while eroding the district attorney's trust in her to loyally perform those duties. The patronage-dismissal exception applied.

A coordinator of a district attorney's office could be fired for political disagreement under the First Amendment's "patronage dismissal" exception.

Election Law

Tex. All. for Retired Americans v. Hughs, 976 F.3d 564 (5th Cir. 2020)

On June 1, 2017, HB 25, which eliminated straight-ticket

voting in Texas, was signed into law. Three years later, various plaintiffs sued Ruth Hughs, the Texas Secretary of State, claiming that HB 25 was unconstitutional and violated the Voting Right Act. Eighteen days before early voting began in Texas, the district court issued a preliminary injunction barring the enforcement of HB 25 and ordering Secretary Hughs to implement the laws in effect before HB 25 was enacted. The Secretary appealed and filed an emergency motion for stay pending appeal.

The Fifth Circuit granted the motion for stay. Judicial changes of state election laws close in time to the election are strongly disfavored under U.S. Supreme Court precedent. Because the district court's order significantly altered election law a mere eighteen days before the election, it disrupted the status quo established by HB 25, a law that was enacted years before the 2020 election. The Secretary's appeal was therefore likely to succeed on its merits. Further, Texas would suffer irreparable harm absent a stay because it cannot run the election over again applying HB 25. This harm outweighed any harm asserted by the plaintiffs, and the public interest weighed in favor of a stay because the state election officials had already planned to operate the election under HB 25. Thus, a stay pending appeal was appropriate.

Stay pending appeal was appropriate for a district court order enjoining the enforcement of a Texas statute eliminating straight-ticket voting.

***Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020)**

Because of the coronavirus pandemic, Texas Governor Greg Abbott issued various proclamations regarding the November 2020 election. These proclamations included extending the period for early voting by six days and allowing 40 extra days for mail-in ballots to be hand-delivered to an early voting clerk should a voter decide to not mail his or her ballot. In response to these proclamations, a few of the more populous Texas counties tried to establish multiple delivery locations for mail-

in ballots. Governor Abbott disagreed with these policies based on his belief that they threated election security and issued a new proclamation stating that mail-in ballots could be delivered in person to only one designated location per county. Various plaintiffs filed suit against Ruth Hughs, the Texas Secretary of State, challenging this later proclamation on the grounds that it placed an undue burden on their right to vote and violated the Fourteenth Amendment's Equal Protection Clause. The district court agreed with the plaintiffs and issued a preliminary injunction to prevent the enforcement of Governor Abbott's proclamation. Secretary Hughs appealed and sought a stay of the preliminary injunction.

The Fifth Circuit granted Secretary Hughs's request for a stay pending appeal. Because Governor Abbott's proclamations expanded the opportunities to deliver a mail-in ballot by 40 days, it was unclear how they burdened the plaintiffs' right to vote. Even if limiting in-person drop offs to one location per county did impose a burden, it was a *de minimis* burden because the plaintiffs still possessed multiple other ways to vote, including voting early in-person or mailing their mail-in ballots. The proclamation also furthered Texas's valid interest in preventing voter fraud. Combining the Secretary's likelihood of success on appeal with the irreparable harm Texas would suffer if its voting procedures were disrupted, the Court granted a stay pending appeal.

Stay pending appeal was appropriate because the Texas Governor's proclamation specifying that mail-in ballots could be delivered in person to only one designated location per county did not abridge the right to vote.

Judge Ho wrote a concurring opinion expressing concern that Governor Abbott's proclamations unlawfully usurped the Texas state legislature's control over federal election laws.

***Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020)**

Texas law establishes that most voters must vote in-person. The only statutory exceptions to this rule are for those who:

(1) anticipate being absent from their county of residence; (2) are sick or disabled; (3) are 65 or older; or (4) are confined to jail. Before suing in federal court, the plaintiffs sought a declaratory judgment that a lack of immunity from coronavirus was a condition that made voters eligible to vote by mail in the 2020 election. After those efforts failed, the plaintiffs sued, alleging that Texas's statute allowing voting by mail for any persons over age 65 violated, among other things, the Twenty-Sixth Amendment. The district court agreed with the plaintiffs and issued an injunction authorizing all eligible voters who so desired to vote by mail. The defendants appealed.

On appeal, the Fifth Circuit vacated the injunction. Because the plaintiffs had standing to bring suit, at least one of the defendants could not dismiss the case on sovereign-immunity grounds, and the political-question doctrine did not bar consideration of the case, the Court addressed the merits of the plaintiffs' claims. The Twenty-Sixth Amendment confers an individual right to be free from the denial or abridgment of the right to vote because of age. However, this right to vote did not include a right to vote by mail because in-person voting was the rule at the time of the Amendment's ratification. There was also no denial of the right to vote here. Nor was there an abridgment of the right to vote. An abridgement occurs only if a law makes voting more difficult for a person relative to the status quo, and a law making it easier for voters over the age of 65 to vote does not make voting more difficult for others. Thus, the Court vacated the injunction and remanded the case to the district court to resolve other issues not before the Court.

Judge Stewart concurred in part on the preliminary issues and dissented on the case's merits, stating he would have found the absentee ballot statute to be unconstitutional because it discriminates based on age and leads to different outcomes for different age groups when considered in the context of the coronavirus pandemic.

The application of a Texas statute limiting the availability of mail-in voting to voters over 65 and certain other limited classes of voters did not abridge plaintiffs' right to vote.

Error Preservation

***Jordan v. Maxfield & Oberton Holdings, L.L.C.*, 977 F.3d 412 (5th Cir. 2020)**

In this product-liability suit, the plaintiffs sued Maxfield & Oberton Holdings, L.L.C., the manufacturer and distributor of Buckyball magnets, for defective design and failure to warn after their toddler sustained injuries from ingesting the magnets. The jury rendered a verdict for the manufacturer, and the plaintiffs appealed, raising three issues.

The Fifth Circuit affirmed, rejecting all three issues on grounds stemming from failure to preserve error or arguments.

First, the plaintiffs claimed the district court erred in granting the manufacturer's motion in limine to exclude evidence that post-dated the plaintiffs' purchase. The Fifth Circuit found no error because the plaintiffs did not ask the district court to reconsider its motion in limine ruling during trial. The Fifth Circuit explained that although the limine ruling limited the plaintiffs' ability to launch directly into post-sale evidence at trial, the ruling did not wholly prevent the plaintiffs from admitting post-sale evidence or prohibit them from seeking reconsideration of the ruling.

Second, the plaintiffs complained that an expert witness was biased. Despite having access to information about bias at trial, the plaintiffs did not present this bias evidence until a motion for new trial. Because the plaintiffs did not proffer the evidence at trial, the Fifth Circuit held that it could not review the district court's exclusion of this evidence and that the district court did not err in denying the motion for new trial. The Fifth Circuit explained that to preserve an excluded-evidence error, the party must proffer the excluded evidence to the court at trial, unless the substance is apparent from the context.

Motion in limine rulings must be revisited at trial, excluded evidence generally must be proffered, and claims must be included in pretrial orders.

Third, the plaintiffs claimed that the district erred in denying their request for a jury

instruction on federal preemption. The Fifth Circuit found no error because the plaintiffs did not raise a preemption claim at the pretrial conference or ask to have it included in the pretrial order. The Fifth Circuit treated the denial of the jury instruction as a denial of a request to modify the pretrial order, which may be modified only to prevent manifest injustice.

Federal Law

***Mays v. Chevron Pipe Line Co.*, 968 F.3d 442 (5th Cir. 2020)**

James Mays worked as a valve technician on offshore oil and gas platforms for an independent contractor. During his work on a platform in Louisiana's coastal waters, a valve was breached, causing an explosion that killed him. Platforms outside Louisiana's waters, in the outer-continental shelf, fed the gas into the platform where Mays died. His estate, wife, and children sued the platform owner asserting tort claims under Louisiana law. The platform owner claimed immunity under the Louisiana Workers' Compensation Act ("Louisiana Act"), which does not apply if the federal Longshore and Harbor Workers' Compensation Act ("Federal Act") covers the situation. The Federal Act reaches injuries "occurring as a result" of outer-continental shelf operations. The district court denied a summary-judgment motion by the platform owner, and the case went to trial. The jury found a "substantial nexus" between the platform owner's outer-continental shelf operations and Mays's death—meaning that the Federal Act applied—and awarded his wife $2 million for loss of affection. The platform owner appealed.

The Longshore and Harbor Workers' Act applied to the exclusion of Louisiana's Workers' Compensation Act based on operations in territorial waters connected with those on the outer-continental shelf.

The Fifth Circuit affirmed. The platform owner argued that, based on a Supreme Court decision, the appropriate question for the Federal Act's application was whether the *independent contractor's* outer-continental shelf operations had

a sufficient connection to the death, not its own. But the statutory language reflected no such restriction, and the cases pointed to by the platform owner were distinguishable. Second, the platform owner argued that the causation evidence was insufficient. The jury, however, heard sufficient evidence at trial supporting that, among other things, the gas coming from the platforms on the outer-continental shelf played some role in the explosion and Mays's death. Lastly, the district court did not abuse its discretion by reducing the jury's $2 million loss-of-affection award; the evidence presented at trial sufficiently supported it.