

## First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between August 1, 2016 and December 31, 2016. This collection, written by the members of the *Seton Hall Circuit Review*, is organized by circuit.

Each summary briefly describes an issue of first impression, and is intended to give only the briefest synopsis of the issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

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## FIRST CIRCUIT

***Blook Island Fishing, Inc. v. Rogers*, 844 F.3d 358 (1st Cir. 2016)**

**QUESTION:** Whether a defendant who overpaid a damages award may offset the overpayment and sue for the sum in an independent action. *Id.* at 359.

**ANALYSIS:** The court relied on a 5th Circuit decision, which held that “once a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman’s damages award — not by an independent suit seeking affirmative recovery.” *Id.* at 366 (internal citations omitted). The court believed that this decision struck the proper balance between “protecting seamen in the wake of debilitating on-the-job injury and ensuring that shipowners can protect themselves from liability for sums attributable to concealed preexisting injuries.” *Id.*

**CONCLUSION:** Defendant could not seek affirmative recovery of maintenance and cure payments that it had already made, however, they could offset the overpayment against any damages awarded to plaintiff at trial. *Id.* at 362.

***Sampson v. United States*, 832 F.3d 37 (1st Cir. 2016)**

**QUESTION:** “Whether the Double Jeopardy Clause bars the government, at [a defendant’s] new [death] penalty phase hearing, from seeking to prove two non-statutory aggravating factors which the jury at [the defendant’s] first [death] penalty phase hearing found had not been proven beyond a reasonable doubt.” *Id.* at 42.

**ANALYSIS:** The court reasoned that “the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an ‘acquittal.’” *Id.* at 44. The court noted that “an ‘acquittal’ in the capital sentencing context turns on ‘whether the sentencer or reviewing court has ‘decided that the prosecution has not proved its case’ that the death penalty is appropriate.” *Id.* The court further reasoned that the jury’s decision at the penalty-phase of defendant’s first trial is not an ‘acquittal’ because “the jury found the death penalty justified, despite also finding that the government had not proven two non-statutory aggravating factors beyond a reasonable doubt to all members of the jury.” *Id.* The court also noted that collateral estoppel, which is embodied in the Fifth Amendment protection against double jeopardy, “does not bar the introduction[,] at a second penalty-phase proceeding[,] of non-statutory aggravating factors presented to, and not found proven by, an earlier penalty-phase jury” because the two non-statutory factors “were not necessary to [the defendant’s] death sentence.” *Id.* at 47.

**CONCLUSION:** The 1st Circuit held that “the Double Jeopardy Clause does not bar the government from alleging those non-statutory aggravating factors again at [a defendant’s] new [death] penalty-phase proceeding.” *Id.* at 49.

***United States v. George*, 841 F.3d 55 (1st Cir. 2016)**

**QUESTION:** “Whether – or under what circumstances – a high-ranking employee of a government contractor can be said to occupy a position of trust vis-à-vis a defrauded government entity.” *Id.* at 67.

**ANALYSIS:** The court began its analysis by noting that the D.C., 2nd, and 4th Circuits “have recognized that a defendant can be found to have occupied (and abused) a position of trust vis-à-vis the government when he misuses public funds through a combination of control over a government contractor and a lack of government oversight.” *Id.* The court reasoned that “a government agency sometimes may rely too heavily on a high-ranking employee of a contractor and thereby place that individual in a position of special trust.” *Id.* As such, both substantial control and significant discretion over the affairs of the government contractor must be established to warrant the application of the position-of-trust enhancement. *Id.*

**CONCLUSION:** The defendant occupied a position of trust because he dominated the corporation and managed the use of public funds with a lack of meaningful government oversight from the governmental authority. *Id.* at 69.

SECOND CIRCUIT

***B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152 (2d Cir. 2016)**

**QUESTION:** “[W]hether an individual with a ‘disability’ under the [Individuals with Disabilities Education Act (IDEA)] categorically qualifies as an individual with a ‘disability’ under the [Americans with Disabilities Act] and Section 504” of the Rehabilitation Act. *Id.* at 155.

**ANALYSIS:** The 2nd Circuit noted that because Section 504 expressly incorporates the ADA’s definition of disability, it would refer to both statutes as the ADA. *Id.* at 159 n.4. The court reasoned that a disability under the ADA is “a physical or mental impairment that substantially limits one or more major life activities,” while a disability under the IDEA includes intellectual, hearing, speech or language impairments, among others, that require “special education or related services.” *Id.* at 162 n.7 (internal citations omitted). The court focused on the language “substantially limits” and reasoned that under the IDEA, a child might require special education services because of an intellectual impairment, but that impairment may not necessarily “substantially limit” a “major life

activity,” as required by the ADA. *Id.* at 159 (internal citations omitted). The court reasoned that the ADA and IDEA present distinct legal standards, and therefore, “an individual will not qualify for the ADA’s protections simply by virtue of his or her disabled status under the IDEA.” *Id.* at 160.

**CONCLUSION:** The 2nd Circuit held that an “individual with a ‘disability’ under the IDEA [does not] categorically qualif[y] as an individual with a ‘disability’ under the ADA and Section 504.” *Id.* at 155.

***Ferrari v. Cnty. Of Suffolk*, 845 F.3d 46 (2nd Cir. 2016)**

**QUESTION:** Whether the Due Process Clause permits a county that presented evidence of a driver’s history of intoxicated or reckless driving at a retention hearing, to “then shift the burden of going forward onto the owner-driver to point to a specific alternative measure that he is willing and able to sustain that might satisfy the County’s interest, and to demonstrate that such alternative measure would be feasible for the driver to accomplish.” *Id.* at 64.

**ANALYSIS:** The court reasoned that “[i]n assessing whether a particular allocation of burdens comports with the Due Process Clause, [the court must] look to the three-factor balancing test articulated in *Mathews v. Eldridge*.” *Id.* The court noted that “[t]he test weighs: (1) the private interest affected; (2) the risk of erroneous deprivation though the procedures used and the value of other safeguards and (3) the government’s interests.” *Id.* at 65. The court reasoned that an automobile “owner may have an important interest in retaining the use of a motor vehicle *pendente lite*” through its use as a mode of transportation, means to earn a livelihood, and obtaining an education. *Id.* The court further noted that “an individual may also have a financial interest in a vehicle apart from its use by the owner himself.” *Id.* The court reasoned, however, that although “the private interest in retaining access to a particular vehicle *pendente lite* is strong, the private interest in affording claimants the specific procedure demanded by [this claimant]—namely, that the County bear the burden of disproving the feasibility of alternative measure . . . — is weak” because this burden “does not greatly add to the protection already afforded such owners pursuant to the [County’s] existing procedures” and “could have the effect of delaying these hearings, which would arguably be detrimental to the interest not only of innocent owners, but title owners more generally.” *Id.* at 65–66.

The court further noted that “the County’s practice of shifting the burden of going forward onto a title owner to articulate the case for an alternative measure does not have any material effect on that owner’s interest” because before the hearings in this County, “title owners receive

notice as to the question that will be discussed, including the availability of alternative measures” and the relevant evidence “is generally uniquely within the purview of the title owner, who can thus be expected to gather it without difficulty.” *Id.* at 66. The court further reasoned that, in retaining the vehicle *pendente lite*, the County had a financial interest in the vehicle and a particularly strong “interest in protecting the public from use of the vehicle ‘as an instrumentality in future acts of driving while intoxicated.’” *Id.* at 67.

**CONCLUSION:** The 2nd Circuit held that that “in weighing the private interest, the risk of error, and the County’s interest, . . . it does not violate the Due Process Clause for [the County], after establishing a *prima facie* case that retention may be necessary to protect the County’s interests in the financial value of the vehicle or in protecting the public from repeated unsafe driving, to shift the burden of going forward to the title owner to point to an alternative measure that he is willing and able to sustain that might satisfy the County’s interests and to demonstrate, at least as an initial matter, that such alternative measure would be feasible for him.” *Id.* at 68.

***Nowakowski v. New York*, 835 F.3d 210 (2d. Cir. 2016)**

**QUESTION ONE:** “Whether a sentence of conditional discharge and one day’s community service, unfulfilled as of the time of filing the habeas petition, satisfies the ‘in custody’ requirement of § 2254.” *Id.* at 213.

**ANALYSIS:** The court stated that the custody analysis “requires a court to judge the ‘severity’ of an actual or potential restraint on liberty.” *Id.* at 216. The court also noted that other courts had considered “restraints on liberty that might appear short in duration” to be sufficiently severe as “they required petitioners to appear in certain places at certain times,” which restricted the freedom of movement available to the public. *Id.* The court thus reasoned that because the restrictions required Nowakowski’s physical presence at particular times and locations and carried potential of adverse consequences for non-cooperation, that he was in fact “in custody” pursuant to § 2254. *Id.* at 217.

**CONCLUSION:** The court concluded that Nowakowski’s sentence falls within the category of restraints that satisfy the statutory requirement of custody. *Id.* at 217.

**QUESTION TWO:** “Whether a presumption of continuing collateral consequences applies to Nowakowski’s conviction, thus presenting a live case of controversy under Art. III despite the expiration of the sentence.” *Id.* at 213.

**ANALYSIS:** The court examined the two-step analysis from *Spencer* to examine if the presumption of continuing collateral

consequences applies and existed in our case. *Id.* at 218. The court determined that the presumption of continuing collateral consequences applied in this case because Nowakowski's conviction is criminal in nature for the purposes of invoking the presumption, which only extends to criminal cases. *Id.* at 222. The court found that the presumption existed because of the possibility that Nowakowski could be impeached in a future proceeding with this information, which was a sufficient collateral consequence of the conviction. *Id.* at 225.

**CONCLUSION:** The court concluded that Nowakowski's conviction is criminal for the purposes of the conviction and that he sufficiently identified a continuing collateral consequence of the conviction. *Id.* at 228.

***United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016)**

**QUESTION:** Whether 21 U.S.C. § 959(b) applies extraterritorially to acts of possession with intent to distribute. *Id.* at 162.

**ANALYSIS:** The court noted that the 5th Circuit has concluded that § 959(b) extends extraterritorially to acts of possession with intent to distribute. *Id.* at n.7. The court reasoned that the statute's text and structure lends itself to various interpretations. *Id.* at 163–65. The court reasoned that limiting the statute to domestic acts “would have the peculiar effect of establishing a purely domestic crime within a statute aimed at combatting international narcotics smuggling and importation where every other provision applies extraterritorially.” *Id.* at 164. Furthermore, “reading § 959(b)(2) to proscribe only domestic conduct would render it a redundancy within the federal statutory framework.” *Id.* Finally, the court noted that the legislative history “strongly confirms our reading of the statute's text and structure.” *Id.*

**CONCLUSION:** The 2nd Circuit held that “the structure, context, and authoritative history of the statute reveal Congress's clear intent that the statute apply extraterritorially in its entirety.” *Id.* at 166.

***United States v. Hill*, 832 F.3d 135 (2d Cir. 2016)**

**QUESTION:** “[W]hether Hobbs Act robbery constitutes a crime of violence under the force clause.” *Id.* at 140.

**ANALYSIS:** The 2nd Circuit previously stated that conspiracy to commit Hobbs Act robbery is a crime of violence under the Bail Reform Act. *Id.* The risk-of-force clause, codified at 18 U.S.C.S. § 924(c)(3)(B), defines a crime of violence as any felony that “has an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* The court noted that the Supreme Court had previously held that “physical force encompasses even its indirect

application.” *Id.* at 143. Further, the court found the 9th Circuit’s holding that Hobbs Act robbery “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” persuasive. *Id.* at 144.

**CONCLUSION:** Hobbs Act robbery “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.*

***United States v. Prevezon Holdings Ltd.*, 839 F.3d 227 (2d Cir. 2016)**

**QUESTION:** Whether the “disqualification of counsel on the basis of a conflict of interest pos[es] a potential harm to a nonparty non-witness.” *Id.* at 238.

**ANALYSIS:** The 2nd Circuit addressed this question by determining whether “there [was] a substantial relationship between the subject matter of the counsel’s prior representation of the moving party and the issues in the present lawsuit.” *Id.* at 239. The 2nd Circuit reasoned that the district court erred in classifying the individual as a “mere spectator to this litigation.” *Id.* at 240. Rather, the court classified the individual as a “putative victim.” *Id.* Because “crime victims, as well as witnesses, possess legitimate interests in criminal proceedings,” disqualification of counsel may be proper. *Id.*

**CONCLUSION:** The 2nd Circuit held that the risk of prosecution for a nonparty, non-witness, “based on the potential disclosure of confidential information obtained during a prior representation,” ultimately outweighs any inconvenience for a defendant to obtain new counsel. *Id.* at 242.

THIRD CIRCUIT

***Chavez v. Dole Food Co.*, 836 F.3d 205 (3d Cir. 2016)**

**QUESTION:** Whether, in applying the “first-filed” rule, a district court’s decision to dismiss the second-filed action with prejudice was an abuse of discretion. *Id.* at 216.

**ANALYSIS:** The 3rd Circuit began by noting that the first-filed rule gives district courts several options with respect to the second-filed action: stay, transfer, dismissal without prejudice or dismissal with prejudice. *Id.* at 210. The court examined multiple treatises, finding that they reflect the “commonsense proposition” that where the timeliness of a case is at issue in the first-filed action, such as a statute of limitations expiration, dismissal with prejudice could “have the effect of putting the plaintiffs entirely out of court.” *Id.* at 217. The court then noted that the 5th, 7th, and 9th Circuits have respectively found that the more appropriate use of discretion afforded by the first-filed rule would be to stay or transfer the second-filed action. *Id.* Relying on this line of case law, the court

reasoned that district courts should take care so as to avoid causing undue prejudice to litigants, which could result where a dismissal would prevent the merits of the claim from ever being heard. *Id.* at 218–19. Finally, the court explained that both the Supreme Court’s abstention doctrine, as well as its own, support issuing a stay under the first-filed rule, in order to avoid “abdication” of a court’s duty to exercise its jurisdiction and decide cases. *Id.* at 220.

**CONCLUSION:** Adopting the jurisprudence of the 5th, 7th, and 9th Circuits, the 3rd Circuit held that “in the vast majority of cases, a court exercising its discretion under the first-filed rule should stay or transfer a second filed suit,” concluding that “a dismissal *with prejudice* will almost always be an abuse of discretion.” *Id.* at 220–21.

***Didon v. Castillo*, 838 F.3d 313 (3d Cir. 2016)**

**QUESTION:** “[M]ay a child have two ‘habitual residence’ countries at the same time under the Hague Convention (‘concurrent habitual residence’)?” *Id.* at 316.

**ANALYSIS:** The 3rd Circuit noted that the Convention was unambiguous and repeatedly referenced “*the State*” of habitual residence. *Id.* at 322 (emphasis in original) (internal citations omitted). The court looked to the ordinary meaning of “residence” to determine which country was the “habitual residence.” *Id.* at 316. The court noted that determining a habitual residence is a fact-intensive inquiry in which factors such as the child’s physical presence, the child’s routine, the child’s connections with people and places, and parents’ “present, shared intentions regarding their child’s presence[.]” *Id.* at 326 (internal citation omitted).

**CONCLUSION:** The 3rd Circuit held that under the Hague Convention, a child may not have two habitual resident countries. *Id.* at 316.

***Mack v. Loretto*, 839 F.3d 286 (3d Cir. 2016)**

**QUESTION ONE:** “Whether an inmate’s oral grievance to prison officials can constitute protected activity under the Constitution.” *Id.* at 291.

**ANALYSIS:** The 3rd Circuit began by noting that the First Amendment right to petition and right to free speech protects both written and oral forms of expression. *Id.* at 297–98. The court further clarified that an individual’s prisoner status does not preclude the protection of an oral grievance to prison officials under the Petition Clause of the First Amendment, so long as the right being exercised is not “incompatible with [the individual’s] status as a prisoner.” *Id.* at 298. Finally, adopting the rationale of the 7th Circuit—the only other circuit to have addressed the

issue—the court determined that the right to petition for redress of grievances does not depend on the form in which the grievance takes, such as an oral, rather than written complaint. *Id.* at 299.

**CONCLUSION:** The 3rd Circuit held that a prisoner’s oral grievance is protected activity under the First Amendment. *Id.*

**QUESTION TWO:** Whether the Religious Freedom and Restoration Act (RFRA) “prohibits individual conduct that substantially burdens religious exercise.” *Id.* at 291.

**ANALYSIS:** The 3rd Circuit first examined the plain language of RFRA, which states that “Government” includes “a branch, department, agency, instrumentality, and official or other person acting under color of law.” *Id.* at 301. The court interpreted this language to mean that the statute is not limited to only those actions taken by officials or other persons acting under the color of law that are “in furtherance of an official policy,” but rather that RFRA prohibits “almost every” official action taken by any official of the Government, as the Supreme Court has previously determined. *Id.* The court further reasoned that the similarities between the definition of “Government” under RFRA and 42 U.S.C. § 1983—the latter imposing liability for individual conduct of “state officials or private persons acting under the color of law”—presumes that Congress intended for RFRA to be similarly construed. *Id.* at 302.

**CONCLUSION:** The 3rd Circuit held that RFRA prohibits the burden of religious exercise through “individual government conduct whether or not it is undertaken pursuant to an official rule or policy.” *Id.*

**QUESTION THREE:** “Whether RFRA provides monetary relief from an official sued in his individual capacity.” *Id.* at 291.

**ANALYSIS:** The 3rd Circuit noted at the outset that although RFRA indicates that plaintiffs may obtain “appropriate relief,” the statute does not define the meaning of this term. *Id.* at 302. As a result, the court turned to the “traditional presumption” of the term’s meaning, articulated by the Supreme Court, which indicates that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief . . . brought pursuant to a federal statute.” *Id.* at 303 (internal quotations omitted). The court justified its application of this presumption to RFRA on the basis that both the Supreme Court and the statute refer to the identical language, that Congress was aware of the interpretation of the Supreme Court at the time of RFRA’s enactment, and that RFRA was intended to provide “broad religious liberty protections.” *Id.* Similar to its analysis of the scope of RFRA’s protections, the court also found persuasive the similarities between RFRA and 42 U.S.C. § 1983, which provides monetary relief for the individual conduct of state officials. *Id.* Finally, the court distinguished RFRA from its sister statute,

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which has been construed as not providing monetary relief for individual conduct, as the two statutes were enacted pursuant to different congressional powers, the former the Necessary and Proper Clause and the latter, the Spending Clause. *Id.* at 303–04.

**CONCLUSION:** The 3rd Circuit concluded that “federal officers who violate RFRA may be sued in their individual capacity for damages.” *Id.* at 304.

***Maliandi v. Montclair State Univ.*, 845 F.3d 77 (3d Cir. 2016)**

**QUESTION:** “Whether [a State University] is an arm of the State of New Jersey, which would render it immune from the discrimination suit brought by [an ex-employee].” *Id.* at 81.

**ANALYSIS:** The court began its analysis by reasoning that the Eleventh Amendment “has [been] interpreted . . . to bar suits against a State by its own citizens—not just those from other jurisdictions.” *Id.* at 83 (internal citations omitted). In addition, the court noted that the Amendment bars not only suits against States themselves, but also suits for damages against “arms of the State”—entities that, by their very nature, are so intertwined with the State that any suit against them renders the State the “real, substantial party in interest.” *Id.* The court then opined that the three factor *Fitchik* test is to apply to determine “whether a state-affiliated entity is an ‘arm of the State’ that falls within the ambit of the Eleventh Amendment.” *Id.* (citing *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)). The court reasoned that while the “funding factor weighs against immunity, . . . its status under state law and autonomy factors both favor immunity.” *Id.* at 99.

**CONCLUSION:** The State University is entitled to Eleventh Amendment protection. *Id.*

***United States v. Browne*, 834 F.3d 403 (3d Cir. 2016)**

**QUESTION:** Whether social media chat logs can be introduced and properly authenticated under the Federal Rules of Evidence (FRE) since the exact author cannot be determined. *Id.* at 405.

**ANALYSIS:** The analysis of the court proceeds in two steps as to proper authentication of social media. *Id.* The court must analyze whether the communications at issue are business records that may be “self-authenticated” by way of certificate from custodian under FRE 902(11) and whether the Government nonetheless provided sufficient evidence to authenticate the records under FRE 901. *Id.* First, the court decided that the recording of social media chat logs by the host website are not records of regularly conducted activity subject to the self-authentication rule

governing business records. *Id.* at 410. Second, the court reasoned that evidence arising from social media records might be authenticated by extrinsic evidence in the same way as documentary evidence. *Id.* at 412. As such, it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence. *Id.*

**CONCLUSION:** The court held that although the exact author of a social media chat cannot be determined, social media chat logs could be introduced as evidence if the authentication can be proven by a veritable mountain of evidence linking the person in question to the statements made in the chat. *Id.* at 415.

#### FOURTH CIRCUIT

***United States v. Batato*, 833 F.3d 413 (4th Cir. 2016)**

**QUESTION:** Whether the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) is unconstitutional as a deprivation of Due Process under the Fifth Amendment. *Id.* at 426.

**ANALYSIS:** The court began by noting that the Supreme Court had previously “struck a federal district court’s use of disentitlement to strike a civil forfeiture claimant’s defense.” *Id.* In that opinion, the Supreme Court left open the question of whether a statute that authorized such a practice would be constitutionally prohibited. *Id.* After that decision was rendered, Congress enacted CAFRA. *Id.* The court began its analysis by distinguishing the Supreme Court’s reasoning on the grounds that its opinion was mainly directed at the balance of power between the branches of government and the opinion signaled that the analysis might be different if the practice was contained within a statute. *Id.* at 427. The court stated that CAFRA did not eliminate the opportunity to be heard as the claimants could have secured a hearing at any time by entering the United States. *Id.* The court also reasoned that “the refusal to face criminal charges that would determine whether or not the claimants came by the property at issue illegally supports a presumption that the property was, indeed, so obtained.” *Id.* The court further distinguished this case from the prior Supreme Court opinion by noting that “the property is located outside the United States, complicating jurisdiction and the district court’s ability to resolve” the issues in front of it. *Id.* at 429. As such, the court reasoned that “notions of due process are not so rigid that they cannot be adapted in light of a party’s clear intent to use procedural guarantees to avoid substantial justice.” *Id.*

**CONCLUSION:** Since CAFRA “predicates disentitlement on an allowable presumption that a criminal fugitive lacks a meritorious defense

to a related civil forfeiture, . . . it does not violate the Due Process Clause of the Fifth Amendment.” *Id.*

***United States v. Muldrow*, 844 F.3d 434 (4th Cir. 2016)**

**QUESTION:** Whether a district court, in calculating the “applicable guideline range” at resentencing is bound by United States Sentencing Guideline Amendment 759. *Id.* at 437.

**ANALYSIS:** The 4th Circuit began by noting that if Amendment 759—which revises the commentary to § 1B1.10 of the Guidelines regarding the calculation of the “applicable guideline range” for reducing a sentence—conflicts with the text of Guidelines, “[the commentary] cannot bind courts.” *Id.* at 439. The court then compared the language of the commentary to § 1B1.10 with Amendment 759’s definition of “applicable guideline range,” to the extent it permits consideration of a sentencing court’s departure or variance from a defendant’s criminal history occurring at the original sentencing, and failed to identify any inconsistencies in the text. *Id.* at 440. The court determined that “Amendment 759’s clarifying definition is consistent with § 1B1.10,” in that Amendment 759 expressly limits the consideration of departure or variance only once the guideline range has been calculated, whereas the commentary to § 1B1.10 does not account for departures and variances.” *Id.* The court further explained that although the application instructions of the Guidelines direct a judge to determine the defendant’s criminal history category, that a court is required to make this determination “does not give the judge a license to factor in a departure,” as a court “cannot factor in a departure from a [guideline] range before calculating the range itself.” *Id.* at 441 (internal quotations omitted). The court also determined that Amendment 759 applied to a defendant’s resentencing, as it was enacted prior to the disposition of a motion for a sentence reduction, despite the fact that the edition of the Guidelines enacted at the time of the original sentence normally controls. *Id.* at 441–42. Finally, the court noted that the 2nd Circuit similarly concluded that the Sentencing Commission “foreclosed” potential inconsistencies between the Guidelines and the Amendment that would render a sentencing court not bound by the Amendment’s definition of the applicable guideline range. *Id.* at 442.

**CONCLUSION:** Joining “all of [their] sister circuits that have considered the issue,” the 4th Circuit held that “Amendment 759 binds sentencing courts.” *Id.* at 436.

***United States v. Rand*, 835 F.3d 451 (4th Cir. 2016)**

**QUESTION:** Whether subpoenas issued to third parties pursuant to Federal Rule of Criminal Procedure 17(c) (“Rule 17(c)”) are subject only to the explicit standard of the rule—oppressive or unreasonable—or the higher standard articulated by the Supreme Court in *United States v. Nixon* (“the Nixon Test”) in order to avoid being modified or quashed by the court. *Id.* at 462–63.

**ANALYSIS:** The court first noted that the Nixon Test requires the requesting party to demonstrate “(1) relevancy; (2) admissibility; [and] (3) specificity.” *Id.* at 462. The court acknowledged that the Nixon Test could be read as applying only to subpoenas issued against the prosecution, but noted that the Supreme Court declined to answer that question. *Id.* The court then stated that the Nixon Test was not explicitly limited to requests from the government or prosecution. *Id.* at 463. Next, the court noted that the explicit requirements of Rule 17(c) were not incompatible with the requirements of the Nixon Test, stating that “[a] subpoena should be quashed as unreasonable or oppressive if it is ‘irrelevant; abusive or harassing; overly vague; or excessively broad.’” *Id.* Finally, the court noted that these Rule 17(c) requirements “map on quite well to the [*Nixon*] standard of relevance, admissibility, and specificity.” *Id.* (internal citations omitted).

**CONCLUSION:** The Nixon Test is the appropriate standard for Rule 17(c) subpoenas requesting documents from third parties. *Id.*

## FIFTH CIRCUIT

***Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 (5th Cir. 2016)**

**QUESTION:** Whether discovery of U immigration visa records from individual claimants can be barred under Federal Rule of Civil Procedure 26(c) as imposing an undue burden. *Id.*

**ANALYSIS:** The court set out to determine the probative value of allowing U visa discovery in order to potentially show fraud and therefore impeach some of the plaintiff’s claims. *Id.* The court gave deference to the district court’s ruling that such discovery was relevant after failing to find an abuse of discretion on the district court’s behalf. *Id.* The court, however, then balanced the probative value with the issue of whether allowing such discovery would create an undue burden on plaintiffs because of the possibility that it would dissuade other plaintiffs from coming forward out of fear of losing their jobs or being reported. *Id.* The 5th Circuit reasoned that “allowing such discovery of U visa information may have a chilling effect extending well beyond this case, imperiling important public purposes” and when weighed against the significant

interests of the defendant, the court found that the discovery would impose an undue burden. *Id.* at 564.

**CONCLUSION:** “The statute bars discovery of U visa records from the EEOC, but it does not bar discovery of the records from the individual claimants.” *Id.* at 554.

***Enable Miss. River Transmission, L.L.C. v. Nadel & Gussman, L.L.C.*, 844 F.3d 495 (5th Cir. 2016)**

**QUESTION:** Whether the National Gas Act’s (“NGA”) exclusive jurisdiction provision extends to actions involving third party interference. *Id.* at 496.

**ANALYSIS:** The court relied on the reasoning of the 6th and 9th Circuits. *Id.* at 499–500. The 9th Circuit held that because a well-operator was not subject to any duties under the NGA, it could not violate the NGA and be subject to the exclusive jurisdiction clause. *Id.* Similarly, the 6th Circuit reasoned that defendants must possess a statutory duty to violate the NGA. *Id.* at 500–01. The court reasoned that since the Defendant did not have any duties under the NGA or any applicable regulations, resolution of State law claims would not require the court “to determine whether the defendants [have] complied with rules that [have] the effect and force of federal law.” *Id.* at 501 (internal quotations and citations omitted).

**CONCLUSION:** The court declined to extend the federal exclusivity provision of the NGA to cover claims of interference against defendants who have no statutory duties under the Act. *Id.*

***Lee v. Verizon Communications, Inc.*, 837 F.3d 523 (5th Cir. 2016)**

**QUESTION:** What is “the degree to which the impact of fiduciary misconduct must be realized . . . in order to establish [constitutional] standing” in an ERISA action brought by a participant in a defined-benefit plan? *Id.* at 545.

**ANALYSIS:** The 5th Circuit explained that “fiduciary misconduct in a defined-benefit plan ‘will not affect an individual’s entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.’” *Id.* (internal citations omitted). Because of this, the constitutional requirement under Article III for a particularized injury in fact “is attenuated as, prior to default under the plan, ‘the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan’s investments.’” *Id.* (citations omitted). The 5th Circuit agreed with the 4th Circuit, stating, “fiduciary misconduct, standing alone without allegations of impact on individual benefits, is too

removed to establish the requisite injury.” *Id.* Without direct injury to the class representative, the 5th Circuit reasoned “that the allegations are insufficient to support the [constitutional] standing to assert this claim,” which was distinct from and could not be conferred by statutory standing alone. *Id.* at 547.

**CONCLUSION:** Imminent risk of default to an ERISA defined-benefit plan, such that the participant’s benefits are adversely affected, is required for the claimants to have constitutional standing when there is fiduciary misconduct by an employer managing an ERISA defined-benefit plan. *Id.* at 546.

***United States v. Ayika*, 837 F.3d 460 (5th Cir. 2016)**

**QUESTION:** “Whether any part of the [money] remaining in [a bank] account can be ‘traced,’ for the purposes of § 982(a)(7), [or alternatively, § 853(p),] to [defendant’s] crime of conviction.” *Id.* at 472.

**ANALYSIS:** The court reasoned that because “there were many deposits and withdrawals of both legitimately and fraudulently obtained funds over the life of the [bank] account . . . tracing the remaining funds under § 982(a)(7) . . . would be virtually impossible.” *Id.* at 473. The court further explained that since the Government provided evidence that only “33.55% of the funds deposited into the [bank] account . . . represented gross proceeds of the crime of conviction . . . the Government . . . failed to prove that it is, more likely than not, that the funds remaining in that account [were] traceable to [defendant’s] fraud[.]” *Id.* at 474. The court then turned its attention to “another statutory provision asserted in the pleadings and orders below[]: 21 U.S.C. § 853(p)” and clarified that “the Government cannot, consistent with the statutes, treat § 982(a)(7) and § 853(p) as interchangeable.” *Id.* at 474–75.

**CONCLUSION:** The 5th Circuit held that “the funds deposited into the [bank] account over the life of the account, those that remain, and the assets purchased with funds therefrom, are not traceable to the crime of conviction and are hence not forfeitable under § 982(a)(7).” *Id.* at 476. The court further held that only “when the Government makes a showing that the defendant commingled funds, both legal and fraudulent, which cannot be divided without difficulty, and consequently rendered forfeitable assets untraceable to the crime of conviction under § 982(a)(1), [then] the Government may turn to § 853(p).” *Id.* at 476.

## SIXTH CIRCUIT

***Berry v. United States Dep't of Labor*, 832 F.3d 627 (6th Cir. 2016)**

**QUESTION:** Whether the U.S. Department of Energy's decision not to reopen a claim seeking compensation to a survivor of an employee covered under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) is subject to judicial review. *Id.* at 632.

**ANALYSIS:** The court noted that the challenged action must be "made reviewable by statute" or be a "final agency action for which there is no other adequate remedy in court." *Id.* at 632. The court examined whether the refusal to reopen constitutes a "final agency action" for judicial review. *Id.* The court further noted that there is a distinction between requests to reopen based on new evidence and those based on material error for judicial review purposes. *Id.* at 636.

**CONCLUSION:** The 6th Circuit held that the survivor's request to reopen his claim based on a "purported material error in the Department's original decision" was "'committed to agency discretion' and unreviewable under the APA." *Id.* at 639.

***Brown v. Battle Creek Police Dep't*, 844 F.3d 556 (6th Cir. 2016)**

**QUESTION:** "Whether the killing of a dog constitutes 'seizure' within the meaning of the Fourth Amendment." *Id.* at 566.

**ANALYSIS:** The 6th Circuit explained that a "large number of this Court's sister circuits have already concluded that, 'the use of deadly force against a household pet is reasonable only if the pet poses an [imminent] danger and the use of force is unavoidable.'" *Id.* (citations omitted) (parenthetical in original). The 6th Circuit cites, with approval, precedent from the 2nd, 3rd, 4th, 7th, 10th, and D.C. Circuits, and adopts the same position, that the killing of a companion animal qualifies as an unconstitutional seizure. *Id.* The 6th Circuit identified that "every sister circuit that had confronted the issue concluded that an individual has a property right in their dog." *Id.*

**CONCLUSION:** "[T]here is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized." *Id.*

***Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016)**

**QUESTION:** Whether ascertainability is a requirement for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). *Id.* at 541.

**ANALYSIS:** The court began by noting that the 1st, 3rd, and 10th Circuits have held that ascertainability is inapplicable to Rule 23(b)(2). *Id.* The court reasoned that (b)(2) class members are distinguishable from (b)(3) class members who are entitled to notice and are able to opt-out of

the class. *Id.* The court further noted that “the focus in a (b)(2) class is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action.” *Id.* at 542.

**CONCLUSION:** The 6th Circuit agreed with the other circuit courts and held that “ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief.” *Id.*

***Loffredo v. Daimler AG*, 666 F. App’x 370, 376 (6th Cir. 2016)**

**QUESTION:** “[W]hether [Employee Retirement Income Security Act of 1974 (ERISA)] preempts a state-law antidiscrimination claim that is filed outside a corresponding federal law’s statute of limitations but within the state law’s longer statute of limitations, despite both state and federal law imposing liability for the same substantive conduct.” *Id.* at 377.

**ANALYSIS:** The 6th Circuit first noted that ERISA’s savings clause only saves state laws from preemption if their preemption would impair or modify federal law. *Id.* at 378. The court held that the preemption of the state law at issue here would not impair or modify its federal counterpart, thus the state law was not saved from ERISA preemption. *Id.* Particularly, “because the [federal law] would continue to ‘prohibit precisely the same employment practices, and be enforced in precisely the same manner,’” even if the state law claim was preempted, application of the ERISA savings clause was not warranted. *Id.* As such, the state law claim was preempted, and the only remaining federal claim therefore had to comply with a federal statute of limitations, not the longer state law statute of limitations. *Id.* Since the Plaintiff’s age discrimination claim was filed outside of the federal statute of limitations, yet within the state law statute of limitations, dismissal of the claim for untimely file was appropriate, the state law statute of limitations having been preempted. *Id.*

**CONCLUSION:** The 6th Circuit held that “ERISA preempts Plaintiffs’ age-discrimination claim because it is untimely under the ADEA and preemption of Michigan’s statute of limitations neither impairs nor modifies federal law.” *Id.*

***Luis v. Zang*, 833 F.3d 619 (6th Cir. 2016)**

**QUESTION:** Whether the term “intercept” as used in the Federal Wire Tap Act (“Act”), 18 U.S.C. § 2511, requires that an acquisition of an electronic communication occur contemporaneously with the transmission of that communication. *Id.* at 627.

**ANALYSIS:** The court reasoned that although “[t]he Act does not explicitly require that the acquisition of a communication occur contemporaneously with the transmission of the communication,” the 3rd, 5th, 9th, and 11th Circuits have interpreted the Act’s language and “have uniformly concluded that an intercept requires contemporaneity.” *Id.* The court noted that the Act draws a distinction between “electronic communications” and “electronic storage.” *Id.* The court also noted that the Act defines the former as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic or photooptical system,” while the latter is defined as “(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof . . . (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.” *Id.* The court further reasoned that the term “intercept” only applies to “electronic communications,” but not to “the acquisition of electronic signals that are no longer being transferred.” *Id.* The court also reasoned that “[o]nce the transmission of the communication has ended, the communication ceases to be a communication at all” and “becomes part of ‘electronic storage,’ which a person cannot ‘intercept.’” *Id.*

**CONCLUSION:** The 6th Circuit joined the 3rd, 5th, 9th, and 11th Circuits and held that “in order for an ‘intercept’ to occur for purposes of the Wiretap Act, the electronic communication at issue must be acquired contemporaneously with the transmission of that communication [before it becomes ‘electronic storage’].” *Id.* at 629.

***Reyes v. Lynch*, 835 F.3d 556 (6th Cir. 2016)**

**QUESTION:** Whether solicitation of prostitution is a crime of moral turpitude. *Id.* at 559.

**ANALYSIS:** The court applied the “‘categorical framework’ to determine whether a crime involves moral turpitude.” *Id.* Under this framework, the court determined not “whether the actual conduct constitutes a crime involving moral turpitude, but whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude.” *Id.* The court relied upon a decision of the 9th Circuit, which found that solicitation of prostitution was a crime of moral turpitude due to several decisions of the Board of Immigration Affairs that had ruled as such. *Id.* at 560. The court agreed with the 8th, 9th, and 10th Circuits and held that the Bureau of Immigration Affairs’ reasonable interpretation of the Immigration and Nationality Act was entitled to *Chevron* deference. *Id.*

**CONCLUSION:** The court held that “[i]f the [Bureau of Immigration Affairs] considers prostitution to be a [crime involving moral turpitude], there is no reason to consider the solicitation of prostitution” not to be. *Id.*

***United States v. Beckham*, 838 F.3d 731 (6th Cir. 2016)**

**QUESTION:** Whether Amendment 759 to the United States Sentencing Guidelines (U.S.S.G.) violates the Ex Post Facto Clause. *Id.* at 735.

**ANALYSIS:** The court began its analysis by noting that every circuit that had considered whether Amendment 759 to the U.S.S.G. violates the Ex Post Facto Clause had rejected it. *Id.* at 735. The court noted that the Ex Post Facto Clause “forbids a change in law that increases the potential punishment for past conduct.” *Id.* In this case, the court reasoned that Amendment 759 “simply restricts the district court’s discretion to *reduce* a sentence pursuant to a future Guidelines amendment, which prisoners have no entitlement to.” *Id.* (emphasis in original). As such, it did not present any Ex Post Facto Clause problems. *Id.*

**CONCLUSION:** The court held that “a decision by the Sentencing Commission to limit the class of defendants who may benefit from a future amendment does not have any bearing on the Ex Post Facto Clause.” *Id.* (internal quotations omitted).

***United States v. Bonds*, 839 F.3d 524 (6th Cir. 2016)**

**QUESTION:** Whether United States Sentencing Guidelines (U.S.S.G.) Amendment 742, which includes a provision that required a two-point enhancement to a criminal defendant’s offense level, may be applied in conjunction with U.S.S.G. Amendment 782, a retroactive reduction to “the base offense levels for most drug-trafficking crimes,” for purposes of reducing a term of imprisonment under 18 U.S.C. § 3582(c)(2). *Id.* at 528.

**ANALYSIS:** The court reasoned that the policy statement in U.S.S.G. § 1B1.10 instructs a court to amend a defendant’s guideline range, and therefore reduce a term of imprisonment, “if the applicable guideline range has subsequently been lowered by one of the amendments named in subsection (d).” *Id.* at 529. The court noted that Amendment 782 was listed in subsection (d), but Amendment 742 was “notably absent.” *Id.* The court reasoned that this was a “clear and unambiguous” direction that only the amendments listed in subsection (d) could be applied when reducing a defendant’s sentence under 18 U.S.C. § 3582(c)(2). *Id.*

**CONCLUSION:** The 6th Circuit held that the retroactive “Amendment 782 does not permit district courts to apply other non-retroactive amendments” to reduce a guidelines range. *Id.* at 528–29.

#### SEVENTH CIRCUIT

***Central States v. American International Group, Inc.*, 840 F.3d 448 (7th Cir. 2016)**

**QUESTION:** Whether a coordination of benefits disputes seeks appropriate equitable relief under section 502(a)(3) of the Employee Retirement Income Security Act (ERISA). *Id.* at 449.

**ANALYSIS:** The court began its analysis by noting that the 8th, 2nd, 3rd, 5th, 6th, and 8th Circuits have already addressed this issue and all have held that the relief sought is legal, not equitable. *Id.* at 452. These Circuits based their reasoning of a series of Supreme Court decisions interpreting the phrase “appropriate equitable relief.” *Id.* The Court, in those opinions, explained that whether a remedy is available “depends on (1) the basis for the plaintiff’s claim and (2) the nature of the underlying remedies sought.” *Id.* at 453 (internal quotations and citations omitted). Both must be equitable for a claim to proceed. *Id.* Importantly, the Supreme Court reasoned that “[t]he remedy is properly regarded as equitable only if the plaintiff seeks the return of specifically identified funds that remain in the defendant’s possession or . . . traceable items that the defendant purchased with the funds.” *Id.* (internal quotations and citations omitted). The court noted that the trustee’s request for declaratory relief “requests money damages, the epitome of legal relief,” and as such his suit cannot proceed. *Id.* at 454.

**CONCLUSION:** The court joined the other circuits in holding that “the trustee’s suit against the insurers to recoup amounts it paid for the beneficiaries’ medical care seeks legal relief, not equitable relief, and as such is not authorized,” by ERISA. *Id.* at 455.

#### EIGHTH CIRCUIT

***United States v. Belmont*, 831 F.3d 1098 (8th Cir. 2016)**

**QUESTION:** Whether the meaning of “engage in the business of” within 18 U.S.C. § 842(a)(1) (“the explosives statute”) requires a profit/livelihood motive, or if it merely requires a showing that one is actively buying, selling, and procuring explosives in commerce. *Id.* at 1100–1102.

**ANALYSIS:** The court noted that the explosive statute makes it unlawful to “engage in the business of importing, manufacturing, or dealing in explosive materials without a license issued under this chapter.” *Id.* at 1100 (quoting 18 U.S.C. § 842(a)(1)) (internal quotation marks

omitted). The court then considered Congress's interpretation of "engage in the business of" under the Gun Control Act—which required a showing of profit or livelihood motive—but dismissed this interpretation as it was enacted to protect gun owning citizens' Second Amendment rights. *Id.* at 1101. Next, the court considered the 10th Circuit's interpretation of "engage in the business of" under the explosive statute, which only requires a showing that one is actively involved in buying or selling explosives in commerce. *Id.* The court noted that "the explosives statute defined 'manufacture' as 'any person engaged in the business of manufacturing explosive materials for purposes of sale or distribution or for his own use.'" *Id.* at 1102 (quoting 18 U.S.C. § 841(h)).

**CONCLUSION:** The 8th Circuit held that the explosive statute does not require a showing of profit or livelihood motive to show that one has engaged in business of manufacturing explosives. *Id.* at 1102.

#### NINTH CIRCUIT

***Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016)**

**QUESTION:** "[W]hether a federally recognized Indian tribe waives its sovereign immunity from suit by exercising its right to remove to federal court a case filed against it in state court [while promptly asserting its immunity defense]." *Id.* at 1014.

**ANALYSIS:** The court reasoned that "[t]he doctrine of . . . sovereign immunity derives from the status of Indian tribes as 'separate sovereigns preexisting the Constitution'" and the courts employ a "strong presumption against [its] waiver." *Id.* at 1016. The court noted that a tribe "may lose its immunity from suit" through a congressional or personal waiver. *Id.* The court further reasoned that "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed'" and that expression must "manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms." *Id.* The court also noted that "[b]y filing a lawsuit, a tribe may . . . 'consent to the court's jurisdiction to determine the claims brought' and thereby agree to be bound by the court decision on those claims. *Id.* at 1017. The court reasoned, however, that "[b]y consenting to the court's jurisdiction to determine its own claims . . . a tribe does not automatically waive its immunity as to claims that could be asserted against it, even as to 'related matters . . . aris[ing] from the same set of underlying facts.'" *Id.*

**CONCLUSION:** The 9th Circuit held that, "an Indian tribe's removal of a case from state to federal court does not, in and of itself, effect a waiver of its tribal immunity." *Id.* at 1023–24.

***Daniels v. MSPB*, 832 F.3d 1049 (9th Cir. 2016)**

**QUESTION:** Whether the Merit System Protection Board (“Board”) had jurisdiction to adjudicate Plaintiff’s appeal alleging that he properly made a non-frivolous disclosure that was protected under the Whistleblower Protection Act (WPA). *Id.* at 1054.

**ANALYSIS:** The WPA was amended in 2012, allowing United States Court of Appeals to review Board decisions pertaining to individual right of action appeals. *Id.* An aggrieved employee may seek recourse from the Board by filing an individual right of action (“IRA”). *Id.* at 1051. For the Board to have jurisdiction over such an appeal “the appellant . . . [must] make ‘non-frivolous allegations’ that (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) . . . .” *Id.* The court noted that “Congress explicitly stated that it only intended to protect disclosures of certain types of wrongdoing,” in passing the WPA. *Id.* at 1055. As such, the court did “not undermine congressional intent . . . [or] improperly limit the definition of ‘disclosure’ by concluding that an erroneous agency ruling or adjudication is not a violation of law for purposes of the WPA.” *Id.*

**CONCLUSION:** The 9th Circuit held that “[a]n agency ruling or adjudication, even if erroneous, is not the type of ‘wrongdoing’ contemplated by the WPA.” *Id.* at 1055–56.

***Helping Hand Tools v. United States EPA*, 836 F.3d 999 (9th Cir. 2016)**

**QUESTION:** Whether the “[Environmental Protection Agency (EPA) is] required to consider solar power and a greater natural gas mix as clean fuel control technologies in [best available control technology (BACT)] analysis.” *Id.* at 1005.

**ANALYSIS:** The court took into consideration the availability of control alternatives in a BACT analysis, but hesitated to require the consideration of control alternatives that would redefine the source—alternatives that would require a complete redesign of the facility. *Id.* at 1006. The court explained that the Defendant properly defined the project and rejected control technologies that redefined the project with thoughtful and rational explanations and was consistent with the EPA’s prior guidance. *Id.* at 1012–13. Furthermore, because of the complicity surrounding the analysis of the environmental effect of different biomass fuels in the ever-developing field of climate-change science, the court deferred to Defendant’s expertise when the record showed that its endeavors were reasonable. *Id.* at 1013.

**CONCLUSION:** The 9th Circuit held that the EPA is not required to consider solar power and a greater natural gas mix. *Id.* at 1005.

***Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016)**

**QUESTION:** “[W]hether the U.S. Constitution allows law enforcement officers to restrain a female inmate while she is pregnant, in labor, or during postpartum recovery.” *Id.* at 1243.

**ANALYSIS:** The court first noted that this constitutional question stems from the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* at 1249. The court stated that, under the Eighth Amendment, “a plaintiff must show that the defendant: (1) exposed her to a substantial risk of serious harm; and (2) was deliberately indifferent to her constitutional rights.” *Id.* The court stated that “[w]ithout more than a broad assertion about the penological interest in restraining all inmates—even one who is in labor—a reasonable jury could find that” policies authorizing the restraint of pregnant inmates could lead “to a substantial and unjustified risk of harm.” *Id.* at 1255–56. The court further stated that, “a jury could find [law enforcement officers] were deliberately indifferent to any risk created by the restraints used on [a pregnant female inmate].” *Id.* at 1257.

**CONCLUSION:** The 9th Circuit held that whether such action is constitutionally permissible “depends on factual disputes a properly instructed jury must resolve.” *Id.* at 1243.

***Move, Inc. v. Citigroup Global Mkts.*, 840 F.3d 1152 (9th Cir. 2016)**

**QUESTION:** Whether equitable tolling applies to the Federal Arbitration Act (FAA). *Id.* at 1156.

**ANALYSIS:** The court noted that the case law from other circuits is conflicting and most circuits have declined to rule on whether equitable tolling applies to the FAA. *Id.* The court reasoned that the text, structure and purpose of the FAA are consistent with equitable tolling. *Id.* at 1157. The court considered whether a limitations period is set forth in “unusually emphatic form,” is “unusually generous,” or uses “highly detailed” and “technical” language, and whether the statute “reiterated the limitations period several times in several different ways,” to determine whether Congress intended equitable tolling to apply. *Id.* The court reasoned that the structure and purpose of the FAA is not incompatible with equitable tolling. *Id.*

**CONCLUSION:** The 9th Circuit held that the FAA is subject to equitable tolling. *Id.* at 1156.

***Riera-Riera v. Lynch*, 841 F.3d 1077 (9th Cir. 2016)**

**QUESTION:** “Whether an ineligible alien who fraudulently enters the [Visa Waiver Program (“VWP”)] is bound by the VWP’s limitations, including its waiver of any challenge to deportation other than asylum.” *Id.* at 1080.

**ANALYSIS:** The court first noted that the 2nd, 7th, and 8th Circuits have held that “the VWP limitations apply to those admitted under the program without being eligible.” *Id.* The 9th Circuit explained that other circuits relied on a regulation issued by the Attorney General pursuant to the statute enacting the VWP to fill a gap regarding fraudulent entrants. *Id.* The court noted that this regulation contained a rule that “those who ‘present[] fraudulent or counterfeit travel documents’ will be removed ‘without referral of the alien to an immigration judge,’ unless the alien ‘applies for asylum.’” *Id.* (internal citations omitted). The court then explained that, after applying a level of deference appropriate under *Chevron*, there was “no real issue concerning the validity of the regulation interpreting the statute.” *Id.* at 1080.

**CONCLUSION:** The 9th Circuit held that an “alien signing the VWP forms gives up any right to challenge removal, except on asylum grounds, if [the alien] overstays the grant of time permitted by the VWP.” *Id.*

***Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016)**

**QUESTION:** “Whether California’s 10-day wait to take possession of a firearm violates Second Amendment rights when applied to subsequent purchasers who pass the background check in less than ten days.” *Id.* at 827.

**ANALYSIS:** The court reasoned that “[t]he waiting period does not prevent any individuals from owning a firearm,” nor does the regulation “prevent, restrict or place any conditions on how guns are stored or used after a purchaser takes possession.” *Id.* The court noted that intermediate scrutiny was appropriate and proceeded to apply the two-step analysis. *Id.* The 9th Circuit stated that the first step was satisfied because the parties agreed that safety and minimizing gun violence are important objectives. *Id.* The court reasoned that the regulation reasonably achieved the government’s objectives because a “cooling-off period would serve to discourage . . . conduct and would impose no serious burden on the core Second Amendment right of defense of the home . . . .” *Id.* at 828. The 9th Circuit further reasoned that the purpose of the regulation is public safety and “[t]he waiting period provides time not only for background checks, but for the purchaser to reflect on what he or she is doing, and, perhaps, for second thoughts that might prevent gun violence.” *Id.* at 829.

**CONCLUSION:** The 9th Circuit held that “[t]he State has established that there is a reasonable fit between important safety objectives and the application of the WPLs,” and, as such, the 10-day wait does not violate the Second Amendment. *Id.*

***Tellez v. Lynch*, 839 F.3d 1175 (9th Cir. 2016)**

**QUESTION:** Whether “[a]n alien [has] ‘reentered’ the United States for purposes of reinstating a removal order, . . . when she was previously removed at a border crossing checkpoint.” *Id.* at 1177.

**ANALYSIS:** The court began its analysis by noting that the relevant statute states that “[i]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed . . . and the alien shall be removed under the prior order at any time after the reentry.” *Id.* The court reasoned that even if the alien was promptly removed at her first entry attempt into the United States, that the alien’s second attempt to enter the United States qualifies as “reentry.” *Id.* at 1178. The court acknowledged that historically, the definition of “entry” under 9th Circuit precedent was narrower, having “not been accomplished until physical presence is accompanied by freedom from official restraint.” *Id.* The court distinguished this precedent by limiting the definition of “reentry” only “to the reinstatement provision’s definition of ‘reentry.’” *Id.*

**CONCLUSION:** The 9th Circuit held that when “an alien is issued an expedited removal order at a U.S. border-crossing checkpoint, that alien has entered the United States for the purpose of the reinstatement provision’s ‘reentry’ requirement.” *Id.* at 1177.

***United States v. Kaplan*, 836 F.3d 1199 (9th Cir. 2016)**

**QUESTION:** Whether the reuse of single-use plastic needle guides during prostate biopsy exams can be criminally prosecuted under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 331(k). *Id.* at 1208.

**ANALYSIS:** The court first stated that the case turned “on the interpretation of ‘held for sale’” under [the statute], and, specifically, whether a doctor’s use of a device in the course of treating a patient be considered a ‘sale’ under the statute[.]” *Id.* The court then noted that Congress intended to “protect consumers from dangerous products” until the products reach the “ultimate consumer,” patients. *Id.* (internal citations omitted). The 9th Circuit further rejected the argument that a single-use device cannot be “held for sale” because it is more appropriately

interpreted as being “held for use.” *Id.* at 1209. The court reasoned that “[a] single-use device is meant to be ‘consumed’ in the course of treating a patient—just like a drug.” *Id.* at 1210. The court then considered the commercial nature of a physician’s business, stating that “when a physician uses a disposable device on a patient, the device is ‘held for sale’ within the meaning of the FDCA, provided that there is a commercial relationship between the doctor and the patient and that the device is one that is meant to be ‘consumed’ in the process.” *Id.*

**CONCLUSION:** The 9th Circuit held that a “physician’s use of a consumable, single-use device on a paying patient satisfies the ‘held for sale’ element under 21 U.S.C. § 331(k),” and thus can be criminally prosecuted under the FDCA. *Id.* at 1211.

***United States v. Kaplan*, 839 F.3d 795 (9th Cir. 2016)**

**QUESTION:** Whether to use fair market value or replacement value of destroyed property when calculating a restitution award. *Id.* at 800.

**ANALYSIS:** The court reasoned that the purpose of the Mandatory Victim Restitution Act (MVRA) is to fully compensate victims for their losses, and to restore victims to their original state prior to the criminal act. *Id.* The court further noted that the Supreme Court has held “that the ordinary meaning of ‘restitution’ is restoring someone to a position he occupied before a particular event.” *Id.* at 801.

**CONCLUSION:** While fair market value generally provides the best measure to ensure that restitution is the full amount, replacement value is an appropriate measure of destroyed property under the MVRA when the fair market value is either difficult to determine or would be an inadequate measure of the value necessary to make the victim whole. *Id.* at 802.

***United States SEC v. Jensen*, 835 F.3d 1100 (9th Cir. 2016)**

**QUESTION ONE:** Whether Rule 13a-14 of the Securities Exchange Act “includes an implicit truthfulness requirement.” *Id.* at 1112.

**ANALYSIS:** The court noted that Rule 13a-14 was enacted under the authority of Section 13(a) of the Securities Exchange Act, which includes provisions that require companies to make filings with the Securities and Exchange Commission (SEC) that are not misleading. *Id.* at 1113. The court further noted that it has previously held other similarly drafted provisions in the Securities Exchange Act to include an implicit truthfulness requirement. *Id.* Additionally, the 9th Circuit noted that other circuit courts “have also read rules promulgated under § 13 to create liability for false statements even when the rules did not explicitly require truthfulness.” *Id.*

**CONCLUSION:** Rule 13a-14 of the Exchange Act carries an implicit truthfulness requirement. *Id.*

**QUESTION TWO:** Whether under Sarbanes-Oxley Act Section 304 (“SOX 304”), CEOs or CFOs are required “to have personally engaged in misconduct before they are required to disgorge profits.” *Id.* at 1114.

**ANALYSIS:** The court reasoned that, while no circuit court had addressed the issue, “most district courts to have examined it have concluded that SOX 304 does not require CEOs or CFOs to have personally engaged in misconduct before they are required to disgorge profits under that statute.” *Id.* at 1115. The court noted that this finding is consistent with the plain language of the statute and its legislative history. *Id.* at 1114–15. The court further reasoned that the language of the statute suggested, “that it is the issuer’s misconduct that matters, and not the personal misconduct of the CEO or CFO.” *Id.* at 1114.

**CONCLUSION:** SOX 304 does not require CEOs or CFOs to have engaged in personal misconduct to entitle the SEC to seek disgorgement. *Id.* at 1116.

#### TENTH CIRCUIT

***General Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178 (10th Cir. 2016)**

**QUESTION:** Whether the immunity provision of 47 U.S.C. § 230 “provides immunity from suit . . . such that a denial would permit an interlocutory appeal”. *Id.* at 1181.

**ANALYSIS:** The court began by explaining that the Communication Decency Act (CDA) was enacted to shield children from Internet content that is sexually explicit. *Id.* Section 230, however, was enacted because of a recognition that tort-based lawsuits pose a threat to freedom of speech on the Internet. *Id.* Defendants asserted that the statutory language of § 230 should be read to imply that CDA immunity bars suit as well as liability under that statute. *Id.* The court noted, however, that “reading the text in its entirety reveals that [§ 230] is merely a preemption provision . . . [and] does not contain an explicit bar to suit.” *Id.* at 1182. The court reasoned that despite the Defendants’ arguments, the statutory language must contain an explicit guarantee of immunity and, without one, no such finding of immunity from suit can be found. *Id.*

**CONCLUSION:** The 10th Circuit held that because § 230 of the CDA does not contain an explicit grant of immunity from suit, no such finding of immunity could be implied from the statutory language. *Id.*

***George v. Urban Settlement Servs.*, 833 F.3d 1242 (10th Cir. 2016)**

**QUESTION:** Whether a plausible promissory estoppel claim arises when a party demonstrates a defendant’s “unambiguous promises to provide permanent [Home affordable Modification Program (HAMP)] loan modifications for eligible borrowers.” *Id.* at 1257.

**ANALYSIS:** The 10th Circuit addressed the lower court’s suggestion of “the existence of a circuit split on this issue.” *Id.* at 1259. The 10th Circuit noted that “our examination of the cases the district court relied on reveals that other circuits have declined to find clear and unambiguous promises when considering documents or circumstances that differ significantly from those [in the other circuits].” *Id.* The 10th Circuit joined the 1st, 7th, and 9th Circuits in finding the first element of a plausible promissory estoppel claim. *Id.* at 1260.

**CONCLUSION:** The 10th Circuit ultimately rejected the district court’s acknowledgment of a circuit split, and joined all other courts that have addressed this issue in concluding that a “document [which] clearly and unambiguously promises to provide permanent HAMP loan modifications to borrowers” is sufficient to allege a promise for a promissory estoppel claim. *Id.* at 1260.

***Kingsbury v. Westlake Mgmt. Co.*, 2016 U.S. App. LEXIS 23416 (10th Cir. December 30, 2016)**

**QUESTION ONE:** Which limitations period the Oklahoma courts would apply to an action to satisfy a judgment against one of the partners in a partnership for the partnership’s liability. *Id.* at \*6.

**ANALYSIS:** The court began its analysis by noting that the complaint contains “no allegations of individual wrongdoing, nor does the complaint identify the individual conduct of either [partner] as a basis for personal liability.” *Id.* (internal quotations and citations omitted). Rather, the complaint “merely [sought] to impose liability on [the partners] for partnership debt by operation of Oklahoma statute.” *Id.* (internal quotations and citations omitted).

**CONCLUSION:** “The Oklahoma courts would apply the five-year statute of limitations governing a suit for debt.” *Id.*

**QUESTION TWO:** When the Oklahoma courts would deem that limitations period to have commenced. *Id.* at \*6.

**ANALYSIS:** The court began its analysis by stating that “the Oklahoma statutes make clear that a “judgment against a partnership is not by itself a judgment against a partner.” *Id.* As such, a creditor’s rights against a partner do not arise when a partnership incurs an obligation. *Id.* at \*7.

**CONCLUSION:** Oklahoma courts would “define accrual as occurring when those rights arise.” *Id.*

**QUESTION THREE:** Whether Oklahoma partnership law compels a contrary conclusion. *Id.* at \*6.

**ANALYSIS:** The court reasoned that Oklahoma law “affords would-be plaintiffs the option of suing in the same action or in separate actions,” and, as such, “suggests the Legislature considers the collection action to be separate from the underlying litigation.” *Id.* at \*7. Further, the court noted that Oklahoma law “merely mandates that before the creditor attempts to satisfy an obligation of the partnership against the assets of the partners, he must first obtain a judgment against the partnership based on the same claim, and unsuccessfully attempt to satisfy that judgment against partnership assets.” *Id.* at \*9. As such, the statute by its plain language “does not dictate that the action against the partners be for the exact same claim; all that is required is that it be based on the same claim.” *Id.*

**CONCLUSION:** Oklahoma partnership law did not prevent the second action because the decedent’s son obtained, in the negligence action, the requisite judgment *based on* the same claim. *Id.* at \*8 (internal quotations omitted and emphasis in original).

***United States v. Miller*, 2016 U.S. App. LEXIS 22433 (10th Cir. 2016)**

**QUESTION:** “[W]hether to resolve on the merits a § 2255 motion that hinges on an issue that will be resolved in the near future by the Supreme Court, but in all likelihood not soon enough to benefit the defendant seeking relief.” *Id.* at \*7–8.

**ANALYSIS:** Defendant argued that he was entitled to a significantly lower sentence because his initial sentence was based on the application of a rule that was rendered invalid by a subsequent Supreme Court decision. *Id.* at \*2. The district court elected a stay order until another relevant case was decided. *Id.* at \*3. Defendant argued that the stay order, in effect, operated as a final dismissal of his claim. *Id.* at \*3–4. The court reasoned that “staying resolution of his motion until the Supreme Court resolves [the issue] will irreparably damage Miller by resulting in his unnecessary confinement.” *Id.* at \*7. As such, the court reasoned that a stay amounted to an abuse of discretion on the part of the district court. *Id.* Even though the Supreme Court would likely resolve the issue in the near future, the court noted that it was not likely to happen “soon enough to benefit the defendant seeking relief.” *Id.*

**CONCLUSION:** The court found that defendant’s right to issuance of the writ was clear and indisputable because, without it, he would effectively be denied his right to timely resolution of his § 2255 motion. *Id.* at \*8.

***United States v. Supreme Court*, 2016 U.S. App. LEXIS 18543 (10th Cir. Oct. 13, 2016)**

**QUESTION:** Whether New Mexico’s Rule 16-308(E) provisions may survive a preemption challenge considering the federal grand jury law. *Id.* at 923.

**ANALYSIS:** New Mexico’s Rule 16-308(E) “prohibits a prosecutor from subpoenaing a lawyer to present evidence about a past or present client in a grand-jury or other criminal proceeding unless such evidence is ‘essential’ and ‘there is no other feasible alternative to obtain the information.’” *Id.* at 893. The court reasoned the “Anglo-American legal tradition and the Constitution itself” carve out a unique position for the federal grand jury system. *Id.* at 923. The court noted the Framers designed such a system to ensure a neutral process to ascertain truth and justice, apart from the three branches of government. *Id.* The court further reasoned that any such conflict with the federal law “would impede the grand jury’s broad investigative mandate—which the Framers specifically envisioned in enacting the Grand Jury Clause of the Fifth Amendment.” *Id.* at 928.

**CONCLUSION:** The 10th Circuit held “Rule 16-308(E)’s challenged provisions are conflict-preempted in the grand-jury setting because the essentiality and no-other-feasible-alternative requirements pose an obstacle to the accomplishment and execution of the full purposes and objectives of the federal legal regime governing grand-jury practice.” *Id.* at 923 (internal quotation marks omitted).

ELEVENTH CIRCUIT

***Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202 (11th Cir. 2016)**

**QUESTION:** Whether a seaman’s work in international waters on a cruise ship that travels to foreign ports constitutes “performance . . . abroad” under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 202. *Id.* at 1203.

**ANALYSIS:** Section 202 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards only allows for arbitration agreements between United States citizens when the contractual relationship between the parties envisages performance abroad. *Id.* at 1203. The crux of the dispute was the determination of what was the proper definition of the term “envisages performance . . . aboard.” *Id.* at 1204. Plaintiff argued “abroad” means “in one or more foreign states,” while Defendant argued that abroad means “anywhere outside a country.” *Id.* The court found flaws in both party’s definitions. *Id.* at

1205. Ultimately, the court ruled that because Plaintiff worked on a cruise ship that traveled in international waters to foreign ports, his contract “envisaged performance abroad,” thus the arbitration clause was found to be enforceable under the Convention. *Id.* at 1204.

**CONCLUSION:** The 11th Circuit held that “performance abroad” includes a seaman’s work traveling to or from a foreign country. *Id.* at 1204.

***Gelin v. United States, AG, 837 F.3d 1236 (11th Cir. 2016)***

**QUESTION:** “Whether ‘abuse of an elderly person or disabled adult’ is a crime involving moral turpitude.” *Id.* at 1243.

**ANALYSIS:** In addressing whether a crime involves moral turpitude, the 11th Circuit first determined whether a categorical approach or modified categorical approach is appropriate. *Id.* at 1241. The categorical approach “consider[s] only the fact of conviction and the statutory definition of the offense, rather than the specific facts underlying the defendant’s case.” *Id.* The 11th Circuit further reasoned that “a person who knowingly or willfully abuses an elderly person or disabled adult without causing great bodily harm” constitutes a crime involving moral turpitude. *Id.* at 1242. The 11th Circuit stated that this act “qualifies as a [crime involving moral turpitude] because of (1) the culpable state of mind required by the statute, and (2) the particularly vulnerable nature of the victims.” *Id.* at 1243.

**CONCLUSION:** The 11th Circuit held that “a conviction for abuse of an elderly person or disabled adult . . . is categorically a crime involving moral turpitude.” *Id.* at 1247–48.

***United States v. Phillips, 834 F.3d 1176 (11th Cir. 2016)***

**QUESTION:** Whether “the police [can] arrest someone based solely on a civil writ of bodily attachment for unpaid child support[.]” *Id.* at 1178.

**ANALYSIS:** The court noted that “a court will issue a writ of bodily attachment for unpaid child support if it determines, by a preponderance of the evidence, that a person is liable for civil contempt.” *Id.* at 1180–81. The court explained that the Fourth Amendment requires only probable cause in order to issue a warrant for a civil or criminal offense and that writs of bodily attachment are, therefore, subject to a higher standard for issuance. *Id.* at 1181. The court further reasoned that writs for bodily attachment are warrants in the historical sense in that they require a person’s arrest and production before the court. *Id.* The court finally noted the close analogy between writs for bodily attachment and bench warrants—which are also based on civil offenses—and noted that bench

warrants have long been held to satisfy the Fourth Amendment by the courts. *Id.* at 1182.

**CONCLUSION:** The 11th Circuit held that a “writ of bodily attachment for unpaid child support is a warrant for Fourth Amendment purposes.” *Id.*