Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between January 1, 2017 and August 17, 2017. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and it intended to give only the briefest synopsis of the circuit split, and not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 14 SETON HALL CIR. REV. [n] (2017).

CIVIL MATTERS

CIVIL

ADMINISTRATIVE LAW

Applicability of Notice-and-Comment Rulemaking to the Medicare Act – Administrative Procedure Act: *Allina Health Servs. v. Price*, 863 F.3d 937 (D.C. Cir. 2017)

The D.C. Circuit addressed whether the Medicare Act incorporates the Administrative Procedure Act's (APA's) exemption for notice and

comment rule-making as applied to interpretive rules. *Id.* at 945. The court noted that the 1st, 6th, 8th, and 10th Circuits have concluded that all of the APA's exemptions to the notice and comment requirement are incorporated by the Medicare Act. *Id.* The court concluded that "[u]nlike the APA, the text of the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking," but instead, "the text expressly *requires* notice-and-comment rulemaking." *Id.* at 944 (emphasis in original). Therefore, the D.C. Circuit held that "the Medicare Act does not incorporate the APA's interpretive-rule exception to the notice-and-comment requirement." *Id.* at 945.

Native American Housing Assistance and Self-Determination Act (NAHASDA) – Entitlement to Administrative Hearing: *Modoc Lassen Indian Hous. Auth. v. United States HUD*, 864 F.3d 1212 (10th Cir. 2017)

The 10th Circuit addressed whether the United States Department of Housing and Urban Development (HUD) lacked authority to recapture overpayments resulting from the over-reporting of eligible housing units by Native American tribes, without first providing an administrative hearing. *Id.* at 1216. The court explained that under section 4165 of the Native American Housing Assistance and Self-Determination Act (NAHASDA), HUD was required to undertake such reviews and audits as may be necessary or appropriate to make three specific determinations; (1) whether each tribe "carried out its eligible activities in a timely manner, . . . carried out its eligible activities and certifications in accordance with the requirements and the primary objectives of this chapter and with other applicable laws, and has a continuing capacity to carry out those activities in a timely manner"; (2) whether each tribe "complied with [its] Indian housing plan"; and (3) whether each tribe's "performance reports . . . [were] accurate." *Id.* at 1218. The 9th Circuit determined that a tribe's report of eligible housing stock falls within the first category of section 4165, under "activities" and "certifications," and as such affords the HUD the authority to review and entitles the tribe to an administrative hearing. *Id.* The court, however, disagreed with the 9th Circuit's determination, as the "applicable statutes unambiguously establish that the terms 'eligible activities' and 'certifications' don't encompass a tribe's report on its eligible housing units." *Id.* at 1219. Thus, the 10th Circuit concluded that HUD was under no obligation to afford the Tribes an administrative hearing since the HUD lacked authority to review such reports under section 4165. *Id.* at 1220.

Appellate Jurisdiction – Collateral Order Doctrine: *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720 (9th Cir. 2017)*

The 9th Circuit decided "whether [it could] consider the appeal immediately under the collateral-order doctrine, or whether any appeal based on state-action immunity must await final judgment." *Id.* at 722. The court noted that the 11th Circuit held that "state-action immunity was comparable to qualified immunity because both doctrines protected officials from "costly litigation and conclusory allegations." *Id*. at 729 (internal citations omitted). The court then noted the 5th Circuit similarly held that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities," and therefore could be immediately appealed. *Id.* On the other hand, the court noted the 6th Circuit held that "unsuccessful assertions of state-action immunity failed the second and third parts of the collateral-order test," in which the 4th Circuit agreed. *Id.* at 728. The 9th Circuit was persuaded by the 4th and 6th Circuits, and ultimately held that "the collateral-order doctrine does not allow an immediate appeal of an order denying a dismissal motion based on state-action immunity." *Id*. at 722.

District Court Discretion – Declaratory Judgment Act: *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223 (3d Cir. 2017)

The 3rd Circuit addressed the "legal standard a district court must apply when addressing whether it may decline jurisdiction when both declaratory and legal relief are claimed." *Id.* at 227–28 (internal citations and quotations omitted). The court noted that the 2nd, 4th, and 5th Circuits "have adopted a bright line rule that prioritizes a federal court's duty to hear claims for legal relief over its discretion to decline jurisdiction to hear declaratory judgment actions," while the 7th and 9th Circuits have applied "an independent claim test, which balances the court's duty to hear legal claims with its discretion to decline jurisdiction over claims for declaratory relief." *Id.* at 228. The 3rd Circuit agreed with the 7th and 9th Circuits in finding the "independent claim test" the most appropriate, noting that "it prevents plaintiffs from evading federal jurisdiction through artful pleading." *Id.* Thus, the 3rd Circuit concluded that the "independent claim test" was the correct test to apply "for review of a complaint that seeks both legal and declaratory relief." *Id.* at 230.

Federal Arbitration Act – Arbitrability: *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017)

The 1st Circuit addressed "whether the district court or the arbitrator decides the applicability of [an] exemption" to a transportation employment contract from the Federal Arbitration Act (FAA). *Id.* at *12. The court noted the 8th Circuit held that the arbitrator may answer whether the exemption applies when the parties have agreed that the arbitrator may determine his or her jurisdiction. *Id.* at *12–13. The 9th Circuit disagreed, reasoning that if the FAA does not apply, the court has no authority to compel arbitration, so the court must first determine whether an exemption applies. *Id.* at *13. The 1st Circuit reasoned that the applicability of an exemption is a question of authority which presents an "antecedent determination" prior to compelling arbitration. *Id.* at *14 (citation omitted). The court noted that compelling arbitration over whether the court has the authority to do so "puts the cart before the horse and makes no sense." *Id.* (internal quotations and citation omitted). The 1st Circuit followed the 9th Circuit's approach and concluded that the court must decide the applicability of an exemption before contemplating a motion to compel arbitration. *Id.* at *15.

Federal Question Jurisdiction – Federal Arbitration Act (FAA) Post-Award Review: *Ortiz-Espinosa v. BBVA Sec. of P.R., Inc.*, 852 F.3d 36 (1st Cir. 2017)

The 1st Circuit addressed "whether [the] difference in language between the pre-award enforcement provision of [9 U.S.C.] § 4 and the post-award enforcement provisions of [9 U.S.C.] §§ 9-11 warrants a different test for federal question jurisdiction." *Id.* at 44. The court noted that the 2nd Circuit found that the look-through approach is applicable to § 4 and at least § 10 petitions to vacate, while the 7th and 8th Circuits have held the opposite view—that a federal issue resolved by the arbitrator does not supply subject-matter jurisdiction for review or enforcement of the award. *Id.* (internal quotations omitted). The 1st Circuit agreed with the 2nd Circuit in finding that the look-through approach cannot be limited to § 4 petitions to compel because the mere textual difference between the sections does not indicate that the sections should be interpreted differently. *Id.* The court disagreed with the 7th and 8th Circuits in finding that it would make little sense to effectively exclude federal question jurisdiction over post-award arbitration cases given the important role federal courts have in enforcing these agreements. *Id.* at 45. Thus, the 1st Circuit concluded that the look-through approach may be applied to § 4 and the post-award provisions of §§ 9-11. *Id.* at 47.

Late-Filed Motions to Dismiss – Interpretation and Application of Rule 12(g)(2): *Pepper v. Apple Inc.*, 846 F.3d 313 (9th Cir. 2017)

The 9th Circuit addressed whether FED. R. CIV. P. 12(g)(2) should be interpreted to foreclose a motion to dismiss when there has been a previous motion to dismiss under Rule 12. *Id.* at 318. The court noted that the 7th Circuit "has held that Rule 12(g)(2) does not foreclose a motion to dismiss under Rule 12(b)(6) when there has been a previous motion to dismiss under Rule 12," while the 3rd and 10th Circuits "have been very forgiving of a district court's failure to follow Rule 12 (g)(2)." *Id.* The 9th Circuit found that the 7th Circuit misunderstood Rule 12, instead following the approach of the 3rd and 10th Circuits, finding that "[d]enying late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1," and thus the appellate courts should "generally be forgiving of a district court's ruling on the merits of a late-filed Rule 12(b)(6) motion." *Id.* at 318–19.

Pleading Requirements – False Claims Act (FCA): *United States ex rel. Chorches v. Am. Med Response, Inc.*, 865 F.3d 71 (2d Cir. 2017)

The 2nd Circuit addressed "whether, to satisfy [FED. R. CIV. P. 9(b)], an FCA relator alleging a fraudulent scheme must provide the details of specific examples of actual false claims presented to the government." *Id.* at 89. The court noted that the 3rd, 5th 7th, 9th, and 10th Circuits have chosen a "more lenient" pleading standard, allowing alleged complaints that display no evidence of actual false claims to satisfy Rule 9(b). *Id*. In contrast, the 1st, 4th, 6th, 8th, and 11th Circuits have chosen a stricter Rule 9(b) pleading standard, requiring actual evidence of alleged fraudulent conduct. *Id*. at 89–90. Ultimately, the 2nd Circuit held that Rule 9(b) does not require that every complaint provide specific evidence so long as the relator makes plausible allegations. *Id.* at 93.

Subject Matter Jurisdiction – Waiver By Participation: *City of Albuquerque v. Soto Enters.*, 864 F.3d 1089 (10th Cir. 2017)

The 10th Circuit addressed whether waiver by participation in state court proceedings "falls within either of the [28 U.S.C. § 1447(c)] bases [of remand]—(1) lack of subject-matter jurisdiction, or (2) any defect [other than lack of subject matter jurisdiction]"—and is therefore reviewable under 28 U.S.C. § 1447(d). *Id.* at 1092. Regarding the first basis of remand, the court noted that the 9th and 11th Circuits "treat[] waiver by participation as nonjurisdictional," and specifically highlighted the 11th Circuit's position that "[w]aiver may be a proper basis upon

which to find lack of *removal* jurisdiction; however, waiver does not divest the court of *subject matter* jurisdiction." *Id.* at 1094 (internal citations omitted) (emphasis in original). The court then noted that, in contrast, the 5th Circuit concluded that "a district court's belief that removal was no longer available led 'to the logical inference that [the district court] felt jurisdiction was lacking.'" *Id.* (internal citations omitted). The court ultimately agreed with the 9th and 11th Circuits, holding that "waiver by participation is independent from subject-matter jurisdiction," and therefore " . . . falls outside § 1447(c)'s subject-matter-jurisdiction basis." *Id.* Regarding the second basis of remand, the court agreed with the 4th, 7th, 9th, and 11th Circuit in holding that "'any defect' applies solely to failures to comply with the statutory requirement for removal." *Id.* 1095. Ultimately, the 10th Circuit concluded that waiver does not qualify as "'any defect' under § 1447(c)," and therefore does not "limit [the court's] jurisdiction to review the case's merits." *Id.* at 1097–98.

CIVIL RIGHTS

Business and Corporate Compliance – EEOC Investigative Authority Under Title VII: *EEOC v. Union Pac. R.R.*, No. 15-3452, 2017 U.S. App. LEXIS 15228 (7th Cir. Aug. 15, 2017)

The 7th Circuit addressed "whether the [Equal Employment Opportunity Commission ("EEOC")] is authorized by statute to continue investigating an employer by seeking enforcement of its subpoena after issuing a notice of right-to-sue to the charging individuals and the dismissal of the individuals' subsequent civil lawsuit on the merits." *Id.* at *6–7. The court noted that the 5th Circuit ruled the issuance of a right-to-sue letter ended the EEOC's authority to investigate, while the 9th Circuit held that "the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis." *Id.* at *9. The 7th Circuit agreed with the 5th Circuit and concluded that the EEOC may continue to investigate allegations of discrimination even after it issues a right-to-sue letter. *Id.* at *11.

CONSTITUTIONAL LAW

Contracts Clause – Revocation-On-Divorce Statute: *Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017)

The 9th Circuit addressed whether the operation of a revocation-on-divorce statute (ROD) violates the Contracts Clause, a provision in the

United States Constitution that prevents any state from passing a law impairing the obligation of contracts. *Id.* at 1198. The court noted that the 8th Circuit determined that an ROD statute was unconstitutional because of interference with the donative intent of a party in the contract, while the 10th Circuit upheld the constitutionality of a ROD statute. *Id.* On the other hand, the 10th Circuit conceptualized the contract as having both contractual and donative transfer elements, and the Contracts Clause would only be violated if the statute interfered with both of those elements. *Id.* at 1199. The 9th Circuit agreed with the 10th Circuit in finding that there was no contractual impairment if there was never a possession of vested contractual right. *Id.* at 1200. Ultimately, the 9th Circuit upheld the ROD statute as constitutional since there was no impairment of a contractual right. *Id.* at 1200.

Fifth Amendment Due Process – Deck Rule: *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017)

The 9th Circuit addressed the issue of whether the rule in *Deck v. Missouri*, 544 U.S. 622 (2005)—that the Constitution prohibits a requirement that a criminal defendant appear before a jury in shackles without an individual inquiry into the necessity of such security measures—applies to all court room proceedings. *Sanchez-Gomez*, 859 F.3d at 661. The court noted the 2nd and 11th Circuits maintain that the rule requiring an individual inquiry into the necessity of shackles does not apply to non-jury proceedings and is limited only to jury trials. *Id.* at 680–81 (Ikuta, J. dissenting). The court also noted that the 2nd Circuit found that a defendant is not prejudiced by shackles in a non-jury proceeding because judges are not so easily biased. *Id.* at 681. The majority did not acknowledge the existence of a split, but does not believe that the Deck rule is so limited. *Id.* at 661. The 9th Circuit reasoned the Court in *Deck* was more concerned with a criminal defendant's presumption of innocence. *Id.* at 660. The court found that "a presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain." *Id.* at 661. Thus, the 9th Circuit held "if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant." *Id.* at 666.

First Amendment – Pickering Test: *Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017)

The 6th Circuit addressed whether employers must show evidence of actual disruption in the workplace in order to prevail under the *Pickering* test, promulgated by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Miller*, 845 F.3d at 685. The court noted that the 2nd, 3rd, 7th, 8th, 9th and 11th Circuits determined that evidence of actual disruption is not required, while the 10th Circuit found that evidence of actual disruption of services must be produced. *Id.* at 685–86. The 6th Circuit agreed with the 2nd, 3rd, 7th, 8th, 9th and 11th Circuits in finding that evidence of events unfolding to the extent of actual disruption in the office and to working relationships is unnecessary. *Id.* at 687. The court disagreed with the 10th Circuit's interpretation of the Pickering test, noting that the requirement of actual disruption was not an "obvious application of *Pickering* and its progeny." *Id.* at 686. Thus, the 6th Circuit concluded that an employer is not required to show actual disruption to prevail under the *Pickering* test. *Id.* at 687. Rather, the court held that the appropriate inquiry is whether an employer could reasonably predict the employee's speech would cause disruption. *Id.*

Fourth Amendment Seizures – Vehicle Impound: *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017)

The 9th Circuit addressed "whether a 30-day impound of a vehicle is a seizure requiring compliance with the Fourth Amendment." *Id.* at 1195. The court noted that the 7th Circuit, the only other circuit to address the question, determined that so long as the initial seizure was supported by probable cause, continued possession did not implicate the Fourth Amendment. *Id.* at 1197. The 7th Circuit concluded that "the City's continued possession of the vehicle neither continued the initial seizure nor began another." *Id.* (internal citations and quotation marks omitted). The 9th Circuit disagreed with the 7th Circuit, finding the case relied on by the 7th Circuit inapplicable. The 9th Circuit concluded that a 30-day impound of a vehicle requires compliance with the Fourth Amendment. *Id.*

Freedom of Religion – Establishment Clause: *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521 (5th Cir. 2017)

The 5th Circuit addressed "whether a school district's policy of inviting students to deliver statements which can include invocations, before school-board meetings, violated the First Amendment's Establishment Clause." *Id.* at 523 (internal citations omitted). The court

noted that the 3rd and 6th Circuits held that legislative-prayer exception did not carry on to invocations at school board meetings, and that these particular cases should be recognized as school-prayer cases. *Id.* at 528. In contrast, the court noted that the 9th Circuit held that the legislative-prayer exception applies to school board invocations. *Id.* The 5th Circuit held that "a school board is more like a legislature than a school classroom or event." *Id.* at 526. Therefore, the 5th Circuit concluded that under the specific facts presented, the school-board-expression practice did not offend the Establishment Clause since the practice falls more nearly within the legislative-prayer exception. *Id.* at 530.

CONTRACT LAW

Judicial Interpretation – Claims Arising Under the Contracts Clause: *Kaminski v. Coulter*, 865 F.3d 339 (6th Cir. 2017)

The 6th Circuit addressed whether a "Contracts Clause violation is cognizable as a" claim under 42 U.S.C. § 1983 of the United States Code Service. *Id.* at 346. The United States Supreme Court held "that the Contracts Clause does *not* protect an individual constitutional right enforceable under § 1983, but is rather a structural limitation placed upon the power of the States." *Id.* (emphasis in original). Conversely, the Supreme Court held that § 1983 may provide for a Commerce Clause violation resulting in a cause of action. *Id.* The 9th Circuit held that a Contracts Clause violation may give rise to a § 1983 cause of action. *Id.* The 4th Circuit rejected this approach and held that a § 1983 claim cannot be supported by a Contracts Clause violation. *Id.* at 346–47. Ultimately, the 6th Circuit joined the 4th Circuit and held that "an alleged Contracts Clause violation cannot give rise to a cause of action under § 1983." *Id.* at 347.

EMPLOYMENT/LABOR LAW

Age Discrimination in Employment Act – Scope & Definitions: *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168 (9th Cir. 2017)

The 9th Circuit analyzed "whether the Age Discrimination in Employment Act applies to a political subdivision of Arizona." *Id.* at *1169. The 9th Circuit noted that the 6th, 7th, 8th, and 10th Circuits have previously held that the Age Discrimination in Employment Act is ambiguous when it comes to determining if the statute also applies to state-affiliated entities, such as a political subdivision of the state. *Id.* at *1173. The court also noted that these four circuits held further that section 630(b) of the Act, which defines an employer, can have another reasonable

interpretation of the status. *Id.* The 9th Circuit, however, rejected this claim, stating that the statute is not ambiguous and that the other circuits fail to demonstrate how and why the other statutory construction is reasonable. *Id.* Thus, the 9th Circuit held that the Act applies to political subdivisions. *Id.*

Age Discrimination in Employment Act (ADEA) – Subgroups: *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017)

The 3rd Circuit addressed whether subgroups, such as those over the age of 50, can bring disparate impact claims under the ADEA. *Id.* at 68. The court noted that the 2nd, 6th, and 8th Circuits determined that subgroup disparate impact claims are not cognizable under the ADEA. *Id.* at 75. The court disagreed with the 2nd, 6th, and 8th Circuits because the United States Supreme Court rejected the arguments that those circuits' earlier decisions relied on. *Id.* at 75–80. Thus, the 3rd Circuit concluded that subgroup disparate impact claims are cognizable given the Supreme Court's interpretation of the plain meaning of the statute's text and its remedial purpose. *Id.* at 86.

Employee Compensation – Fair Labor Standards Act (FLSA): *Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017)

The 5th Circuit addressed whether the fluctuating workweek method should be used when calculating overtime back pay due to a salaried employee. *Id.* at 613. The court created a circuit split by declining to follow the 4th Circuit's definition of a "fluctuating workweek." *Id.* at 616. The 4th Circuit held that a fluctuating workweek occurs when the number of hours an employee works in a particular week alternates according to a fixed schedule. *Id.* However, the 5th Circuit rejected this definition and noted that the Department of Labor ruling on which the 4th Circuit based its reasoning was inconclusive and did not bind the court. *Id.* at 616–17. The court therefore held that a fluctuating work week only occurs where the employee is compensated for however many hours the job demands in a particular week and without regard for a predetermined number of hours they must work. *Id.* at 616.

Employee Retirement Income Security Act (ERISA) – Exhaustion of Administrative Remedies: *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017)

The 6th Circuit addressed whether participants or beneficiaries of the Employee Retirement Income Security Act (ERISA) "must exhaust internal plan remedies before suing plan fiduciaries on the basis of an alleged violation of duties imposed by the statute." *Id.* at 564. The court

noted that the 3rd, 4th, 5th, 9th, 10th, and D.C. Circuits determined that exhaustion is not required when plaintiffs seek to "enforce statutory ERISA rights rather than contractual rights created by the terms of the Plan," while the 7th and 11th Circuits found that the exhaustion requirement applies even where plaintiffs assert statutory rights. *Id.* The 6th Circuit agreed with the 3rd, 4th, 5th, 9th, 10th, and D.C. Circuits in finding that "the remedy for claims based on violations of ERISA's substantive guarantees was intended to be provided by the courts," and that a breach of fiduciary duty claims are statutory claims because they assert rights granted by ERISA. *Id.* at 565 now. Thus, the 6th Circuit concluded that ERISA plan participants or beneficiaries do not need to exhaust internal remedial procedures before proceeding to federal court when they assert statutory violations of ERISA. *Id.* at 564.

Fair Labor Standards Act (FLSA) – Administrative Exemption: *McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847 (9th Cir. 2017)

The 9th Circuit addressed "whether mortgage underwriters qualify for FLSA's administrative exemption . . . ." *Id.* at 849. The court first noted the 2nd Circuit's holding that mortgage underwriters "fall[] under the category of production rather than of administrative work," and therefore do not qualify for the administrative exemption. *Id.* at 852. The court then noted the 6th Circuit's holding that "mortgage underwriters are exempt administrators," because they perform services that are ancillary to the bank's primary production activity. *Id.* Ultimately, the court adopted the 2nd Circuit's holding, reasoning that mortgage underwriters should be labeled under the category of production because their duties do not entail assessing the business interests of a bank. *Id.* The court further explained that, instead, mortgage underwriters assess loan risk and provide analyses to their respective banks. *Id.* The court continued that these duties are related to the bank's production, thereby falling outside the scope of the administrative exemption. *Id*. As such, the 9th Circuit joined the 2nd Circuit in holding that mortgage underwriters fall outside of the administrative exemption of the FLSA, and are therefore entitled to overtime compensation. *Id.* at 852–53.

Gender & Sex Discrimination – Title IX: *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017)

The 3rd circuit addressed "whether an ex-resident . . . can bring private causes of action for sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*, against . . . a private teaching hospital operating a residency program." *Id.* at 549. The court analyzed six United States Supreme Court decisions to derive four

guiding principles. *Id.* at 560–63. First, "private-sector employees aren't limited to Title VII in their search for relief from workplace discrimination . . . despite Title VII's range and design as a comprehensive solution for invidious discrimination in employment." *Id.* at 562 (internal citations and quotations omitted). Second, "it is a matter of 'policy' left for Congress's constitutional purview whether an alternative avenue of relief from employment discrimination might undesirably allow circumvention of Title VII's administrative requirements." *Id.* (internal citations omitted). Third, "the provision implying Title IX's private cause of action, 20 U.S.C. § 1681(a), encompasses employees, not just students . . . ." *Id.* (internal citations omitted). Fourth, "Title IX's implied private cause of action extends explicitly to *employees* of federally-funded education programs who allege sex-based *retaliation* claims under Title IX." *Id.* (internal citations omitted) (emphasis in original). The court then noted the 5th and 7th Circuits' position that Title VII provides the "exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Id.* at 563 (internal quotations omitted). However, the 3rd Circuit declined to follow this method, and instead followed the 1st and 4th Circuits' decisions recognizing employees' private Title IX claims. *Id.*

Judgment as a Matter of Law – Qualified Immunity: *Holt v. Pennsylvania*, 683 F. App'x 151 (3d Cir. 2017)

The 3rd Circuit addressed whether the initiation of an internal investigation—in this case an Internal Affairs Division (IAD) investigation into a Pennsylvania police officer—can constitute an "adverse action" for purposes of a First Amendment retaliation claim. *Id.* at 159. The court explained that the 5th Circuit held that investigation into alleged violations of departmental policies does not constitute adverse employment action, while the 9th Circuit held that placement on administrative leave pending discipline can constitute an adverse action for a First Amendment retaliation case. *Id.* The court agreed with the Magistrate Judge's grant of judgment as a matter of law in favor of Pennsylvania because the plaintiff's suit was barred by qualified immunity, which protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* Ultimately, the court concluded that the state official was entitled to qualified immunity, reasoning that "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [a public official] to money damages for picking the losing side of the controversy." *Id.* (internal

citation and quotation marks omitted). In addition, the court ruled that given its precedent, it would have been reasonable for the state official to conclude that the initiation of an IAD investigation would not create liability under the Equal Protection Clause, thus entitling her to qualified immunity. *Id.* at 160.

National Labor Relations Act (NLRA) – Arbitration Provisions: *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017)

The 6th Circuit addressed whether federal law permits employers to require individual arbitration of employees' employment-related claims. *Id.* at 401. The court noted that the 7th and 9th Circuits ruled that "arbitration provisions mandating individual arbitration of employment-related claims violate the NLRA and fall within the FAA's saving clause." *Id.* The court explained, on the other hand, that the 5th and 8th Circuit ruled such provisions do not violate the NLRA. *Id.* The 6th Circuit disagreed "with the [5th] Circuit's holding that employers may require employees to agree to a mandatory arbitration provision requiring individual arbitration of employment-related claims." *Id.* at 405. Ultimately, the 6th Circuit held that "[m]andatory arbitration provisions that permit only individual arbitration of employment-related claims are illegal pursuant to the NLRA and unenforceable pursuant to the FAA's saving clause," and thus concluded the defendant "violated the NLRA by forbidding employees from discussing compensation-related information." *Id.* at 405, 411.

National Labor Relations Act (NLRA) – Class and Collective Action Waiver: *Convergys Corp. v. NLRB*, No. 15-60860, 2017 U.S. App. LEXIS 14521 (5th Cir. Aug. 7, 2017)

The 5th Circuit addressed whether Section 7 of the National Labor Relations Act (NLRA) "contemplates a right to participate in class and collective actions." *Id.* at *4. The court noted that the 2nd, 8th, and 11th Circuits determined that because class and collective actions are procedural, they may be waived notwithstanding the NLRA because no substantive right is violated. *Id.* at *5 n.4. The 5th Circuit also noted that the 7th and 9th Circuits held that the right to class and collective action is substantive and cannot be waived. *Id.* The 5th Circuit adhered to its prior precedent and held that such actions are procedural. *Id.* at *5–6. Accordingly, the 5th Circuit concluded that class and collective actions may be waived notwithstanding the NLRA. *Id.* at *7.

Statutory Interpretation – ADEA Claims Recovery: *Vaughan v. Anderson Reg'l Med. Ctr.*, 849 F.3d 588 (5th Cir. 2017)

The 5th Circuit addressed the availability of recovery for pain and suffering damages and punitive damages under the Age Discrimination in Employment Act (ADEA). *Id.* at 590. The plaintiff conceded that the court's previous ruling in *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977) barred pain and suffering and punitive recoveries for ADEA claims but suggested that *Dean* does not necessarily control all retaliation claims under the Act. *Vaughan*, 849 F.3d at 591. The lower court relied upon *Dean* in its decision to bar recovery for pain and suffering and punitive damages, but certified its ruling for interlocutory review after recognizing a circuit split regarding the availability of that recovery. *Id.* at 590–91. The court noted the 7th Circuit held that the 1977 amendments to the Fair Labor Standards Act expanded the remedies ordinarily available for ADEA violations. *Id.* at 592–93. On the other hand, the court noted that the 11th Circuit has continued to follow the 5th Circuit's holding in *Dean*. *Id.* at 592–93. Ultimately, the 5th Circuit disagreed with the 7th Circuit, and adhered to the rule of orderliness, under which a panel may not overturn a controlling precedent absent an intervening change in law. *Id.* at 593. The court held that *Dean* contains no suggestion that its holding excluded ADEA retaliation actions. *Id*.

Title VII Employer Retaliation – Burden of Proof: *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249 (3d Cir. 2017)

The 3rd Circuit addressed "whether a plaintiff asserting a Title VII retaliation claim must establish but-for causation as part of her prima facie case." *Id.* at 253. The court noted that the 6th and 10th Circuits have found that "a plaintiff must prove but-for causation as part of the prima facie case of retaliation." *Id.* at 259. On the other hand, the 4th Circuit does not require a showing of but-for causation during the pre-trial stage. *Id.* The 3rd Circuit joined the 4th Circuit and held that at this stage, a plaintiff must merely provide evidence to allow a judge to infer that activity protected under Title VII was a likely reason the adverse employment action was taken, although a plaintiff must still prove but-for causation at trial. *Id.* at 257–59.

ENVIRONMENTAL LAW

Contribution Actions – Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

(CERCLA): *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017)

The 9th Circuit addressed whether a non-CERLCA settlement agreement gives rise to a contribution action for "persons who have taken actions to clean up hazardous waste sites . . . from other parties who are also responsible for the contamination." *Id.* at 1113. The 9th Circuit noted the 3rd Circuit's view that "[s]ection 113(f)(3)(B) does not state that the 'response action' in question must have been initiated pursuant to CERCLA." *Id.* at 1119 (internal citations and quotations omitted). The court then noted that, on the other hand, the 2nd Circuit held that "§ 113(f)(3)(B) creates a 'contribution right only when liability for CERCLA claims . . . is resolved.'" *Id.* at 1120 (internal citation omitted). The 9th Circuit explained that "[c]onsideration of CERCLA's statutory context, structure, and broad remedial purpose, combined with EPA's reasonable interpretation," led it to conclude that " . . . Congress did not intend to limit § 113(f)(3)(B) to response actions and costs incurred under CERCLA settlements." *Id.* Thus, the 9th Circuit joined the 3rd Circuit in holding that "a non-CERLCA settlement agreement may form the necessary predicate for a § 113(f)(3)(B) contribution action." *Id.* at 1120–21.

HEALTH LAW

Collective-Bargaining Agreements – Healthcare Benefits: *Reese v. CNH Indus. N.V.*, 854 F.3d 877 (6th Cir. 2017)

The 6th Circuit addressed whether a collective bargaining agreement (CBA) between two parties provided life-long healthcare benefits to retirees and their spouses. *Id.* at 879. In his dissent, Justice Sutton pointed out that the majority ruling departed from rulings in the 1st, 2nd, 3rd, 4th and 7th Circuits, which have respected the general durational clauses in each of the agreements at issue. *Id.* at 889. The CBA in *Reese* contained a durational clause that limited the benefits of the contract to the six-year term of the agreement. *Id.* Nevertheless, the majority held that the consideration of extrinsic evidence was proper in determining whether a CBA provided retirees with a vested right to lifetime healthcare benefits, and found that the plaintiffs' rights had vested. *Id.* at 883. The majority cited the United States Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), which concluded that finding ambiguity from silence permits the court to turn to extrinsic evidence to determine the intent of the parties. *Reese*, 854 F.3d at 882. A provision in the CBA at issue said only that healthcare coverage would continue past the date of retirement, but was silent on whether the benefits would

continue past the termination date of the agreement. *Id.* However, the 6th Circuit decided that when read in conjunction with the whole instrument, as *Tackett* commands, silence regarding the continuation of the benefits furthered the ambiguity of the CBA, and that the court should not presume that the general-durational expressed everything about the parties' intentions. *Id.*

IMMIGRATION LAW

Adjustment of Status – Eligibility for Adjustment of Status: *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017)

The 9th Circuit addressed the "question of statutory interpretation about the interplay between two subsections of the immigration code—one involving designation of Temporary Protected Status ('TPS') and the other involving adjustment of status." *Id.* at 955. The court noted that the 6th Circuit held a TPS recipient meets the requirement to be admitted because the recipient has lawful nonimmigrant status. *Id.* at 959. The court noted that, in contrast, the 11th Circuit held that a TPS recipient does not necessarily meet the requirement because the alien must have been inspected and admitted. *Id.* The 9th Circuit agreed with the 6th Circuit, reasoning that someone who has obtained lawful status as a nonimmigrant must have necessarily been inspected and admitted. *Id.* at 960. Thus, the court concluded that a TPS recipient is eligible for adjustment to a legal permanent resident. *Id.* at 956.

The Immigration and Nationality Act – Stop-Time Rule: *Pereira v. Sessions*, 866 F.3d 1 (1st Cir. 2017)

The 1st Circuit addressed whether a non-permanent resident alien's notice to appear under section 1229(a) of the Immigration and Nationality Act "that does not contain the date and time of the alien's initial hearing is nonetheless effective to end the alien's period of continuous physical presence" for purposes of the "stop-time" rule. *Id.* at 2. The court noted that the 3rd Circuit determined that "the language of § 1229b(d)(1) unambiguously requires that the date and time of the hearing be provided before the stop-time rule is triggered," while the 7th Circuit found that "even if such an omission renders a notice to appear defective, a defective document [may] nonetheless serve[] a useful purpose." *Id.* at 5 (internal quotation marks omitted). The 1st Circuit agreed with the 2nd, 4th, 6th, 7th, and 9th Circuits in finding that "the [Board of Immigration Appeals'] construction of the stop-time rule is neither arbitrary and capricious nor contrary to the statute." *Id.* at 7. Thus, the 1st Circuit concluded that the

[Board of Immigration Appeals'] "interpretation of the stop-time rule" is "a permissible construction of the statute to which [it] defer[red]. *Id.* at 8. As such, the court held that a non-permanent resident alien's "period of continuous physical presence end[s] when [they are] served with a notice to appear." *Id.*

INTELLECTUAL PROPERTY

Trademark Infringement – Tea Rose-Rectanus Doctrine: *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 2017 U.S. App. LEXIS 16632 (9th Cir. 2017)

The 9th Circuit addressed what constitutes good faith within the context of the *Tea Rose-Rectanus* doctrine, which requires that a junior user must establish good faith use in a geographically remote area in order to take advantage of the doctrine. *Id.* at *18–19. The court first noted that the 8th and 7th Circuits have held that "[t]he junior user's knowledge of the senior user's prior use of the mark destroys good faith." *Id.* at *20. The court then noted that, in contrast, the 10th and 5th Circuits held that "knowledge is a factor informing good faith, but the 'focus is on whether the [junior] user had the intent to benefit from the reputation or goodwill of the [senior] user.'" *Id.* (internal citations omitted). The 9th Circuit explained that "[t]ying good faith to knowledge makes sense in light of the policy underlying the doctrinal framework." *Id.* at *25. Thus, the 9th Circuit joined the 8th and 7th Circuits in holding that a junior user cannot establish good faith if the junior user had knowledge of the senior user's prior use. *Id.* at *26.

SECURITIES LAW

Dodd-Frank Act – Whistleblower Protections: *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017)

The 9th Circuit addressed "whether, in using the term 'whistleblower,' Congress intended to limit protections to those who . . . disclose information to the Securities and Exchange Commission ('SEC')." *Id.* at 1046. The court noted that the 5th Circuit does not protect those who fail to report to the SEC, "strictly appl[ying] the [Dodd-Frank Act ('DFA')]'s definition of 'whistleblower,'" and dismissing a case brought by a plaintiff who failed to report directly to the SEC. *Id.* at 1046–47. The court then noted that, in contrast, the 2nd Circuit "interprets the provision to extend protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC." *Id.* at 1047. The 9th Circuit found the 2nd Circuit's approach to

be "more consistent with Congress's overall purpose," looking to the "language of the specific statutory subdivision," as well as the "overall operation of the statute." *Id.* Thus, the 9th Circuit held that "the SEC regulation provide[s] protection for those who make internal disclosures." *Id.*

TAX LAW

Charitable Deduction Classification – Conservation Easements: *BC Ranch II, L.P. v. Commissioner*, Nos. 16-60068, 16-60069, 2017 U.S. App. LEXIS 14947 (5th Cir. Aug. 11, 2017)

The 5th Circuit addressed whether a homesite adjustment provision prevents grants of a conservation easement from satisfying the perpetuity requirement of 26 U.S.C. §170(h)(2)(C) (2012), and thus prevents a party from taking a charitable deduction. *Id.* at *16. The 4th Circuit held that "a provision which allowed the parties to substitute other land for the land that was originally restricted under the easement did not meet the perpetuity requirement of § 170(h). *Id.* at *10. The 5th Circuit distinguished its holding from the 4th Circuit's decision stating, "[t]he easements at issue in this case differ markedly from the easement in [the 4th Circuit case]," and that " . . . the instant easements allow *only* the homesite parcels' boundaries to be changed and then *only* (1) within the tracts that are subject to the easements and (2) without increasing the acreage of the homesite parcel in question." *Id.* at *11 (emphasis in original). The court further explained that the instant easements " . . . do not allow any change in the exterior boundaries of the easements or in their acreages." *Id.* As such, "neither the exterior boundaries nor the total acreage of the instant easements will ever change: Only the lot lines of one or more the five-acre homesite parcels are potentially subject to change and then only (1) within the easements and (2) with NALT's consent." *Id.* Moreover, the court noted that unlike the 4th Circuit case, easements that cannot be moved in part or in its entirety do not pose the same issues in determining deductions for perpetuity. *Id.* Ultimately, the 5th Circuit created a circuit split in holding that "the homesite adjustment provision does not prevent the grants of the conservation easements here at issue from satisfying the perpetuity requirement of §170(h)(2)(C) and thus does not prevent the grantors of these easement from taking the applicable charitable deductions." *Id.* at *16.

CRIMINAL

ASSAULT

Scope of Generic Aggravated Assault – Reckless Conduct: *United States v. Villasenor-Ortiz*, 675 Fed. App'x 424 (5th Cir. 2017)

The 5th Circuit addressed "whether offenses that are committed recklessly are within the scope of generic aggravated assault." *Id.* at 428 n.10. The court recognized that the 4th Circuit expressly disagreed with the 5th Circuit on this issue. *Id.* The 4th Circuit determined that offenses committed recklessly are not within the scope of generic aggravated assault. *Id.* However, in a prior opinion, the 5th Circuit held that reckless conduct does not necessarily fall outside the scope of generic aggravated assault. *Id.* at 428. Based upon prior precedent and the court's rule of orderliness, the court was compelled to maintain the position that offenses committed recklessly are within the scope of generic aggravated assault. *Id.* at 428 n.10.

CONSTITUTIONAL LAW

Fifth Amendment – Scope of Protection: *Vogt v. City of Hays*, 844 F.3d 1235 (10th Cir. 2017)

The 10th Circuit addressed whether the protections afforded by the Fifth Amendment are limited only to the trial. *Id.* at 1240. The court noted that the 3rd, 4th and 5th Circuits determined that the Fifth Amendment is only a trial right, while the 2nd, 7th, and 9th Circuits found that certain pretrial uses of compelled statements violate the Fifth Amendment. *Id.* The 10th Circuit agreed with the 2nd, 7th, and 9th Circuits, and found that the "common understanding of the phrase "criminal case" encompasses all proceedings in a criminal prosecution and the Framers' "understanding of the right against self-incrimination" indicated that Fifth Amendment protections extend to pretrial proceedings. *Id.* at 1242. Thus, the 10th Circuit concluded that the right against self-incrimination is more than a trial right. *Id.*

Armed Career Criminal Act (ACCA) – Fla. Stat. § 843.01: *United States v. Lee*, No.16-6288, 2017 U.S. App. LEXIS 11680 (10th Cir. 2017)

The 10th Circuit addressed whether "wiggling and struggling" during an arrest satisfies the element of violence in Fla. Stat. § 843.01. *Id.* at *6–7 n.1. The court noted that the 11th Circuit, in holding that a conviction under section 843.01 is an ACCA predicate, "emphasized . . . cases where defendants had engaged in more substantial, and more violent, conduct . . . " than the "wiggling and struggling" at issue in the instant case. *Id.* The 10th Circuit disagreed with this approach, explaining that its job "is not to find what kind of conduct is most routinely prosecuted, and evaluate *that*[,]" but rather, "[u]nder the categorical approach, we consider only the 'minimum conduct criminalized,' not the typical conduct punished." *Id.* As such, the 10th Circuit concluded that "'wiggling and struggling' during an arrest is enough to sustain a conviction under § 843.01." *Id.* at *6.

Jury Instruction – Unanimity: *United States v. Jockisch*, 857 F.3d 1122 (11th Cir. 2017)

The 11th Circuit addressed whether a jury must unanimously agree on the specific type of unlawful sexual activity that a sex offender engaged in with a minor in order to convict the defendant of coercion and enticement of a minor under 18 U.S.C § 2422(b). *Id.* at 1132. The court held that the government "need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed." *Id.* There is no requirement under 18 U.S.C § 2422(b) that the jury had to unanimously agree on the specific type of unlawful sexual activity that the defendant would have engaged in. *Id.* This holding aligned with the 6th and 11th circuits' precedent. *Id.* Alternatively, the 7th Circuit determined that the jury should be instructed that it can "only convict if it unanimously agrees that the defendant has violated one of the [relevant] statutes." *Id.* at 1133.

Victim Witness and Protection Act – "Residual" or "Omnibus" Clause of 18 U.S.C. § 1503: *United States v. Davis*, 854 F.3d 1276 (11th Cir. 2017)

The 11th Circuit addressed whether the "residual" or "omnibus" clause of 18 U.S.C. § 1503 of the Victim Witness Protection Act ("VWPA") continued to cover witness tampering. *Id.* at 1287. The court

noted the 2nd Circuit's determination that witness tampering would be prosecuted under 18 U.S.C. § 1512, as opposed to § 1503, while the majority of circuits held that the residual clause of § 1503 continued to encompass witness tampering. *Id.* The 11th Circuit agreed with the 1st and 4th Circuits in holding that the scope of § 1503 is broad to cover witness tampering, since the subsequent amendment to § 1512 was intended to close a gap in that statute, rather than to alter the language of the residual clause. *Id.* at 1288–89. The court expressly disagreed with the 2nd Circuit that Congress used this subsequent amendment in 1988 to broaden the scope of § 1512 and remove any need for residual coverage under §1503. *Id.* at 1288. Thus, the 11th Circuit concluded that "witness tampering remains punishable under [the residual clause of] § 1503." *Id.* at 1289.

U.S.S.G. § 2B3.1(b)(4)(A) – Abduction: *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017)

The 10th Circuit addressed "whether the forced movement of victims from one room or area to another room or area within the same building constitutes an abduction for purposes of § 2B3.1(b)(4)(A)." *Id.* at 1285. The court noted that the 3rd, 4th, and 5th Circuits "have all held that an abduction occurs for purposes of § 2B3.1(b)(4)(A) when a defendant forces a victim from one room or area of a building to another room or area within the same building." *Id.* The court next explained that the 7th Circuit's decisions on the matter have varied. *Id.* at 1286–87. The court then noted that the 11th Circuit has held that "a bank branch is a single location and that, consequently, movement of victims within a bank branch to individual offices or rooms does not constitute movement to a different location for the purposes of § 2B3.1(b)(4)(A)." *Id.* Ultimately, the 10th circuit adopted the 3rd Circuit's three-pronged test. *Id.* at 1288.

CRIMINAL PROCEDURE

Crime of Violence Offense – Constitutional Vagueness: *United States v. Sneed*, 2017 U.S. App. LEXIS 13905 (11th Cir. 2017)

The 11th Circuit addressed "whether 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015)," in which the United States Supreme Court " . . . invalidated the Armed Career Criminal Act's ('ACCA') 'residual clause' as unconstitutionally vague." *Sneed*, 2017 U.S. App. LEXIS 13905, at *4–5. The 11th Circuit noted that the 8th, 2nd, and 6th Circuits have found that "*Johnson* does not apply to or invalidate § 924(c)(3)(B)," while the 7th Circuit found that "*Johnson* invalidated § 924(c)(3)(B)." *Id.* The 11th

Circuit "agreed with the decisions of the 2nd, 6th, and 8th Circuits that there were significant material textual differences between the definition of 'crime of violence' in § 924(c)(3)(B) and the residual-clause definition of 'violent felony' in the ACCA's § 924(c)(2)(B). *Id.* at *6. Thus, the 11th Circuit held that "*Johnson* does not apply to or invalidate § 924(c)(3)(B)." *Id.*

First Amendment – Public Employee Speech Protection: *Mayhew v. Town of Smyrna*, 856 F.3d 456 (6th Cir. 2017)

The 6th Circuit addressed whether an employee's complaints about a coworker's misconduct fell outside the scope of his ordinary job responsibilities, in an attempt to determine what degree of First Amendment protections are afforded to public employee speech. *Id.* at 464. The court first noted that the United States Supreme Court has stated that the critical question "is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* (citing *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014)). The 6th Circuit acknowledged that a circuit split exists over whether the Supreme Court's holding in *Lane v. Franks* requires the question of whether a public employee's speech is protected to be one of both fact and law, or rather one of only law. *Id.* at 462. The court stated that the 3rd, 7th, 8th, and 9th Circuits have concluded that whether the speech was made as a public employee or as a private citizen is a mixed question of law and fact. *Id.* On the other hand, the D.C. Court of Appeals, as well as the 5th and 10th Circuits found that a question regarding protected status of speech is a question of only law. *Id.* Ultimately, the 6th Circuit joined the D.C. Court of Appeals and the 5th and 10th Circuits in holding that the lower court did not err in concluding that the protected speech was a question of law. *Id.* at 464.

Mandatory Victims Restitution Act – Offenses Against Property: *United States v. Collins*, 854 F.3d 1324 (11th Cir. 2017)

The 11th Circuit examined the definition of an "offense against property" under subsection (c) of the Mandatory Victims Restitution Act (MVRA). *Id.* at 1330. The court noted that the 10th Circuit has held that such an offense must have "the objective of knowingly and intentionally damaging property," while the 6th and 9th Circuits have included any offense which "results in physical harm to a property," and the 3rd and 9th Circuits have included offenses which simply "involve[] the intentional deprivation, or attempted deprivation, of another's property." *Id.* The 11th Circuit also noted that 11th Circuit precedent has included "various types of fraud, and their attendant false or misleading representations." *Id.*

at 1331. However, the court reasoned that the MVRA's framework suggests that collateral damage to property is not necessarily an "offense against property" because subsection (b)(1) already covers "offense[s] resulting in damage to or loss or destruction of property of a victim." *Id.* at 1331–32. The 11th Circuit joined the 10th Circuit in holding that an "offense against property" must intentionally damage property. *Id.* at 1331–33.

Mandatory Victims Restitution Act (MVRA) – Redirection of Disclaimed Payments: *United States v. Hankins*, 858 F.3d 1273 (9th Cir. 2017)

The 9th Circuit addressed "whether a district court may redirect restitution payments to the federal Crime Victims Fund . . . when a victim later disclaims restitution without making a direct assignment to the fund." *Id.* at 1275. The court acknowledged that while the MVRA requires restitution and does not allow its expiration or modification except under limited circumstances, the victim is not required to accept the restitution payments; however, the MVRA does not state where the payments must go if rejected. *Id.* at 1278–79. The court recognized that the 7th and 10th Circuits have held that the MVRA bars redirection and essentially allows victims to stop restitution payments. *Id.* at 1280. However, the 9th Circuit noted that this approach either allows defendants to stop paying restitution or leaves restitution payments unclaimed, both sidestepping the MVRA's goal to ensure that defendants repay their debt to society. *Id.* at 1279–80. Accordingly, the 9th Circuit created a circuit split by holding that the MVRA allows district courts to redirect disclaimed restitution payments to the Crime Victims Fund. *Id.*

Prosecutorial Misconduct – Perjured Testimony in Habeas Context: *Haskell v. Superintendent Greene SCI*, 866 F.3d 139 (3d Cir. 2017)

The 3rd Circuit addressed "whether *habeas* petitioners must meet *Brecht*'s actual-prejudice hurdle." *Id.* at 150. The court noted that the 9th circuit has rejected applying the *Brecht* test to perjured testimony, whereas the 1st, 6th, 8th, and 11th have applied *Brecht* to perjured testimony claims in habeas petitions. *Id.* The court also noted that 6th Circuit agreed with the 1st Circuit and found that the 9th Circuit "erred in failing to distinguish false-testimony claims from *Brady* withholding claims." *Id.* The 11th Circuit agreed several years later, followed by the 8th Circuit, which found that "the materiality standard for false testimony is lower, more favorable to the defendant, and hostile to the prosecution as compared to the standard for a general *Brady* withholding violation." *Id.* (internal citations omitted). Ultimately, the 3rd Circuit joined the 9th Circuit in holding that

Brecht does not apply to perjured testimony in *habeas* cases because the concerns in *Brecht*'s harmless error standard do not reach cases of perjured testimony. *Id.* at 150–51.

Restitution – Defaced Currency: *United States v. Anderson*, No. 16-3134, 2017 U.S. App. LEXIS 14484 (7th Cir. Aug. 7, 2017)

The 7th Circuit addressed whether defaced currency recovered by the government should be subtracted from a defendant's restitution obligation if the extent of the damage is not disclosed at trial. *Id.* at *7–8. The court noted that the 6th Circuit held that it is impossible to know whether the Treasury Department would replace the bills because the issue was not raised at trial; therefore, the defendant is liable for them. *Id.* at *12–13. The court also noted that the 8th Circuit followed a similar approach, but recently switched positions, holding that failing to subtract the value of recovered stolen property would result in double recovery to the victim. *Id.* at *13–14. The 7th Circuit reasoned that because currency can be replaced unless less than one half remains or its denomination is doubtful, the intact and replaceable currency's value can be returned after remand. *Id.* at *11–12. The 7th Circuit thus concluded that unless the government proves the currency is defaced beyond replacement, it must be returned, and must be subtracted from the defendant's restitution obligation. *Id.* at *14–15.

Sentence-Reduction Proceedings – Explanatory Requirements: *United States v. Chavez-Meza*, 854 F.3d 655 (10th Cir. 2017)

The 10th Circuit addressed "the degree of explanation necessary to satisfy [18 U.S.C.] § 3582" during sentence-reduction proceedings in district court. *Id.* at 660. The court noted that the 1st, 3rd, and 4th Circuits "have all held that no elaborate explanation is necessary" and that the appellate court could infer pertinent factors from the record. *Id.* However, the court also noted that the 2nd, 6th, 7th, 8th, 9th, and 11th Circuits have all "found an explanatory requirement" because a lack of reasoning prevents the appellate court from effectively reviewing the decision. *Id.* The 10th Circuit agreed with the 1st, 3rd, and 4th Circuits because § 3582 does not explicitly require additional explanation, and refused to impose an explanatory requirement not found in the statute. *Id.* at 661. Thus, the 10th Circuit held that no further explanation was required from the district court. *Id.*

Sentencing – Saving Clause: *McCarthan v. Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076 (11th Cir. 2017)

The 11th Circuit considered whether a "change in case law entitle[d] a federal prisoner to an additional round of collateral review of his sentence." *Id.* at 1079. To answer this question, the 11th Circuit was required to determine whether "a change in case law [satisfies] the saving clause of [28 U.S.C. § 2255(e)]." *Id.* at 1081. In determining whether the saving clause was satisfied, the court noted how there is no "settled consensus about the meaning of the saving clause." *Id.* at 1097. The court explained how the 7th, 4th, 5th, 6th, 2nd, 3rd, 8th, 9th and 10th circuits have all developed various tests in determining whether a federal prisoner satisfied the savings clause. *Id.* at 1084–85. The court noted, however, that every court except the 10th Circuit "focused on legislative purpose and avoided rigorous textual analysis." *Id.* at 1097. The 11th Circuit was persuaded to follow the 10th Circuit's approach since it was the only circuit to "ha[ve] adhered to – or even seriously considered – the text of the saving clause." *Id.* at 1085. After engaging in a detailed textual analysis of the statute, the court held that a change in case law did not render the motion to vacate an "inadequate and ineffective test to the legality of his detention." *Id.* at 1080, 1099. The 11th Circuit, therefore, concluded that it—like the 10th Circuit—must "apply [the text of the statute] to the parties before us." *Id.* at 1099.

Special Parole – Reimposition of Revoked Parole Term: *Fillingham v. United States*, 2017 U.S. App. LEXIS 14925 (5th Cir. 2017)

The 5th Circuit addressed "whether our decision in *Artuso v. Hall*, 74 F.3d 68 (1996), holding that the [United States Parole] Commission cannot reimpose a revoked special parole term, remains valid after *Johnson v. United States*, 529 U.S. 694 (2000)." *Id.* at *6. In *Johnson*, the United States Supreme Court held that the Commission is allowed to reimpose supervised release because it determined that the definition of "revoke" in the sentencing guidelines meant "recall." *Id.* at *8. Given this definition, the Supreme Court then found that the ability to recall does not mean that a prisoner loses the ability to have supervised release; instead, once supervised release is revoked and a new prison term is imposed, supervised release could again be granted. *Id.* The 5th Circuit noted that the 7th Circuit has held that the Commission cannot reimpose special parole while the 2nd Circuit held that the Commission is empowered to do so. *Id.* at *6. The 5th Circuit joined the 2nd Circuit and held that *Johnson* allows the Commission to reinstate special parole following previous revocation. *Id.*

Substantial-Assistance Motion – Good Faith Review: *United States v. Doe*, No. 17-604, 2017 U.S. App. LEXIS 14371 (10th Cir. Aug. 4, 2017)

The 10th Circuit addressed whether the government's failure to file a substantial-assistance motion, in accordance with a plea agreement giving it sole discretion to do so, may be reviewed for good faith. *Id.* at *3–4. The court noted that the 3rd Circuit determined that a district court may examine a prosecutor's refusal to file such a motion for good faith even if the plea agreement grants the government sole discretion to file, while the 5th Circuit found that only allegedly unconstitutional motives can be reviewed. *Id.* at *4–5. The 10th Circuit also noted that potentially conflicting United States Supreme Court precedent did not disturb existing 10th Circuit precedent authorizing good-faith review because the Supreme Court emphasized that no agreement to file a substantial-assistance motion existed. *Id.* at *6–7. Regardless, the 10th Circuit incorporated the Supreme Court's constitutionality threshold test into its contractual good-faith inquiry. *Id.* at *10–11. Thus, the 10th Circuit held that "[i]n order to trigger good-faith review . . . a defendant must first allege that the government acted in bad faith[,]" and the government must "then rebut that allegation by providing its reasons for refusing to file" the substantial-assistance motion. *Id.* at *11. Good-faith review is then permitted when the defendant can give reason to question the government's good-faith justification for refusal to file a substantial-assistance motion. *Id.*

United States Court of Appeals for the Eleventh Circuit – Sentencing Guidelines: *United States v. Burke*, 863 F.3d 1355 (11th Cir. 2017)

The 11th Circuit addressed the issue of whether the term "prior sentence" in U.S.S.G. § 4A1.1(a) refers to the defendant's original sentence or the resentencing sentence for purposes of calculating a defendant's criminal history category. *Id.* at 1357. The court noted that the 8th and 9th Circuits held that "when a defendant's initial sentence is vacated, a sentencing court shall add criminal history points for any unrelated sentences imposed after the initial sentencing but before resentencing." *Id.* at 1359. The 1st Circuit reached a different conclusion, opining that "the Guidelines' reference to 'prior sentence' means, in this context, a sentence which is prior to the original sentence which was vacated and remanded only for resentencing." *Id.* The 11th Circuit agreed with the 8th and 9th Circuits in finding that when the initial sentence has been vacated, criminal history points are to be added for unrelated sentences imposed in between the initial sentencing and resentencing. *Id.* The court reached this holding based on the text of section 4A1.2(a), along with its related commentary, as well as its own precedent in holding that

when the 11th Circuit vacates a sentence it "becomes void in its entirety" unlike the 1st Circuit. *Id.* Thus, the 11th Circuit concluded that the Defendant's unrelated sentences imposed after the initial sentencing and before resentencing shall be included in determining criminal history points. *Id.*

IMMIGRATION LAW

Withholding of Removal Following Illegal Reentry Into the United States – Immigration and Nationality Act: *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017)

The 9th Circuit addressed whether an alien against whom the government has reinstated removal proceedings may challenge the validity of that order pursuant to 8 U.S.C. § 1226(a), or whether the order is administratively final pursuant to 8 U.S.C. § 1331(a), where the alien petitioned for withholding of removal out of fear of persecution and torture if he were removed to his native country. *Id.* at 884. The court noted that the 2nd Circuit determined that an alien's removability is not administratively final where his petition for withholding of removal is pending. *Id.* at 888. Accordingly, the 2nd Circuit held that "the purpose of withholding-only proceedings is to determine precisely whether 'the alien is to be removed from the United States,'" and therefore the alien may petition for relief under § 1226(a). *Id.* (internal quotation marks omitted). The 9th Circuit concluded that the removal order was final because the purpose of withholding of removal proceedings is to determine "whether the alien is to be removed to a particular country," rather than "removed from the United States." *Id.* at 888–89 (internal quotation marks omitted). Thus, the court held that § 1331(a) applied, rather than § 1226(a), and the alien could not challenge the validity of the removal order. *Id.* at 886.

PROPERTY CRIMES

Actus Reas – The Definition of Aggravated- Burglary: *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017)

The 6th Circuit addressed whether "statutes criminalizing the burglary of vehicles and movable enclosures . . . fall outside the generic definition of burglary[,]" even if the statute is "limited to 'habitations' or 'occupied structures.'" *Id.* at 861. The court acknowledged that the 3rd, 4th, 6th, 8th, and 11th Circuits held that such statutes do fall outside the generic definition, while the 10th Circuit rejected this position. *Id.* If the definition did fall outside the "general definition," then Tennessee

aggravated-burglary constitutes a violent-felony then has repercussions when sentencing a defendant after another conviction. *Id.* This decision overruled a previous 6th Circuit decision in which the court failed "to scrutinize the statutory definition of 'habitation,' which includes vehicles, tents, and other movable enclosures." *Id.* As such, the court admitted that it "incorrectly concluded . . . that a conviction for Tennessee aggravated-burglary therefore constituted a violent felony." *Id.* at 861. Thus, the 6th Circuit joined the 3rd, 4th, 6th, 8th, and 11th Circuits, and determined that such convictions do not constitute violent felonies. *Id.*

SENTENCING

Sentencing – Availability of Reduction After Statutory Amendment: *United States v. Koons*, 850 F.3d 973 (8th Cir. 2017)

The 8th Circuit addressed whether 18 USC § 3582(c)(2) relief was newly available to five defendants convicted of methamphetamine conspiracy offenses because Amendment 782 to the Guidelines retroactively reduced by two levels the base offense levels assigned to drug quantities. *Id.* at 974. The court explained that § 3582(c)(2) allows a district court to reduce the sentence of a "defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . ." *Id.* at 976. The court acknowledged a conflict in the circuits regarding both how to determine eligibility when the applicable guidelines range is affected by a mandatory minimum, and what to use as the floor of the amended range. *Id.* at 976. The court noted the 6th, 7th, and 8th circuits have held that a retroactive amendment did not have the effect of lowering a defendant's applicable guidelines range because the amended and original ranges were both determined by the mandatory minimum. *Id.* The court further explained that the Sentencing Commission subscribed to "the approach of the [3rd] Circuit and D.C. Circuits—when a defendant's initial guidelines range was entirely below the mandatory minimum, the bottom of the amended range is the bottom of the Sentencing Table guideline range." *Id.* at 976 (internal citations and quotation marks omitted). The 8th Circuit disagreed with the 4th Circuit ruling that a sentence would not be based on a range the Sentencing Commission subsequently lowered, because it was not initially based on a sentencing range. *Id.* at 977. Rather, the court concluded that the defendants were "ineligible for § 3582(c)(2) sentencing reductions because their initial sentences were not 'based on' a guidelines range lowered by Amendment 782." *Id.* at 979.

Sentencing Enhancements Due to Prior Criminal Convictions – Armed Career Criminals Act: *United States v. King*, 853 F.3d 267 (6th Cir. 2017)

The 6th Circuit addressed whether a sentencing judge, under United States Supreme Court precedent, must refrain from finding facts in the "first instance, [and] merely [identify] findings or admissions that were previously made under constitutional safeguards" in determining whether prior offenses were "committed on occasions different from one another" under the Armed Career Criminals Act (ACCA). *Id.* at 273. The court noted that the 2nd, 4th, 5th, 7th, 10th, 11th, and D.C. Circuits have concluded that a sentencing judge's evidentiary sources for determining whether prior offenses were "committed on occasions different from one another" are limited to conclusive findings by the trier-of-fact and the defendant's own admissions pursuant to a guilty plea. *Id.* On the other hand, the 8th Circuit concluded that "evidentiary restrictions are not applicable in determining whether offenses were committed on different occasions." *Id.* The 6th Circuit concluded that allowing a sentencing judge to make factual findings as to the first-occasion question is contrary to Supreme Court Sixth Amendment precedent because the judge would "[become] the trier of fact regarding when and where the prior offenses occurred . . . ." *Id.* Therefore, the court agreed with the majority of circuit courts and held that a sentencing judge is limited to the factual findings of the trier-of-fact and the defendant's own constitutionally valid admissions in determining whether prior offenses were "committed on occasions different from one another" under the ACCA. *Id.*

STATUTES

United States Sentencing Guidelines – 18 U.S.C. § 924(b): *United States v. Guillen-Cruz*, 853 F.3d 768 (5th Cir. 2017)

The 5th Circuit addressed whether a defendant's "22 U.S.C. § 2778 conviction proves an offense described in 18 U.S.C. § 924(b)." *Id.* at 773. The court noted that the 4th Circuit determined that "proof of all the elements of 22 U.S.C. § 2778 automatically proves a [18 U.S.C.] § 924(b) violation." *Id.* at 774. However, the court disagreed with the 4th Circuit, stating that under the 4th Circuit's approach, "a conviction under 22 U.S.C. § 2778(b) and (c) could be sustained if an individual exported a warship or '[r]adar systems and equipment,' 22 C.F.R. § 121.1, items which are plainly not anticipated by the firearms or ammunition offenses listed in 18 U.S.C. § 924(b)." *Id.* The court explained that the 7.62x39 magazines at issue in this instance "are neither 'firearms' nor 'ammunition' for purposes of § 924(b)." *Id.* Thus, the 5th Circuit held

that proof of all elements of § 2778 does not automatically prove a § 924(b) violation. *Id.*