On July 20, 2020 the SVIA filed a petition with the U.S. Supreme Court supporting the Principal Life Insurance Company's appeal of the Eighth Circuit decision that ruled a service provider is an ERISA fiduciary based on two characteristics common to many stable value products—a rate of return that varies by period, and divestment restrictions applicable to plan sponsors (exit provisions for plan sponsors, which are not applicable to individual plan participants at any time).

The purpose of the SVIA petition is to convince the Court that the issues raised in the petition are important enough for its consideration. To accomplish this, the SVIA brief seeks to describe stable value and the potentially negative consequences of the Eighth Circuit Court's decision in general terms that are applicable to a broad range of stable value products. If the case is heard by the Court, the SVIA will have the opportunity to further address the nuances of stable value in all its product forms as well as the potential impacts of this case in a merit brief, which can be filed once the Court elects to take up the appeal.

The Principal Life Insurance Company's petition before the Supreme Court was filed on June 19. Filing an amicus brief demonstrates the importance of the Principal petition to not only the stable value industry but the millions of older and risk-averse Americans who rely upon stable value funds for retirement financial security.

No. 19-

IN THE

Supreme Court of the United States

PRINCIPAL LIFE INSURANCE COMPANY,
Petitioner,

v.

FREDERICK ROZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 1, 2020

QUESTION PRESENTED

A person is a "fiduciary" under ERISA to the extent that person "exercises any authority or control respecting management or disposition of [the] assets" of an ERISA-governed employee benefit plan. Petitioner offers a product that plan sponsors may choose to make available to plans' participants. Every six months, petitioner adjusts the rate of return offered to participants who choose to put money into this product, and pre-announces the rate before it goes into effect. Plan sponsors that make this product available to participants agree that if they want to stop offering the product, they must either pay petitioner 5% of the assets allocated to it, or wait 12 months to remove all participants' monies. Participants, however, can remove their money from the product without waiting or paying anything. As a result, though petitioner adjusts the rate every six months, it lacks the final say over whether any participant's assets remain invested at any particular rate. The question presented is:

Whether a service provider is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) when it changes the rate of return on a product offered in an employee benefit plan, even though the plan's participants, by virtue of their freedom to withdraw from the product at any time, retain "authority [and] control respecting management [and] disposition" of their assets.

RULE 29.6 STATEMENT

Petitioner Principal Life Insurance Co. is wholly owned by a sole shareholder, Principal Financial Services, Inc., an Iowa corporation, which in turn is wholly owned by a sole shareholder, Principal Financial Group, Inc., a Delaware corporation. The common stock of Principal Financial Group, Inc. is publicly traded on the NASDAQ.

RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

Rozo v. *Principal Life Ins. Co.*, No. 18-3310 (Feb. 3, 2020)

United States District Court (S.D. Iowa):

Rozo v. *Principal Life Ins. Co.*, No. 4:14-cv-00463-JAJ (Sept. 25, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Principal Life Insurance Company ("Principal") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a–8a) is reported at 949 F.3d 1071. The district court's opinion (Pet. App. 9a–37a) is reported at 344 F. Supp. 3d 1025.

JURISDICTION

The Eighth Circuit entered its judgment on February 3, 2020. On March 19, 2020, in light of the ongoing public health concerns relating to COVID-19, the Court entered an order that extended the time to file a petition for a writ of certiorari until July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(21)(A)(i) of the Employee Retirement Income and Security Act of 1974 ("ERISA") provides:

> [A] person is a fiduciary with respect to a plan to the extent … he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets[.]

29 U.S.C. § 1002(21)(A)(i). Other relevant provisions of ERISA are set forth in Appendix C (Pet. App. 38a–40a).

INTRODUCTION

In this case, the Eighth Circuit adopted a novel rule of law for determining when a service provider for ERISA-governed retirement plans may be deemed a fiduciary. The new rule, if allowed to stand, will substantially disrupt the availability of safe, highly valued options to people who are nearing retirement or who otherwise prefer to avoid market volatility and risk. This Court's review is urgently needed.

Under what was, until this opinion, settled law, a service provider who offers an investment product is not a fiduciary unless the service provider has the "final say" over whether the terms of the offer are imposed on participant assets. See, *e.g.*, *F.H. Krear & Co.* v. *Nineteen Named Trs.*, 810 F.2d 1250, 1259 (2d Cir. 1987); *Santomenno ex rel. John Hancock Tr.* v. *John Hancock life Ins. Co. (U.S.A.)* ("*John Hancock*"), 768 F.3d 284, 293–97 (3d Cir. 2014); *Schloegel* v. *Boswell*, 994 F.2d 266, 271–72 (5th Cir. 1993); *Seaway Food Town, Inc.* v. *Med. Mut. of Ohio*, 347 F.3d 610, 616–19 (6th Cir. 2003); *Leimkuehler* v. *Am. United Life Ins. Co.*, 713 F.3d 905, 911–12 (7th Cir. 2013); *Santomenno* v. *Transamerica Life Ins. Co.*, 883 F.3d 833, 838–39 (9th Cir. 2018); *Teets* v. *Great-W. Annuity & Ins. Co.*, 921 F.3d 1200, 1218–20 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019). That rule flows from the statutory definition of "fiduciary" in ERISA. As relevant here, "a person is a fiduciary" only "to the extent" that person "exercises any authority or control respecting management or disposition of [a plan's] assets." 29 U.S.C. § 1002(21)(A)(i). When a service provider offers terms to participants, it does not exercise any "authority or control" over participants' plan assets if participants are free to reject those terms.

The Eighth Circuit's new rule sweeps aside this settled law. According to the Eighth Circuit, even if

participants have the final say over whether their assets are subject to the terms offered by a service provider, the service provider becomes a fiduciary if the *plan sponsor* cannot *immediately* reject the service provider's product terms for all participants. This rule not only finds no basis in the statute, it contradicts the standards set forth by both the Tenth and the Seventh Circuits. Both of those courts have ruled that if *either* participants *or* plan sponsors can reject a service provider's product terms by directing plan assets away from that product, then the service provider is not a fiduciary. *Teets*, 921 F.3d at 1216–20; *Chi. Bd. Options Exch., Inc.* v. *Conn. Gen. Life Ins. Co.* ("*CBOE*"), 713 F.2d 254, 260 (7th Cir. 1983).

The Eighth Circuit's new rule dramatically expands the definition of an ERISA fiduciary beyond the terms of the statute. It cannot be squared with the "final say" rule, or with all the cases reflecting it, which have appropriately governed ERISA fiduciary status for decades. Moreover, it threatens to subject the retirement services industry to massive and wasteful litigation over valued products that participants remain free to accept or reject. The imminent and predictable result of this threat is that these valuable products—which include scores of low-risk products similar to petitioner's that are particularly popular among individuals nearing retirement—will disappear from the marketplace, to the detriment of plan participants nationwide. This Court should grant certiorari to clarify that no entity can be an ERISA fiduciary when it offers plan participants a product on terms that participants are always free to accept or reject as they see fit.

STATEMENT OF THE CASE

A. ERISA and Defined Contribution Plans

ERISA is a comprehensive federal statute designed to enable participants in employer-sponsored benefit plans to make safe and informed investment decisions. It "protect[s] … the interests of participants" in such plans by "requiring the disclosure and reporting to participants and beneficiaries of financial and other information" about their plans. 29 U.S.C. § 1001(b). It also establishes requirements for plan fiduciaries, who must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1).

One type of benefit plan that employers can sponsor for their employees is a defined contribution plan. In a defined contribution plan, the plan sponsor assembles a menu of investment options to make available to plan participants. Each participant holds an individual account, to which the participant and/or the plan sponsor contributes money. The participant chooses investment options from the menu, and chooses how much of the money in his or her individual account to allocate to each of those options. The amount in the participant's account is "based solely upon the amount contributed," "any income, expenses, gains and losses" resulting from the investment options the participant chooses, and "any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

Employee benefit plans are required to identify "one or more named fiduciaries" (often a committee of employees of the plan sponsor), 29 U.S.C. § 1102(a)(1), and those persons owe certain fiduciary duties to plan participants. A fiduciary must manage and administer the plan with the care and skill of a prudent person,

including by selecting prudent investment options to include within the plan's menu. *Id.* § 1104(a)(1)(B). And, except in certain circumstances described in the statute, a fiduciary must "diversify[] the investments" on a plan's menu "so as to minimize the risk of large losses" to participants. *Id.* § 1104(a)(1)(C), (a)(2).

Third parties who provide services to defined contribution plans can sometimes be fiduciaries. As relevant here, a third party is a fiduciary if it "exercises any discretionary authority or discretionary control respecting management of [a] plan," or "exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i).

B. The Principal Fixed Income Option

Principal is an insurance company that offers products and services to employee benefit plans, including defined contribution plans. One product it offers is the Principal Fixed Income Option, or "PFIO." If the plan sponsor chooses to make the PFIO available on its menu, participants decide whether and how much money to allocate to the PFIO from monies in their individual accounts.

The PFIO offers a guaranteed rate of return that is backed by the assets in Principal's general account and is higher than the rates of similarly safe products, such as money market funds and other short-term debt securities. The PFIO's rate of return has ranged from 1.10% to 3.50% during the class period. By contrast, for most of the class period, the rate of return on money market funds has averaged approximately 0.44%, and bank certificates of deposit have generally offered rates below 0.25%. Treasury bonds have also offered consistently lower rates than the PFIO, ranging from 0.03% to 0.32% during the same period.

The PFIO's rate is fixed for six-month periods. Principal notifies plan sponsors of the next six-month period's rate of return approximately 30 days before the new rate goes into effect. In turn, federal regulations promulgated under ERISA require plan sponsors to notify participants of each new rate on or before the date it goes into effect. See 29 C.F.R. § 2550.404a-5(d)(1)(ii)(B); see also Pet. App. 12a & n.9. Participants who allocate money to the PFIO can withdraw their money at any time, including after they learn what the next six months' rate will be and before that rate goes into effect. At all times, participants control their own assets. And of fundamental importance, there is never any cost to a participant who wants to withdraw from the PFIO.[1]

Principal invests the money participants allocate to the PFIO, along with other money in its general account, and earns a return on its investments. Principal must pay the PFIO's guaranteed rate to participants regardless of whether Principal's return on its general account investments are higher or lower than the guaranteed rate. The "spread," or the difference between the guaranteed rate for any particular six-month period and the net return Principal earns on its general account investments, is Principal's profit. If Principal's general account investments yield a lower return than the amount promised to participants in the PFIO, then Principal loses money on the product for that six-month period.

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[1] Participant withdrawals are subject to an "equity wash" provision, under which participants who withdraw monies from the PFIO may not then invest those monies in certain competing options until 90 days after the withdrawal. Pet. App. 12a–13a. The equity wash provision neither requires participants to pay a charge to withdraw monies from the PFIO, nor imposes any delay on withdrawals. *Id.*; see also *id.* at 26a.

The PFIO is a particularly popular product among participants who are saving for or nearing retirement. In addition to a forward-looking guaranteed rate of return that facilitates financial planning, the PFIO is exceedingly reliable. The PFIO is guaranteed to preserve the capital invested by participants and yield returns at the promised rate, and these guarantees are backed by the assets of a major insurance company, whose financial stability is closely watched by insurance regulators to ensure that the company can meet its going-forward financial obligations to policyholders as well as participants in its guaranteed return products.

The guaranteed rate of return for the PFIO is designed to be stable and to change only modestly from period to period. It is structured as a series of underlying funds that accept deposits for six months each. Every six months, Principal opens a new fund that will receive deposits for the next six months, and Principal sets an interest rate for that new fund. That rate is fixed for the ten-year life of that fund. Participants in the PFIO do not receive that rate. Instead, they are promised the asset-weighted average of all 20 such funds (all the funds opened every six months for the past ten years) that make up the PFIO. Every six months, the oldest underlying fund expires and is replaced with a new fund, while the other 19 funds remain in place with their existing interest rates. So when Principal calculates the asset-weighted rate of return for a given six-month period, 19 of the 20 rates that are averaged are the same as those used to calculate the rate for the prior period. The PFIO's weighted-average rate of return has changed 24 times since the start of the class period; 22 of those times the rate either did not move or moved 0.2% or less, and the

other two times the rate moved by 0.35%, once up and once down.

Unlike participants, who are entirely free to enter or exit the PFIO at any time and are assessed no fees for doing so, plan sponsors agree, when choosing to make the PFIO available to their participants, to place some conditions on their ability to remove the PFIO from their plan menus. A plan sponsor who wants to withdraw all plan assets allocated by participants to the PFIO must either provide Principal with 12 months' notice before Principal is obliged to release the funds, or pay Principal a charge equal to 5% of the assets allocated to the PFIO if it wants Principal to release the funds sooner.[2] These terms minimize volatility in Principal's general account. Volatility in an insurance company's general account raises concerns regarding the insurance company's ability to meet its obligations to *all* its policyholders. The National Association of Insurance Commissioners, a standard-setting organization governed by the chief insurance regulators of the 50 states, the District of Columbia, and five U.S. territories, has issued risk-based capital rules to regulate that volatility. These rules determine how much capital an insurance company must set aside for each particular product it offers. The PFIO's 12-month notice requirement and 5% surrender charge are designed to ensure that the PFIO complies with these rules.

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[2] The plan assets withdrawn from the PFIO when the plan sponsor chooses to remove the PFIO from the menu remain assets belonging to participants. Typically, the plan sponsor chooses to withdraw from the PFIO when the plan sponsor is changing recordkeepers; the PFIO is available only to plans that also use Principal's recordkeeping services. Regardless, when the assets are withdrawn from the PFIO, participants decide which alternative option from the menu in which to invest those assets.

C. Proceedings Below

1. Respondent Frederick Rozo allocated money to the PFIO through his participation in his employer's 401(k) plan. He received in full the guaranteed returns that Principal promised during the periods in which he kept money in the product. After his employer ceased offering the PFIO, he filed this case against Principal on behalf of himself and a class of more than 100,000 other plan participants who also allocated monies to the PFIO. He alleged that Principal acts as an ERISA fiduciary when it sets the rate of return for the PFIO. Respondent also alleged that Principal is liable as a fiduciary for breaching its duties to participants and engaging in prohibited transactions under 29 U.S.C. §§ 1104(a) and 1106(b), because Principal keeps the difference between the returns it guarantees to participants and the net returns it earns on the assets in its general account.[3]

2. The district court certified respondent's proposed class of participants and later entered summary judgment in Principal's favor. It held that Principal is not a fiduciary when it sets the rate of return for the PFIO because—as established by the "overwhelming weight" of precedent, Pet. App. 25a—offering a rate to participants is not an exercise of "authority" or "control" over a plan or plan assets, as required by ERISA's definition of "fiduciary."

The district court recognized that, under the rule articulated in "a number of cases," a service provider

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[3] Respondent also claimed in the alternative that Principal was liable as a non-fiduciary party in interest under 29 U.S.C. § 1106(a). This claim is an alternative to the fiduciary duty breach claim and is not relevant to this petition. The district court rejected it at summary judgment, Pet. App. 35a–37a, and the Eighth Circuit did not address it, *id.* at 1a–8a.

is not an ERISA fiduciary when it proposes a rate of return on an investment product, as long as plan participants who "dislike the new rate" can "vote with their feet" by withdrawing their investments or otherwise rejecting the product. *Id.* at 19a (quotation marks omitted). That is because in those circumstances, participants—not the service provider—have "final say" over whether their assets will be subject to the proposed rate. *Id.* at 23a. The district court also recognized the long-standing rule that a service provider is not an ERISA fiduciary when it adheres to the terms of a contract resulting from an "arms-length negotiation" with a plan sponsor. *Id.* at 22a.

These well-established principles mean that, in the view of the district court, Principal is not an ERISA fiduciary even though it can change the PFIO's offered rate every six months. When Principal calculates a new rate of return for an upcoming six-month period, it announces the rate "in advance" and "communicates [the rate] to plan sponsors," who in turn are "required by law to communicate [the rate] to participants." Pet. App. 25a. If participants dislike the rate that Principal announces, they have a "meaningful opportunity to 'vote with their feet' by leaving the PFIO," and they never have to pay a penalty or fee to do so. *Id.*

3. The Eighth Circuit reversed. It held that Principal is a fiduciary when it identifies the offered rate of return for the PFIO because *plan sponsors* who dislike the proposed rate cannot immediately withdraw all participant assets from the PFIO without paying a charge.[4] The Eighth Circuit did not disagree

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[4] The Eighth Circuit confusingly referred to the PFIO as a "plan" in various places in its opinion. The PFIO is not a plan; it is a product that may be offered to participants in 401(k) plans serviced by Principal. ERISA makes clear that the "plan" is the

with the district court's conclusion that *participants* always have a meaningful ability to reject a proposed rate by withdrawing their assets from the PFIO at no cost. To the contrary, the court acknowledged that participants "can immediately withdraw their funds" at any time, Pet. App. 2a, and that participants therefore always have the unimpeded "ability to reject the [rate]," *id.* at 7a. Rather, it determined that unless *both* plan sponsors *and* participants are free to direct plan assets out of the PFIO, then Principal is a fiduciary. *Id.* at 7a–8a. It did so even though this case was brought on behalf of participants, not plan sponsors. No plan sponsor has ever brought a claim challenging the rate of return or any other aspect of the PFIO.

The Eighth Circuit asserted that its rule is in accord with *Teets*, a recent Tenth Circuit decision that considered a similar guaranteed return product offered by a different insurance company. Pet. App. 4a. But, as the Eighth Circuit's decision makes clear, the Tenth Circuit considered whether *either* the plan sponsor *or* participants may freely direct plan assets out of the product. *Id.* at 3a–4a ("[A] service provider acts as a fiduciary[] if … it 'took a unilateral action respecting plan management or assets without the plan *or* its participants having an opportunity to reject its decisions.'" (emphasis added) (quoting *Teets*, 921 F.3d at 1212)). Because "plan sponsors here do not have the unimpeded ability to reject [Principal's new] rate," the Eighth Circuit concluded that Principal is a fiduciary. *Id.* at 5a (quotation marks omitted).

The Eighth Circuit not only quoted the passage in *Teets* stating that a service provider is not a fiduciary

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employer's retirement program, see 29 U.S.C. § 1002(2), which is a written instrument, see *id.* § 1102(a)(1).

if either the plan sponsor *or* participants can direct assets away from a product whose terms the service provider has changed, it acknowledged the Seventh Circuit decision that held the same almost 40 years ago. Pet. App. 6a–7a (citing *CBOE*, 713 F.2d at 260). The Eighth Circuit offered no rationale for departing from these other Circuits' legal standards.

The Eighth Circuit also never confronted ERISA's language. The opinion does not explain how changing the offered rate can be said to be "authority" or "control" over "management of [a retirement] plan," which is one way a discretionary act makes a third party a fiduciary under ERISA. 29 U.S.C. § 1002(21)(A)(i). Neither did it explain how Principal can be said to be exercising "authority or control" over "[plan] assets" (the other relevant way a third party can be a fiduciary) when it re-computes the rate of return, even though participants remain in full control of whether the new rate is ever applied to their assets.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit is the only federal court of appeals to have ruled that a service provider is a fiduciary when it sets the terms of a product offered to participants unless *both* the plan sponsor *and* participants can freely reject those terms and direct plan assets away from that product. Both the Tenth and Seventh Circuits have held that if *either* the plan sponsor *or* participants can reject the service provider's terms and direct plan assets away from the product, then the service provider is not a fiduciary. See *Teets*, 921 F.3d at 1212 ("[T]o establish a service provider's fiduciary status, an ERISA plaintiff must show the service provider … took a unilateral action respecting plan management or assets without the plan *or* its participants having an opportunity to reject

its decision." (emphasis added)); *CBOE*, 713 F.2d at 260 (concluding that "[it] is not the case" that the service provider would "be a fiduciary under ERISA" merely by "guarantee[ing] the rate of return in advance" for a product from which participants could withdraw). The novel Eighth Circuit rule also cannot be reconciled with the decades-old line of cases acknowledged by the Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits that makes clear that a service provider is not a fiduciary when it sets the terms of a product but lacks "final say" over whether plan assets will be subject to the terms it proposes.

This Court's review is urgently needed to resolve the conflict and restore a nationally uniform test for determining fiduciary status under ERISA. The decision muddies a foundational legal principle governing retirement plans—the rule for when a third party is subject to fiduciary duties—by ignoring the statutory terms in ERISA that provide the much-needed clarity regarding that issue. Moreover, service providers like Principal offer their products widely to plans with participants across many jurisdictions. If the Eighth Circuit's ruling stands, they and numerous other service providers offering popular guaranteed return and other stable value products will face costly litigation over products they have offered for years, on terms which no other Circuit has ever before suggested could create fiduciary status. The uncertainty and costs imposed by such litigation will inevitably cause many service providers to stop offering products like the PFIO. This Court should grant this petition.

I. THE DECISION BELOW CREATES A CONFLICT REGARDING THE STANDARD FOR DETERMINING WHEN A SERVICE PROVIDER IS A FIDUCIARY UNDER ERISA.

1. The Tenth and Seventh Circuits have held that if *either* a plan sponsor *or* participants can direct plan assets away from a product, then the service provider offering those terms is not a fiduciary. The Eighth Circuit's ruling rejects those decisions without offering any reason to do so.

In *Teets*, the Tenth Circuit considered a product very similar to the PFIO. There, as here, the service provider offered a guaranteed return product to plan participants and changed the rate of return on the fund periodically (every 90 days). There, as here, a certified class of participants asserted that the service provider was a fiduciary when it modified the going-forward rate each period. The Tenth Circuit determined that the service provider is not a fiduciary. It explained that the service provider's fiduciary status "depend[ed] on whether the Plan *or* its participants [could] reject a change" in the rate of return. 921 F.3d at 1216–20 (emphasis added). Unlike the Eighth Circuit, it did not require both the plan *and* the participants to have authority to reject the rate. See *id.*

The ruling in *Teets* has roots in *CBOE*, in which the Seventh Circuit announced, decades ago, that participants' ability to reject a service provider's guaranteed rate of return forecloses fiduciary status. In *CBOE*, the court considered a service provider that offered participants an investment product with a pre-announced, guaranteed rate of return that the provider could change "from time to time." 713 F.2d at 256. The contract governing the product allowed participants to withdraw their investments at any time, except under certain conditions. Several years after

the product became available to participants, the service provider unilaterally amended the contract in a way that ensured that participants would be restricted from making withdrawals for the next ten years. The Seventh Circuit held that the service provider's actions made it a fiduciary under 29 U.S.C. § 1002(21)(A)(i). Because the service provider's unilateral amendment of the contract effectively "lock[ed]" the plan's assets into the investment product for a ten-year period, the amendment amounted to an exercise of "control" over those assets, as that term is used in the statute. *Id.* at 260.

Critically, the Seventh Circuit explained that simply changing the product's guaranteed rate of return did not render the service provider a fiduciary—so long as the service provider announces the rate in advance and participants remain free to withdraw. See *id.* (explaining that if the service provider had merely "guaranteed the rate of return in advance for the [product], [it] is not the case" that the service provider would "be a fiduciary under ERISA"). That explanation made clear that if participants *or* plan sponsors can reject a rate change, then the entity proposing that rate is not a fiduciary. See *id.*

2. The rulings in *Teets* and *CBOE* are specific instances of a broad, generally accepted rule for determining when a service provider can be a fiduciary under ERISA. Case after case for decades has agreed that a service provider is not a fiduciary when it has discretion over the terms of a product, unless the service provider has the "final say" over whether plan assets are made subject to those terms.

The Second Circuit in *F.H. Krear & Co.*, 810 F.2d 1250, considered whether a service provider for three employee benefit plans had become a fiduciary when it proposed the terms on which it would be compensated.

The court concluded that the service provider was not a fiduciary because the plans' trustees could reject the proposed terms of the service provider's compensation. The service provider thus had "no authority or responsibility for [those] terms," and lacked the "authority or control" necessary to trigger fiduciary status under the statute. *Id.* at 1259.

The Third Circuit has taken the same approach. In *John Hancock*, 768 F.3d 284, the service provider had authority to select the investment options available on a "big menu" from which the plan's trustee could select a subset of options to put on a "small menu" offered to plan participants. The service provider also could change the options on the big menu, as long as it gave adequate notice of the changes to plan sponsors. Despite the service provider's authority to change the options, the court held that the service provider was not a fiduciary because the plan's trustees "exercised final authority" over which funds would be included on the small menu. *Id.* at 295. In other words, because the service provider lacked the "ultimate authority" to decide "whether to accept or reject" its changes to the list of available options, it was not an ERISA fiduciary. *Id.* at 297; see also *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) (service provider was not an ERISA fiduciary with regard to terms of its compensation because it lacked authority over final "approval of those terms").

In *Schloegel*, 994 F.2d 266, the Fifth Circuit considered whether a benefit plan's consultant was an ERISA fiduciary when he proposed that the plan invest in insurance policies for which he received commissions. The court held that the consultant lacked sufficient "authority or control" to be a fiduciary because he merely "made an investment *proposal*, not an investment decision," with regard to the plan's

assets, and thus lacked power over the "ultimate decision" whether to invest in the insurance policies at issue. *Id.* at 272. Conversely, in a different case in which a consultant acted as the final "decision maker" for a plan, the Fifth Circuit held that the consultant was a fiduciary. See *Reich* v. *Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995).

The Sixth Circuit similarly considered in *Seaway Food Town, Inc.*, 347 F.3d 610, whether a service provider was an ERISA fiduciary when it renegotiated contractual terms with a benefit plan. The court held that the service provider had no ability to exercise "discretion or authority" over the plan in connection with those terms, because the plan sponsor was "free to seek … a different administrator with a better plan and lower costs" if it did not like the terms the service provider proposed. *Id.* at 617–19. By contrast, when a service provider has the power to make unilateral decisions affecting plan assets without first disclosing those decisions to plan sponsors or participants, the Sixth Circuit has held that the service provider is a fiduciary. See *Hi-Lex Controls, Inc.* v. *Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 744–45 (6th Cir. 2014) (service provider that decided to retain undisclosed additional fees was a fiduciary); *Pipefitters Local 636 Ins. Fund* v. *Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 865–67 (6th Cir. 2013) (same).

The Seventh Circuit has reaffirmed the "final say" rule in numerous cases since its decision in *CBOE*. For example, in *Leimkuehler*, 713 F.3d 905, a plan trustee claimed that a service provider was a fiduciary because it selected the set of funds from which the trustee could in turn choose a subset to offer to participants. The court held that the service provider was not a fiduciary—even though its selection of funds "shape[d] the disposition of Plan assets"—because the

trustee had the "final say" about which options to offer to participants and always remained "free to seek a better deal with a different 401(k) service provider." *Id.* at 911–12.

In *Hecker* v. *Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the court considered the fiduciary status of a service provider that managed two investment options available to a plan's participants and whose sister company was the investment advisor for 23 of the remaining 24 options on the plan's menu. The court concluded that the service provider was not an ERISA fiduciary because the plan sponsor, not the service provider, had the "final say on which investment options [would] be included" on the menu. *Id.* at 583. Compare also *Ed Miniat, Inc.* v. *Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 734, 737–38 (7th Cir. 1986) (service provider with power unilaterally to change rates applicable to plan assets may be a fiduciary), with *Chi. Dist. Council of Carpenters Welfare Fund* v. *Caremark, Inc.*, 474 F.3d 463, 473 (7th Cir. 2007) (service provider that proposed new prices during contract's term was not a fiduciary because plan sponsor could reject changes), and *Schulist* v. *Blue Cross of Iowa*, 717 F.2d 1127, 1131–32 (7th Cir. 1983) (service provider was not a fiduciary when it annually proposed rates because it "did not have any control over what organization would be chosen to fulfill [its] functions in the following year or on what terms"); see also *Pappas* v. *Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991) ("'[D]iscretionary authority,' 'discretionary control,' and 'discretionary responsibility' in § 1001(21)(A) … speak[] to actual decision-making power rather than to … influence.").

The Ninth Circuit has also applied the "final say" rule in a case where, as in *John Hancock* and *Leimkuehler*, a service provider selected a set of

investment options for a big menu from which a plan sponsor could choose a subset to put on the plan's menu. The court held that the service provider's selection of options was not an exercise of "discretionary control" or "authority" under ERISA's definition of "fiduciary," because the options and their associated fees were fully disclosed to the plan sponsor, which made the final decision about which subset of options to offer to participants. See *Santomenno*, 883 F.3d at 838–39.

3. The Eighth Circuit's ruling here breaks sharply from all of the other Circuits' "final say" decisions. It directly contradicts the holdings of *Teets* and *CBOE*, under which fiduciary status attaches only when *both* the plan sponsor *and* participants lack the freedom to reject changes to a product and direct plan assets away from the service provider's proposal. And it cannot be squared with the widely accepted "final say" rule.

With respect to rejecting the *Teets* and *CBOE* standard, the Eighth Circuit was explicit. It quoted the relevant passage in *Teets* and then, in the very next paragraph, it changed the *Teets* standard even as it purported to agree with it. The quotation from *Teets* clearly states that a service provider is not a fiduciary if either "the plan *or* its participants hav[e] an opportunity to reject" the service provider's change to the product. Pet. App. 3a–4a (emphasis added) (quoting *Teets*, 921 F.3d at 1212). The Eighth Circuit changed the word "or" to "and" in stating its own rule: the service provider is not a fiduciary if "a plan *and* participant[s] can freely reject" the service provider's actions. *Id.* at 4a (emphasis added).

The departure from the "final say" rule is just as clear, though not express. The Eighth Circuit never tried to explain how its view of the law can be squared with the "final say" rule. It cannot. The rationale

behind the widely accepted "final say" rule is that so long as *someone* has the authority to reject the service provider's actions, the service provider cannot be said to have "authority or control" over plan assets, as ERISA requires to establish fiduciary status. It does not matter whether the plan sponsor or participants or both stand in the way of the service provider's control over plan assets. The point of the "final say" rule is the absence of control by the service provider, not *why* the service provider lacks control, or *who* has control instead of the service provider, or *how many* parties stand in the way of service provider control. The Eighth Circuit never said that Principal has the "final say" regarding whether any participant's plan assets are made subject to Principal's rate changes. To the contrary, it admitted that participants have that "final say." Pet. App. 7a. That admission makes the departure from the "final say" rule as clear as if the Eighth Circuit had declared that it was abandoning it.[5]

II. THE QUESTION PRESENTED HAS PROFOUND CONSEQUENCES FOR EMPLOYEES' ABILITY TO PUT THEIR RETIREMENT SAVINGS IN SAFE, VALUABLE INVESTMENTS.

This Court's review is urgently needed not only to resolve the conflict in authority, but also because of the disruptive impact the Eighth Circuit's ruling will have on a nearly trillion-dollar industry.

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[5] Though he did not develop the argument in the lower courts, respondent suggested in passing in his appellate briefing that discretion to change the rate for the PFIO might be deemed "management of [the retirement] plan," which, under ERISA, also makes a third party a fiduciary. As discussed below, the Eighth Circuit did not and could not have concluded that a change in the rate is "management" of the plan. *Infra* at 25–26.

Service providers operate nationwide. They now face the prospect of costly and disruptive litigation over a wide range of valued products like the PFIO, even though the Eighth Circuit is the only court to hold that such service providers are ERISA fiduciaries with regard to the terms on which they offer these products. The legal uncertainty created by the Eighth Circuit's decision, by itself, will predictably discourage service providers from offering such products. The legal conflict the Eighth Circuit created subverts "ERISA's policy of … assuring a predictable set of liabilities, under uniform standards of primary conduct." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) ("The uniformity of decision which [ERISA] is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." (quoting H.R. Rep. No. 93-533, at 12 (1973))).

Defined contribution plans "dominate the retirement plan scene today," *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), and millions of Americans rely upon such plans as their primary means of saving for retirement. As of 2016, there were more than 530,000 defined contribution plans throughout the United States. And as of 2017, employer-sponsored defined contribution plans held an estimated $7.7 trillion in assets.

Among those assets, approximately $821 billion are invested in stable value products like the PFIO. The vast majority of defined contribution plans offer at least one stable value product to their participants. As of 2016, 13.5% of the total assets in the 200 largest private benefit plans were invested in stable value funds, as were 19% of the total assets in the 200

largest public benefit plans. Over the last decade, stable value funds have consistently outperformed similarly low-risk products, such as money market funds, short-term bond funds, and bank certificates of deposit. They served as an especially valuable and rare safe haven to participants in the aftermath of the 2008 financial crisis, throughout which they continued to yield consistent and positive returns, despite the widespread turmoil affecting the financial markets.

The Eighth Circuit's decision jeopardizes the continued availability of these widely preferred and attractive products. The structure of the product at issue here—requiring a 12-month delay before a plan sponsor can withdraw all funds while participants can withdraw immediately—is standard in the industry. The decision thus impacts virtually all of the products in this nearly trillion-dollar market.

Service providers are certain to respond to the increased risk of litigation by reducing the products' availability. For the PFIO, for example, the 12-month notice requirement applicable to plan sponsors' withdrawals allows Principal to meet the risk-based capital standards promulgated by the NAIC and adopted by its state insurance regulators. See, *e.g.*, Iowa Code § 508.36. And it is no answer to suggest that Principal could offer a stable value product with an indefinitely fixed rate of return or a formulaic rate-setting mechanism. Such products would, of necessity, reduce the rate of return and thus harm investors with no discernible benefit. Part of what makes the PFIO and similar products valuable is that they outperform money market funds and other low-risk, low-value products invested in short-term debt securities. Changes to the product to ward off litigation would deprive investors of that value.

Recognizing the importance of having uniform standards for applying ERISA's provisions across the Circuits, this Court has granted certiorari on multiple occasions to clarify ERISA's definition of "fiduciary"—including in cases, unlike this one, that did not even present a split of authority among the lower courts. See *John Hancock Mut. Life Ins. Co.* v. *Harris Tr. & Sav. Bank*, 510 U.S. 86, 94–106 (1993) (deciding the meaning of "plan assets" in ERISA's definition of "fiduciary"); *Varity Corp.* v. *Howe*, 516 U.S. 489, 502–03 (1996) (deciding the meaning of "administration" in ERISA's definition of "fiduciary"); *Pegram* v. *Herdrich*, 530 U.S. 211, 231–37 (2000) (deciding whether a managed care organization acted as an ERISA fiduciary).

The Court should grant certiorari now to decide the meaning of the terms "authority" and "control" in that definition. No service provider exercises "authority" or "control" over a plan or plan assets by merely proposing a rate of return on a product that plan participants are always free to reject. The Eighth Circuit's conclusion otherwise sets a dangerous precedent that threatens to upend the national market for stable value products, with potentially disastrous effects for participants and their retirement savings. This Court should intervene to resolve the conflict among the Circuits and to adopt a rule that limits fiduciary status to entities that actually exercise control over ERISA plans or their assets.

III. THE DECISION BELOW IS WRONG BECAUSE IT IS CONTRARY TO ERISA'S TEXT.

The Eighth Circuit's ruling merits review also because it is wrong. The "final say" rule rejected by the Eighth Circuit reflects faithful adherence to the text of ERISA. The Eighth Circuit all but ignored the dictates

of that text, parroting the words while ignoring their import.

As relevant here, ERISA provides that a service provider is a fiduciary "to the extent" the service provider "exercises any discretionary authority or discretionary control respecting management of [a retirement] plan or … authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). Because ERISA defines a third party as a fiduciary only "to the extent" it exercises the requisite authority or control, third-party fiduciary status is not an "all-or-nothing" concept. See, *e.g.*, *Gordon* v. *CIGNA Corp.*, 890 F.3d 463, 474 (4th Cir. 2018); *McCaffree Fin. Corp.* v. *Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). Rather, as this Court has held, fiduciary status is act-specific: the "threshold question" is whether the person was "acting as a fiduciary … when taking the action subject to complaint." *Pegram*, 530 U.S. at 226.

Here, the "action subject to the complaint" is announcing that the rate applicable to the PFIO will change. So under the text of ERISA and this Court's decision in *Pegram*, Principal is a fiduciary if, when announcing the rate, it exercises authority or control over "management" of either the plan itself or plan assets. The Eighth Circuit never explained how Principal could do either. It cannot.

1. Discretionary control over what rate to offer is not authority or control over plan assets. Setting a pre-announced rate is no exercise of "authority" or "control" over plan assets unless the service provider has the absolute power to decide that the rate will govern and become officially binding on those assets. See, *e.g.*, *Black's Law Dictionary* (11th ed. 2019) (cited in Pet. App. 4a) (defining "authority" as the "official right or permission to act," and defining "control" as

"direct or indirect power to govern the management and policies of a person or entity"). Without that power, all that the service provider is doing when it announces a new rate is proposing a contractual term that participants can reject. Authority and control over the assets remain, at all times, with the participants.

Indeed, respondent has never claimed that Principal acts as a fiduciary when it *initially* offers the PFIO to any plan. His theory instead is that Principal becomes a fiduciary six months *after* the initial offer, when it first changes the rate of return that it will offer for the next six months. But changing a rate that participants may reject gives Principal no more authority over plan assets than offering the initially proposed rate that participants were equally free to reject.

Nowhere in its opinion did the Eighth Circuit explain how a service provider can be thought to exercise "authority" or "control" over a plan or plan assets by proposing a rate of return that participants can always reject without cost. Instead, it held that a service provider in those circumstances is a fiduciary if the participants' *plan sponsor* lacks the ability to reject the proposed rate by forcing all of the participants to withdraw immediately. The statute, however, does not turn on whether *plan sponsors* have "authority" or "control" over the plan or plan assets. It turns on whether the *service provider* has such "authority" or "control," as the "final say" rule prevailing in other jurisdictions correctly recognizes. Here, Principal lacks such authority or control, so it is not a fiduciary within the meaning of the statute.

2. Changing the rate that applies for any six-month period is also not "management" of the "plan." It is, instead, discretion over the terms of a product offered through a plan. The terms of any particular product offered to participants through a retirement

plan are not terms of the plan itself. When Principal offered respondent's plan sponsor the option to place the PFIO on its retirement plan menu, the term allowing Principal to adjust the rate was part of the contract and thus fully disclosed. The plan sponsor, in its capacity as manager of the plan, made the decision to place the PFIO on its plan menu. To be sure, changes to the rate that occurred thereafter affected plan assets (for those participants who chose to keep money in the PFIO after the announced change), but it did not change, manage, or do anything to the "plan" itself. And it is no answer to suggest that delaying the plan sponsor's ability to remove the PFIO from the menu is "management" of the plan. The delay requirement was also a contractual term to which the sponsor agreed when it exercised its plan management discretion to include the PFIO within its menu. More importantly, that is not the "discretionary" act that is "subject to complaint." *Pegram*, 530 U.S. at 226. The only discretionary act at issue in this case is the periodic rate adjustment.

3. The Eighth Circuit's decision is also inconsistent with the overall design of ERISA with respect to defined contribution plans. One of ERISA's central aims for such plans is to encourage and enable informed decision-making by participants. See, *e.g.*, *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011) (noting that ERISA's provisions "encourage[] sponsors to allow more choice to participants"); *Renfro*, 671 F.3d at 327 ("An ERISA defined contribution plan is designed to offer participants meaningful choices about how to invest their retirement savings."). Yet the Eighth Circuit's decision treats participants' role in choosing how to invest their assets as legally irrelevant. That disconnect makes no sense, especially

in cases, like this one, that bring claims on behalf of a class exclusively comprised of participants.

Congress has made clear that the purpose of ERISA is to "protect … the interests of participants" in covered benefit plans by, among other things, "requiring the disclosure and reporting to participants" of information about their plans so that participants can make informed decisions about the management and disposition of their plan assets. 29 U.S.C. § 1001(b); see also *id.* §§ 1021–30 (setting forth ERISA's disclosure and reporting requirements). ERISA contemplates that participants will use this information to exercise control over their own plan monies. In particular, Congress recognized that "[i]n the case of a pension plan which provides for individual accounts"—that is, defined contribution plans—each "participant or beneficiary" may "exercise control over the assets in his [or her] account," including by "direct[ing] the investment of th[ose] assets." *Id.* § 1104(c)(1)(A).

Without question, the statute is also designed to "establish[] standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. § 1001(b). But that statutory objective, too, operates to enhance the power of plan participants. Fiduciaries' duties do not run to plan sponsors, or to plans in the abstract. They run "solely" to "participants and beneficiaries." *Id.* § 1104(a)(1); see also *id.* § 1104(a)(1)(A)(i) (requiring fiduciaries to discharge their duties for the "exclusive purpose of … providing benefits to participants and their beneficiaries").

Given the statute's focus on the decisions participants make about how to invest their plan assets and the crucial role of participant choice, it makes little sense for a court to ignore the role of participant decisions when it determines whether a service

provider has sufficient authority or control over plan assets to be an ERISA fiduciary. Yet that is what the Eighth Circuit's decision does.[6]

4. The Eighth Circuit's expanded definition of "fiduciary" is also contrary to the meaning that term has under the common law of trusts, which, as this Court and others have widely recognized, informs the meaning of ERISA's terms.

ERISA "abounds with the language and terminology of trust law," and the principles of trust law therefore "guide[]" the interpretation of its provisions. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110–11 (1989) (citing *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)). That is particularly true for the provisions that describe ERISA fiduciary status and fiduciary obligations, as those provisions were intended to "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Id.* (alterations in original) (citing H.R. Rep. No. 93-533, at 11). Courts have therefore traditionally drawn upon the common law of trusts in interpreting the words that appear in ERISA's definition of "fiduciary." See, *e.g.*, *Varity Corp.*, 516 U.S. at 496–97, 502–03 (collecting cases); see also *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016) ("[I]t is a settled principle of

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[6] Nothing in the legislative history relating to Section 3(21)(A)(i) of ERISA supports the Eighth Circuit's decision either. Several Senate and House Committee Reports discuss the definition of "fiduciary," but none even hints that the definition includes a service provider that sets rates of return on a product that participants are free to reject, or that participants' ability to control their own assets was intended to be irrelevant to that definition. See, *e.g.*, H.R. Rep. No. 93-533, at 21; S. Rep. No. 93-1090, at 323 (1974); H.R. Rep. No. 93-1280, at 323 (1974).

interpretation that … Congress intends to incorporate the well-settled meaning of the common-law terms it uses." (quoting *Sekhar* v. *United States*, 570 U.S. 729, 732 (2013))).

At common law, fiduciary status turned on the existence of a relationship of trust and confidence between the fiduciary and its client. The concept of fiduciary duties "dates back to … Roman law" and is "founded on concepts of sanctity, trust, confidence, honesty, fidelity, and integrity." 1 George M. Turner, *Revocable Trusts* § 3:2 (5th ed. 2019 update); see also, *e.g.*, 3 Dan B. Dobbs et al., *The Law of Torts* § 697 (2d ed. 2017 update) (fiduciaries "act in a position of trust or confidence for the benefit of another"). The word "fiduciary" itself comes from the Latin *fiducia*, which refers to "ideas of trust or confidence." Turner, *supra*, § 3.3.

The common law traditionally distinguished between relationships of trust and confidence on the one hand, which give rise to fiduciary duties, and "arm's length" relationships on the other, in which each party acts according to his or her own judgment. See Restatement (Second) of Trusts § 2 (Am. Law Inst. 1959) (collecting cases holding that "arm's length" relationships do not create fiduciary obligations); 10 George G. Bogert et al., *The Law of Trusts and Trustees* § 481 (3d ed. 2020 update) (same).

The "final say" rule that has long governed fiduciary status under ERISA—with which the Eighth Circuit's decision below conflicts—is in perfect accord with this common-law understanding of "fiduciary." When a service provider proposes a rate of return on an investment product that participants are free to reject, it does not assume some special relationship of trust or confidence vis-à-vis the participants to whom it offers the product. It is simply offering a product for

sale. Participants exercise their own judgment about whether to accept the terms of the offer. The service provider is not a fiduciary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Appellate and Constitutional Law Practice

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher is one of the leading U.S. appellate practices, with broad experience in complex appellate litigation at all levels of the state and federal court systems.

The American Lawyer named Gibson Dunn its 2020 Litigation Department of the Year, recognized as the "best of the best." This unprecedented achievement was the firm's fourth win in the last six years of the publication's biennial "Litigation Department of the Year" competitions, and the sixth time in a row the firm has been a finalist. In addition, Ted Boutrous was named Litigator of the Year, Grand Prize, recognizing that he was "at the center of some of the nation's most closely watched cases on the First Amendment, the rule of law, privacy and more."

Accolades

- *Chambers USA: America's Leading Lawyers for Business* 2020 ranked Gibson Dunn in Tier 1 nationwide in the category of Appellate Law.
- *U.S. News – Best Lawyers*® "Best Law Firms" named Gibson Dunn the 2020 "Law Firm of the Year" for Appellate Practice. Only one law firm is recognized in each national practice area.
- *Benchmark Litigation* recognized Gibson Dunn as Appellate Firm of the Year at its 2020 U.S. East Awards ceremony.
- *The Legal 500 United States* 2019 ranked Gibson Dunn in Tier 1 in the categories of Appellate – Courts of Appeals, and Appellate – Supreme Courts (federal and state).
- *The National Law Journal* named Gibson Dunn to its 2019 Appellate Hot List, which recognized 25 firms that "won key matters before the U.S. Supreme Court and federal courts of appeals." The publication noted the firm's U.S. Supreme Court win in *Rimini Street v. Oracle*, which addressed "the significant question whether the authorization to award 'full costs' in the Copyright Act includes expert fees and e-discovery expenses."
- *Law360* named Gibson Dunn a 2019 Appellate Practice Group of the Year, noting the firm's "victories in 2019, including a unanimous U.S. Supreme Court ruling in patent litigation, a trailblazing win for a company whose property Venezuela nationalized, and a rapid response for Facebook after a subpoena in a murder case," that "extended [the firm's] streak as a Law360 2019 Appellate Group of the Year."
- *The Daily Journal* named Gibson Dunn's win in *Trendsettah USA Inc. et al. v. Swisher International Inc.,* securing relief for Swisher from a $44 million antitrust verdict when the Central District of California set it aside, among the Top Defense Results in California for 2019.

- *The Daily Journal* named Gibson Dunn's win in *O'Connor et al. v. Uber Technologies Inc.* among the Top 5 Appellate Reversals in California for 2018, and the firm's reversal of a court's $34.5 million verdict against another client a Top Appellate Reversal in California for 2018.

U.S. Supreme Court Litigation

Gibson Dunn has a strong and high-profile presence before the U.S. Supreme Court, appearing numerous times in the past decade in a variety of matters including closely watched cases with far-reaching significance in the class action, intellectual property, separation of powers, First Amendment and other high-profile fields. Moreover, while the grant rate for certiorari petitions is below 1%, Gibson Dunn's certiorari petitions have often captured the Court's attention resulting in a much higher success rate.

Three of our partners served in the Office of the Solicitor General of the United States, the office charged with representing the United States before the U.S. Supreme Court. Mr. Olson was the U.S. Solicitor General from 2001 to 2004, Mr. Estrada served as Assistant to the Solicitor General from 1992 to 1997, and Mr. Hungar served as Deputy Solicitor General from 2003 to 2008 and Assistant Solicitor General from 1992 to 1994. Mr. Hungar also served as General Counsel to the U.S. House of Representatives from 2016 to 2019. In addition, Mr. Yarger served as Solicitor General for the State of Colorado from 2014 to 2018. Mr. Kolkey previously served as an Associate Justice on the California Court of Appeal, Third Appellate District. Numerous other partners have held high-ranking government positions, including Helgi Walker, Eugene Scalia, Tom Dupree, Allyson Ho, and Stuart Delery.

Some of our recent representations in the U.S. Supreme Court include:

- Representing Parsons Corporation as petitioner, secured a grant of certiorari from the U.S. Supreme Court in a case that presents an important question regarding the False Claims Act's statute of limitations. The case arises out of a False Claims Act suit against Parsons and Cochise Consultancy alleging that they defrauded the U.S. government in connection with work they performed as defense contractors in Iraq in 2006. Hunt, a former Parsons employee, filed suit but the United States declined to intervene. The Eleventh Circuit's various holdings in ruling that Hunt's suit was timely created a three-way circuit split involving the decisions of five other courts of appeals.

- Representing Leidos, Inc. (formerly SAIC, Inc.) in cases arising from SAIC's $500 million settlement and deferred prosecution agreement with the U.S. Department of Justice and New York City related to SAIC's involvement with CityTime, the City's payroll system. Gibson Dunn has secured U.S. Supreme Court review in a securities case asserting claims under Section 10(b) of the Securities Exchange Act. Plaintiffs alleged that Leidos' 2010 Form 10-K annual report was misleading because it omitted information related to a contract Leidos had with the City, including a required disclosure under Item 303 of Regulation S-K. After the Southern District of New York dismissed the complaint, the Second Circuit reversed in part, holding that violations of Item 303 could serve as the basis for Section 10(b) claims. Gibson Dunn has also secured dismissal and Second Circuit affirmance of consolidated derivative litigation.

- In a major U.S. Supreme Court victory for Gibson Dunn pro bono clients, six individual DACA recipients or "Dreamers," and hundreds of thousands of other DACA recipients, the Court held that the 2017 decision by the Trump Administration to terminate the Deferred Action for Childhood Arrivals (DACA) policy was arbitrary and capricious in violation of the Administrative Procedure Act. Since 2012, DACA allowed undocumented individuals who arrived in the United States as children to live and work here without fear of deportation, so long as they qualified and remained eligible for the policy. DACA recipients and others challenged the termination, including Gibson Dunn, on behalf of our pro bono clients. The firm obtained and then defended on appeal in the Ninth Circuit the first nationwide

preliminary injunction halting DACA's termination. The Supreme Court granted review of the Ninth Circuit's affirmance of the injunction along with two other district court decisions enjoining or vacating DACA's termination. The Court's decision reinstated the DACA policy for the immediate future.

- Obtained a unanimous U.S. Supreme Court victory for Comcast Corporation when the Court vacated a Ninth Circuit decision allowing a $20 billion discriminatory contracting claim to proceed. Plaintiffs National Association of African American-Owned Media and Entertainment Studios Networks, Inc. (ESN) sued Comcast under 42 U.S.C. §1981 for allegedly declining to carry ESN's television networks because ESN is 100% African American-owned. The district court dismissed the action three separate times because plaintiffs did not sufficiently allege a plausible claim given Comcast's "legitimate business reasons for denying [ESN] carriage, namely, lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels." The Ninth Circuit reversed, ruling that the plaintiffs only needed to allege that race played at least "some role" in Comcast's decision. In vacating that decision, the Supreme Court confirmed that the "ancient and simple 'but for' common law causation test" was the one to be used.

- Secured a unanimous U.S. Supreme Court decision in favor of our clients, victims of the 1998 African Embassy Bombings perpetrated by al Qaeda and sponsored by the Republic of Sudan, clearing the way for an award of more than $4 billion in punitive damages. In a case that turned on the retroactive effect of 2008 amendments to the "terrorism exception" to the Foreign Sovereign Immunities Act (FSIA), the district court had awarded the more than $4 billion but the D.C. Circuit reversed, holding that Congress had not spoken clearly enough to permit the punitive damages award for pre-enactment conduct. The Supreme Court concluded, however, that the 2008 amendments do permit the plaintiffs to seek punitive damages for conduct predating the amendments.

- Filed an amicus brief on behalf of the pro bono clients, constitutional law scholars who, along with female lawyers and law students, medical professionals and others, urged the U.S. Supreme Court not to restrict reproductive health services. At issue in the case is a Louisiana regulation requiring all abortion providers in the state to have hospital admitting privileges. The law mirrors a Texas provision that was struck down by a divided 2016 ruling, *Whole Woman's Health v. Hellerstedt*, in which the Court determined the requirement would pose an "undue burden" to women seeking abortions. The Trump administration's brief asked the Court to narrow or overturn that ruling, which reproductive rights advocates argue is binding precedent.

- The U.S. Supreme Court declared moot a Second Amendment challenge to a New York City handgun regulation, consistent with Gibson Dunn's amicus brief filed on behalf of 139 members of the U.S. House of Representatives, led by Hon. Jerrold Nadler, Chair of the House Judiciary Committee. The brief was filed in support of the respondents, the City of New York and the New York City Police Department-License Division. The regulation prevented the petitioners and others who owned a handgun premises license from transporting their handguns to shooting ranges and second homes outside New York City. After the Supreme Court granted review but before the parties filed their merits briefs, New York City and New York State separately amended their licensing schemes to permit the conduct at issue. The Supreme Court held these amendments mooted the petitioners' claim for relief, and therefore did not reach the question of whether the former regulation violated the Second Amendment to the U.S. Constitution.

- Helped obtain a significant victory on behalf of amici – 25 businesses and business associations – when the U.S. Supreme Court struck down the proposed citizenship question for the 2020 U.S. Census and remanded back to the Department of Commerce for further administrative proceedings. Several challengers had filed suit in New York and elsewhere seeking to strike the question from the Census, arguing that it would depress response rates among minority communities and that the Secretary of Commerce's proffered explanation for adding it was pretextual. Gibson Dunn filed an amicus brief in the district court on behalf of several businesses and after the challengers prevailed, the case went

directly to the U.S. Supreme Court, where Gibson Dunn again represented amici concerned that inclusion of a citizenship question would impair the accuracy of the Census.

- Represented software support company in copyright infringement litigation concerning the applicability of numerous statutory and equitable defenses to Copyright Act, and raising novel issues relating to the scope of copyright injunctions and entitlement to attorneys' fees for successful copyright claims. The U.S. Supreme Court unanimously held in favor of Gibson Dunn's position, that a provision in the Copyright Act authorizing a prevailing party to recover "full costs" entitles that party to recover only those categories of costs enumerated in 28 U.S.C. §§ 1821 and 1920, and not all litigation expenses. *Law360* named the case among its "Top 10 Copyright Rulings of 2019" and *Managing IP* recognized it as an Impact Case at its Americas Awards 2020.

- Secured complete victory for the directors and officers of one of the world's leading retailers in a long-running shareholder derivative suit when the U.S. Supreme Court declined to review the Delaware Supreme Court's affirmance of the dismissal of the action. Plaintiffs had alleged that current and former directors and officers breached their fiduciary duties in connection with a 2005-2006 internal investigation relating to allegations of FCPA violations at the company's Mexican subsidiary. However, the Delaware action paralleled an Arkansas federal court suit by a separate set of plaintiffs involving nearly identical issues and claims. Gibson Dunn had secured dismissal of the Arkansas claims for failure to adequately allege demand futility, and the Eighth Circuit affirmed. Gibson Dunn persuaded the Delaware Supreme Court that the Delaware plaintiffs must be collaterally estopped from relitigating that demand futility ruling, and that doing so did not violate Due Process. The U.S. Supreme court's denial of review successfully ended more than six years of litigation in both Delaware and Arkansas.

- The U.S. Supreme Court agreed with Gibson Dunn client Raymond J. Lucia in a constitutional challenge to the manner in which the Securities and Exchange Commission selects its administrative law judges (ALJs). The Appointments Clause of the U.S. Constitution requires that all "Officers of the United States" be appointed by the President, a court of law, or a head of department such as the SEC acting as a whole. SEC ALJs, however, are selected by SEC staff. On the key question of whether SEC ALJs are "Officers," Gibson Dunn argued that they are, and the Supreme Court agreed. As a remedy for the Appointments Clause violation, Mr. Lucia was entitled to a new hearing before a properly appointed official other than the one who had decided his case. The decision opened up potential Appointments Clause challenges to a broad swath of ALJs across dozens of agencies.

- Won reversal from the U.S. Supreme Court for Wisconsin Central Ltd., Grand Trunk Western Railroad, and Illinois Central Railroad of the Seventh Circuit's determination in a case involving taxation of employer-provided stock options under the Railroad Retirement Tax Act (RRTA). According to the IRS, the case's outcome implicated more than $100 million in tax dollars throughout the railroad industry. The specific question was whether stock issued to railroad employees when they exercised their employer-provided stock options was taxable. Because the RRTA taxes "money remuneration," the matter turned on whether stock is considered "money" – as the IRS argued – or is not, as Gibson Dunn asserted. The Court agreed with Gibson Dunn.

- The U. S. Supreme Court rejected tolling of the statute of limitations for successive class actions, consistent with an amicus brief filed by Gibson Dunn on behalf of the Chamber of Commerce of the United States, the Retail Litigation Center, and the American Tort Reform Association. The Court held specifically that once class certification is denied, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations. Gibson Dunn filed amicus briefs in support of the petitioner at both the certiorari and merits stages, and the Court's opinion largely tracked the arguments in the merits-stage brief.

- Secured a U.S. Supreme Court victory for the State of New Jersey – and for the right of U.S. states to control their legislatures – when the Court struck down the federal Professional and Amateur Sports

Protection Act that prohibited states from authorizing or licensing sports gambling. The Court held that the statute violated the U.S. Constitution's Tenth Amendment because it dictated the content of state law, such as by preventing states from legalizing sports gambling. The Court also struck down additional federal prohibitions on state-run lotteries, private operation of sports gambling schemes, and advertising of sports gambling.

- Secured a major U.S. Supreme Court victory for BNSF Railway Company in its fight against frequent forum shopping in Federal Employers' Liability Act (FELA) litigation. Two former BNSF employees who alleged they were injured on the job sued in Montana state court, known for its liberal construction of FELA (the basis of their claims) rather than in the actual states where they were injured. On appeal before the Montana Supreme Court, BNSF argued that it was not subject to general jurisdiction in Montana under the U.S. Supreme Court's 2014 *Daimler v. Bauman* decision, also a key Gibson Dunn jurisdictional win. That court disagreed but the U.S. Supreme Court agreed. The Court held that FELA does not confer personal jurisdiction on state courts, and that the U.S. Constitution's Fourteenth Amendment Due Process Clause prevents out-of-state defendants from being sued in state courts unless those defendants are "at home" in the forum under the *Daimler* standard.

- Successfully represented the University of Texas in the U.S. Supreme Court which, in a historic victory for diversity, upheld the University's use of race as one factor among many in its holistic review of undergraduate applicants who do not qualify for automatic admission under the state's Top 10% Law. The Court rejected a challenge to the University's diversity efforts under the Equal Protection Clause. Gibson Dunn served as co-counsel for the University.

- Secured a U.S. Supreme Court victory for BlueMountain Capital Management, LLC when the Court affirmed the First Circuit in holding that the federal Bankruptcy Code preempts the Puerto Rico Public Corporation Debt Enforcement and Recovery Act, a statute that purported to create a binding bankruptcy-like debt-restructuring regime for Puerto Rico's highly indebted public entities, including electric utility, PREPA. Gibson Dunn filed suit on behalf of PREPA bondholder BlueMountain shortly after the law was enacted. The Supreme Court's analysis is likely to impact express-preemption jurisprudence and provides important protections for holders of municipal bonds.

- Resolved groundbreaking, multibillion-dollar litigation by NML Capital, Ltd. (an affiliate of Elliott Management Corporation) against the Republic of Argentina when Argentina paid NML more than $2.4 billion to satisfy NML's claims on the country's defaulted bonds. This settlement marked the conclusion of what the *Financial Times* called the "sovereign debt trial of the century" and ended 13 years of litigation following Argentina's default in 2001 on more than $80 billion in external debt. The tide turned with two decisive U.S. Supreme Court victories won for NML by Gibson Dunn; the Republic's new president ultimately initiated negotiations with creditors and the settlement agreement was reached.

- Secured a U.S. Supreme Court victory for more than 1,300 victims of Iranian-sponsored terrorist attacks when the Court, adopting many of Gibson Dunn's arguments, held that the Iran Threat Reduction and Syria Human Rights Act of 2012 complies with the U.S. Constitution's separation of powers. The district court had granted plaintiffs summary judgment pursuant to the Act permitting them to satisfy the billions of dollars in judgments they had been awarded against Iran from a beneficial interest that Bank Markazi, Iran's central bank, had in almost $2 billion in assets in a New York bank account. The Second Circuit affirmed and plaintiffs turned to Gibson Dunn when Bank Markazi sought Supreme Court review.

- Persuaded the U.S. Supreme Court to grant a request to take up the question whether giving routine access to a public official is an "official act" that can form the basis for a federal bribery conviction, as supported in Gibson Dunn's amicus brief filed on behalf of a bipartisan group of former high-ranking federal officials, including three former Attorneys General, Counsels to every President since Ronald

Reagan, and former Solicitor General Ted Olson, The matter arose from former Virginia Governor Robert McDonnell's federal conviction for bribery offenses.

- The U.S. Supreme Court agreed to hear a religious liberty case after Gibson Dunn urged review in an amicus brief on behalf of the Association of Christian Schools International and the Lutheran Church – Missouri Synod. The case arose after the application of Trinity Lutheran Church to a Missouri grant program was denied by the State because, while it deemed Trinity eligible under its neutral criteria, the Missouri Constitution prohibits public aid to churches. Trinity sued and alleged violations of the U.S. Constitution's Free Exercise and Equal Protection Clauses.

- The U. S. Supreme Court struck down the "residual clause" of the Armed Career Criminal Act as unconstitutionally vague, consistent with an amicus brief filed by Gibson Dunn on behalf of the National Association of Criminal Defense Lawyers, the National Association of Federal Defenders, Families Against Mandatory Minimums and the Cato Institute. The Act imposes a mandatory minimum sentence for offenders who have three prior convictions for "violent felonies," some of which are listed by name; the residual clause then included any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

- The U.S. Supreme Court left intact a significant, favorable Seventh Circuit victory obtained by Gibson Dunn for Chunghwa Picture Tubes, Ltd., a Taiwanese-based manufacturer of TFT-LCD panels, when the Court denied a petition for writ of certiorari filed by Motorola Mobility. The Seventh Circuit decision, which clarified the limited reach of the Foreign Trade Antitrust Improvements Act, barred Motorola from recovering on more than 99% of its claims because they occurred in foreign commerce and were therefore outside the reach of U.S. antitrust laws.

- On behalf of Senate Republican Leader Mitch McConnell and 44 other U.S. Senators, we persuaded the U.S. Supreme Court to unanimously affirm a landmark separation-of-powers decision from the D.C. Circuit that held unconstitutional three 2012 appointments to the National Labor Relations Board made by President Obama pursuant to the U.S. Constitution's Recess Appointments Clause. Gibson Dunn filed an amicus brief at the certiorari and merits stages and presented oral argument by special leave of the Court.

- For CLS Bank, which settles more than $5 trillion in foreign currency transactions daily, we obtained unanimous U.S. Supreme Court affirmance that ended a long-running patent infringement suit brought by Alice Corporation. The Court affirmed an en banc Federal Circuit ruling, also argued successfully by Gibson Dunn, that Alice's claims were patent-ineligible as the patents were drawn to the abstract idea of intermediated settlement.

- Secured a landmark victory in the U.S. Supreme Court for the Town of Greece, New York when the Court reversed the Second Circuit and upheld the Town's practice of opening its meetings with public prayer. Agreeing with arguments advanced by Gibson Dunn on behalf of the Town, the Court concluded that legislative prayer "has long been understood as compatible with the Establishment Clause" and rejected respondents' argument that such prayers must be nonsectarian or unaligned with any particular religious tradition.

- Filed a successful amicus brief in support of certiorari on behalf of a bipartisan group of U.S. Congress members – including the Chairman and Ranking Member of the House Committee on Foreign Affairs – in a case presenting important, unsettled questions regarding the balance of powers in foreign affairs between the U.S. president and Congress. The U.S. Supreme Court granted certiorari, consistent with the Gibson Dunn brief, to decide whether a federal statute that directs the U.S. Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as "Israel" on U. S. passports and reports of birth abroad is a constitutional exercise of Congress's foreign affairs powers, or is instead unconstitutional on the ground that it infringes on an exclusive power of the President to recognize foreign governments.

- Obtained a unanimous ruling from the U.S. Supreme Court, on behalf of Daimler AG, that it violates due process under the U.S. Constitution for a U.S. court to exercise general personal jurisdiction over a non-U.S. corporation with no employees or facilities in the United States, based solely on the fact that an indirect corporate subsidiary conducts business in the forum state. The case involved claims filed in federal district court in California by 22 Argentine residents who alleged that an Argentine subsidiary of Daimler conspired with the Argentine government to commit human-rights abuses in the 1970s.

- Won a historic marriage equality victory before the U.S. Supreme Court, whose June 26, 2013, decision left intact the district court's broad injunction against the enforcement of California's Proposition 8, an amendment to the California Constitution restricting marriage in the state to between one man and one woman. Gibson Dunn filed the complaint challenging the constitutionality of Proposition 8 and, after trial, the Northern District of California declared it unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. The Ninth Circuit affirmed.

- Obtained a victory for Comcast Corp. when the U.S. Supreme Court reversed an order certifying a class of more than two million current and former Comcast subscribers, who alleged anticompetitive conduct on the company's part but failed to establish that damages could be calculated on a class-wide basis.

- Obtained a landmark victory for Standard Fire Insurance Co. when the U.S. Supreme Court unanimously held that a putative class representative may not evade federal jurisdiction by attempting to stipulate that the class will not seek to recover more than $5 million. In an opinion that strengthened defendants' removal rights under the Class Action Fairness Act of 2005, the Court held that plaintiff cannot bind absent members of a proposed class before the class is certified, and therefore cannot unilaterally limit the claims of the absent class members.

- Obtained a landmark victory for the world's largest retailer when the U.S. Supreme Court unanimously reversed class certification of the biggest employment discrimination class in history, in a 2011 decision. In 2013, Gibson Dunn successfully opposed certification of a smaller class pursuant to the plaintiffs' amended class complaint, filed in the Northern District of California, and plaintiffs' subsequent petition to the Ninth Circuit for permission to appeal the district court's decision. In 2016, we successfully opposed would-be intervenors' attempts in the district court and Ninth Circuit to challenge the class certification denial.

- Obtained a landmark 5-4 decision from the U.S. Supreme Court holding that portions of the McCain-Feingold campaign finance law and other federal laws banning corporate and union expenditures on political speech violate the First Amendment.

Appellate and Constitutional Law Nationwide

Our lawyers have participated in appeals in all 13 federal courts of appeals and state appellate courts throughout the United States in matters involving a wide array of constitutional, statutory, regulatory, and common law issues. Gibson Dunn has a truly national practice before state appellate courts. We have significant experience not only in the courts of the U.S. jurisdictions in which the firm maintains offices (California, New York, Washington, D.C., Texas and Colorado), but in jurisdictions across the country.

Some of our significant appellate and constitutional law representations include:

- Representing the University of Texas at Austin as lead outside counsel on a Fifth Circuit appeal in an important First Amendment case involving student speech. The President of the University, Greg Fenves, was sued in his official capacity by Speech First, which has brought similar suits against

colleges and universities across the country. The suit alleges that the University's student speech codes and other policies violated students' free-speech rights. The case was dismissed by the federal district court on the ground that Speech First lacks standing to bring the suit. Gibson Dunn is defending the judgment on appeal.

- Representing Jan-Pro Franchising International in a challenge to a Ninth Circuit ruling that retroactively applied a California Supreme Court decision changing the test to be used to determine employee or independent contractor status. In 2018 the Supreme Court abandoned a multi-factor common law test that California had long used, for the "ABC test" but declined to say whether the ABC test would apply retroactively. The Ninth Circuit determined that it would, reviving the plaintiffs' wage and hour misclassification class action. Gibson Dunn achieved a major victory for Jan-Pro when the Ninth Circuit vacated that ruling and agreed to certify to the California Supreme Court the question whether businesses can be held retroactively liable for alleged worker misclassification under the newly adopted ABC test.

- Representing Crystallex International Corp., a Canadian gold mining company, in connection with the expropriation of its Venezuelan mining operations at Las Cristinas and enforcement of its $1.4 billion arbitration award and judgment against the Republic of Venezuela. Gibson Dunn won unanimous Third Circuit affirmance of the company's attachment of CITGO Petroleum's parent company in aid of executing the judgment. The District of Delaware had issued the order of attachment against the shares of Delaware corporation PDV Holding, Inc. (PDVH), nominally held by PDVSA, Venezuela's national oil company but which, Crystallex successfully argued, is the alter ego of Venezuela. The Republic owns multibillion-dollar U.S. refiner CITGO through PDVSA and PDVH. The district court found the PDVH shares subject to execution under the Foreign Sovereign Immunities Act, and the Third Circuit ruling affirmed a process by which they can be sold to satisfy Crystallex's judgment. *Law360* named the Third Circuit win among its "Top 5 International Arbitration Decisions of 2019."

- Representing Visa Inc. in the Fifth Circuit to preserve the victory that it won in antitrust litigation in the Southern District of Texas. Pulse Networks, L.L.C. sued alleging that Visa's competitive strategies developed in response to the Durbin Amendment to Dodd-Frank violated the Sherman Act. The Southern District of Texas granted Visa summary judgment because Pulse's asserted injuries flowed from competition-increasing aspects of Visa's challenged strategies. Visa retained Gibson Dunn to preserve that judgment on appeal.

- Representing All American Check Cashing Inc., a check-cashing and lending-services company, in its challenge to an enforcement action brought by the Consumer Financial Protection Bureau (CFPB). The litigation challenges the constitutionality of the CFPB's structure, which places legislative, executive and judicial power all "in the same hands" of a single person, the CFPB director. The director is not answerable to the President, is removable only for cause, is not accountable to Congress, and has sole power to fund the agency from the Federal Reserve System's operating expenses. A core question is whether these structural features violate the constitutional doctrine of separation of powers, a cutting-edge issue with profound consequences for the many different companies subject to the CFPB's authority.

- Representing temporary staffing agency LFI Fort Pierce, Inc., to challenge the largest personal injury compensatory damages award in Colorado history. A jury awarded nearly $55 million for injuries the plaintiff sustained when he was struck by two cars while riding his bicycle through a busy intersection during rush hour. The jury assigned 90% of the liability to LFI on the theory that because the company had temporarily employed one of the drivers of the two cars, it could be held vicariously liable for the driver's conduct even though, at the time of her accident, the driver had finished her work duties for the day and was driving her personal vehicle away from her temporary worksite. Gibson Dunn was retained for post-trial proceedings and to pursue an appeal.

- Representing CTIA – The Wireless Association® in a challenge to the City of Berkeley, California's ordinance requiring cell phone retailers within Berkeley to provide warnings regarding exposure to radiofrequency energy from cell phones. The hotly contested matter is widely viewed as a test case for other local jurisdictions that may want to follow Berkeley's lead. While the Ninth Circuit declined to halt enforcement of the ordinance, the U.S. Supreme Court granted our petition for review, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of *National Institute of Family & Life Advocates v. Becerra*.

- Defending Toyota Motor Services and Toyota Motor Corporation in multiple appellate matters arising out of a closely watched products liability trial in Texas state court regarding the design of Toyota front seats and their restraint systems. Gibson Dunn has secured a successful mandamus petition on a novel electronically stored information (ESI) issue.

- Representing the Association of American Railroads in connection with a consolidated D.C. Circuit challenge to an August 2016 order of the Federal Railroad Administration imposing new safety oversight and enforcement obligations on state entities that oversee intercity passenger rail service. The North Carolina Department of Transportation and the Capitol Corridor Joint Powers Authority, which manages the Amtrak-operated intercity passenger rail service between Silicon Valley and San Jose in California, allege that the order violates the Administrative Procedure Act because it was promulgated by the FRA after only circulating a draft among some state sponsors of intercity passenger rail service and without an adequate opportunity for public notice and comment.

- Representing Rimini Street Inc. in its appeal after a jury found the software support company liable for copyright infringement and computer hacking, and awarded $50 million. The district court added $68 million in collateral relief and entered a permanent injunction. The case raises important and cutting-edge issues of copyright law and the standards for computer hacking liability.

- Representing Roquette Frères, S.A. in a Third Circuit appeal challenging the confirmation of an arbitral award that directed the company to assign its own patent applications to Solazyme (now TerraVia) following dissolution of the parties' unsuccessful joint venture, formed to develop food products based on microalgae. Solazyme seeks to read the award's open-ended language to encompass many unrelated patent applications that are important to Roquette's future business. The matter involves complex issues at the intersection of federal arbitration law, contract, bankruptcy, and patent law, in a technical area involving organic chemistry, manufacturing, and microalgae-based food products.

- Serving as lead counsel for the National Association of Broadcasters (NAB) in its challenge to the Federal Communications Commission's new restrictions on certain sharing agreements between local broadcasters, including joint sales agreements (JSAs), and related orders regarding media ownership. Gibson Dunn is also counsel of record for the entire group of broadcast petitioners, constituting a broad swath of the industry. Successes in this top-priority matter that affects the number of broadcast properties that a person or entity can own include a Third Circuit decision throwing out the FCC's new rule restricting JSAs between broadcasters.

- Leading the challenge, on behalf of Fiat Chrysler Automobiles, to a record-setting $150 million jury verdict in a wrongful death action in Georgia state court. The case arose from an auto accident that resulted in the death of a 4-year-old boy whose parents, the plaintiffs, alleged that the defective design of the Jeep Grand Cherokee in which their son was a passenger led to the fatal post-collision fire. Gibson Dunn has secured a remittitur, cutting the verdict by $110 million.

- Representing Stream Energy, one of the largest retail energy companies in Texas, in a purported RICO fraud class action. Plaintiffs accuse the company of operating an illegal pyramid scheme and seek over $150 million in trebled damages on behalf of a class of over 150,000 current and former Stream Energy independent salespeople. Gibson Dunn convinced the Fifth Circuit to vacate the district court's order certifying a class.

- Representing 926 Ardmore Avenue LLC in the California Supreme Court, challenging Los Angeles County's application and extension of the California Documentary Transfer Tax (a tax paid on documents that transfer real estate) to transfers of interests in entities that own the real estate. The case will have a significant impact on all California real estate transactions. Gibson Dunn played a key role in drafting the successful petition for review to the high court.

- Representing PacifiCare Life and Health Insurance Company in its challenge to a $173.6 million penalty imposed by the California Insurance Commissioner. Gibson Dunn successfully sought a writ of administrative mandamus from the California Superior Court, which vacated the penalty. The court also vacated the Commissioner's findings that PacifiCare was liable for more than 900,000 violations of the California Unfair Insurance Practices Act (Act), all premised on the purported change in PacifiCare's claims processing following its 2005 merger with UnitedHealth. The court refused to allow the Commissioner to reconsider on remand nine of the 19 categories of purported violations, constituting $70 million of the penalties. Gibson Dunn had previously secured orders invalidating and enjoining the Commissioner from enforcing three key regulations underpinning his interpretation of the Act.

- Serving as overall lead counsel in trial and appellate litigation relating to the development of a new mixed-use office, retail and 18,050-seat arena and entertainment complex in the Mission Bay area of San Francisco; the arena, with a target completion date in 2019, will serve as the new home basketball court for NBA Champions the Golden State Warriors basketball team. Gibson Dunn represents the Warriors in the CEQA analysis and entitlements for the project, which was approved in 2015, and in the defense of the approvals in three actions brought to obstruct construction. With co-counsel for the City of San Francisco and co-counsel for the Warriors, Gibson Dunn defeated the trial court claims in two cases, consolidated in San Francisco, and upheld the favorable judgment on appeal. We also successfully opposed an Alameda County action that sought to overturn a memorandum of understanding between the Warriors and the University of California regarding the project.

- Representing the American Chemistry Council (ACC) in its litigation to keep the State of California's Office of Environmental Health Hazard Assessment (OEHHA) from adding bisphenol-A (BPA) to the Proposition 65 list of reproductive toxicants. BPA is a critical chemical for producing shatter-resistant plastics and epoxy resins that protect all canned food and beverage against spoilage and pathogens. Despite a trial court's decision that OEHHA was entitled to list BPA, Gibson Dunn won a writ of supersedeas in the California Court of Appeal persuading the court to stay the listing during the pendency of ACC's appeal.

- Representing Dakota Access, LLC in connection with the construction and operation of the Dakota Access pipeline, a $4 billion infrastructure project connecting oil fields in North Dakota to a transshipment hub in Illinois. Gibson Dunn defeated multiple attempts to obstruct operation and completion of the project, entering the case shortly after a Native American tribe sued in the District Court for the District of Columbia and unsuccessfully sought a preliminary injunction. Multiple tribes have sued in the D.C. District Court, and proceedings have included appeals in the D.C. Circuit.

- Representing Albert G. Hill, Jr., part of the Texas-based H.L. Hunt oil family, in a suit filed against him in Dallas County district court by his former attorneys at the law firm of Shamoun & Norman. The Shamoun firm sued Mr. Hill and others for fraud, breach of contract, conspiracy, and tortious interference relating to an alleged contingency fee, seeking more than $17 million in actual damages plus punitive damages. A jury awarded Shamoun $7.25 million but Gibson Dunn persuaded the court to disregard the verdict, and a take-nothing judgment was entered. Shamoun appealed to the Dallas Court of Appeals, which reinstated the jury award, but the Texas Supreme Court reversed and ordered a new trial.

- Representing the National Cable & Telecommunications Association (NCTA) and the Copyright Alliance, in association with NBCU/Comcast, in challenging and shaping the FCC's proposed set-top box regulations that are being heavily supported by Google, TiVo, Amazon, and other technology

companies and trade groups. These companies seek access to cable companies' data streams, notwithstanding the availability and development of secure streaming apps developed by cable companies themselves. In the face of Gibson Dunn's efforts and prelude to an appeal, the agency dropped the rulemaking. This high-profile matter is a top priority for the cable and content community.

- Won unanimous D.C. Circuit affirmance, on behalf of *Playboy* magazine White House correspondent Brian Karem, of the restoration of Mr. Karem's White House "hard pass," the credential that allows journalists to access White House press areas. The Trump Administration had temporarily suspended it following a White House social media summit at which Mr. Karem was confronted by former White House advisor Sebastian Gorka. Gibson Dunn filed suit and convinced the U.S. District Court for the District of Columbia that the suspension infringed significant First Amendment liberty interests and violated the Due Process Clause of the Fifth Amendment. The district court ordered immediate restoration of the hard pass and the government appealed.

- Won a D.C. Circuit ruling for The NASDAQ Stock Market, Inc. unanimously vacating a Securities and Exchange Commission rule that implemented a two-year "pilot" program capping or eliminating fees and rebates for trades executed for randomly selected securities on the national securities exchanges. Gibson Dunn drafted the petitioner exchanges' consolidated briefs and argued the case, asserting that the SEC lacked the statutory authority to impose experimental agency action without finding that it would advance the purposes of the Exchange Act. The D.C. Circuit agreed with the exchanges, noting that the pilot program would impose "significant, costly, and disparate regulatory requirements merely to secure data that may or may not indicate to the SEC whether there is a problem worthy of regulation." The pilot program, the court concluded, "was an unprecedented action that clearly exceeded the SEC's authority under the Exchange Act."

- Secured a double D.C. Circuit victory for The Nasdaq Stock Market, Inc. against the SEC, the Securities Industry and Financial Markets Association (SIFMA) and Bloomberg. The court vacated SEC orders that set aside a Nasdaq rule establishing fees for one of its market data products, and remanded challenges to numerous other fee rules to Nasdaq for further consideration. SIFMA and Bloomberg had challenged dozens of Nasdaq's rules as impermissible limitations on access to Nasdaq's services under Exchange Act §19(d). Agreeing with Gibson Dunn, the D.C. Circuit ruled that §19(d) is not available to challenge generally applicable fee rules. This across-the-board victory will end SIFMA's and Bloomberg's pending challenges. Gibson Dunn had earlier defeated SIFMA's challenge to Nasdaq's fees for certain "depth-of-book" data products in the first-of-its-kind denial-of-access procedure before the SEC, which SIFMA had invoked. Following a four-day evidentiary hearing the SEC Chief Administrative Law Judge rejected SIFMA's challenge.

- Overturned a $706 million jury verdict, one of the largest in Texas, for Title Source, Inc. (now Amrock, Inc.), a real estate title and appraisal company, in the Texas Fourth District Court of Appeals. The case arose from a licensing agreement between Amrock and HouseCanary in connection with various HouseCanary products and services, including a mobile app for appraisers to use in the field. Amrock sued HouseCanary in Texas state court for breach of contract and fraud, and HouseCanary counterclaimed for breach of contract, fraud, and misappropriation of HouseCanary's trade secrets. A jury returned a verdict for HouseCanary on its counterclaims and against Title Source on its claims, with HouseCanary obtaining a $706 million judgment including more than $470 million in punitive damages, and more than $30 million in prejudgment interest and attorneys' fees. Gibson Dunn was then retained and the Court of Appeals agreed with the firm that the jury charge was defective as to the misappropriation and fraud claims, remanding for a new trial on them.

- Secured a more than $100 million reduction in a jury verdict against International Paper Company (IP), including the largest award of damages for emotional distress ($63 million) ever to reach a Texas court of appeals. The trial included claims for breach of contract and fraud arising out of invoices submitted by a contractor, Signature, to build a new piece of equipment at an IP mill in Orange, Texas. Gibson

Dunn was retained for the appeal. The Texas Thirteenth Court of Appeals rejected the jury's fraud finding against IP and reversed the award of approximately $43.8 million for Signature's alleged lost opportunity to sell the company, and tax penalties imposed for raiding its employees' trust fund. Among multiple claims and damages awards, the court left intact only $14.8 million of the original $125 million verdict, solely on the breach of contract claims. The court ruled that Signature's owner could not individually sue IP for breach of contract, did not prove fraud, and could not collect any of the nearly $67 million that the jury awarded him, including the record-setting emotional distress award.

- Won complete affirmance from the California Court of Appeal of the Environmental Impact Report (EIR) for a major refinery project of Marathon Petroleum Corporation, formerly Tesoro Corporation. Over four years, Gibson Dunn stewarded Marathon to approval of the EIR supporting the large-scale integration and upgrading of two refineries at the Port of Long Beach. After Gibson Dunn's land use attorneys counseled Marathon throughout the EIR administrative process, the firm upheld the EIR against challenges from a statewide community activist group in the California Superior Court. In a published opinion, the Court of Appeal upheld the project's 8,000-page EIR as fully compliant with California's Environmental Quality Act (CEQA). *Communities For A Better Environment v. South Coast Air Quality Management District* (Cal. Ct. of Appeal, 2nd App. Dist. 2020)

- Secured Fourth Circuit reversal of the district court's partial denial of PricewaterhouseCoopers LLP's request to compel arbitration of an employee's Title VII claims. The case was filed in South Carolina asserting claims under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. PwC had sought to compel arbitration and stay or dismiss the proceedings. The Fourth Circuit agreed with Gibson Dunn on every issue, agreed that the arbitration provision at issue could and should be construed to require arbitration of the plaintiff's Title VII claims, and agreed that the arbitration provision was not procedurally or substantively unconscionable. Gibson Dunn subsequently secured the recommendation of a magistrate judge in the District of South Carolina to grant PwC's request to compel arbitration in the same former employee's second Title VII case, based on the Fourth Circuit's ruling

- Won Eighth Circuit reversal of an order certifying a sprawling, nationwide class of former and current employees for Union Pacific Railroad Company (UP). Six plaintiffs sued UP under the Americans with Disabilities Act (ADA) to challenge the company's fitness-for-duty examinations, which implement federal guidance to ensure railroad workers can safely perform their jobs. They sought to certify a nationwide class of more than 7,000 employees who were subject to an exam, and the District of Nebraska did so, making it one of the largest class actions ever certified under the ADA.. Gibson Dunn was retained thereafter and obtained review of the certification order under Federal Rule of Civil Procedure 23(f). In reversing, the Eighth Circuit adopted Gibson Dunn's position that the class did not meet multiple requirements under Rule 23.

- Won two significant victories for one of the world's leading retailers when the Ninth Circuit affirmed an order denying certification of one class of former California employees and reversed an order granting certification of a different class of California employees. Plaintiff filed a putative class action against the retailer asserting various California Labor Code violations and seeking to certify several distinct subclasses. The district court first denied certification of a former employee class that received a certain discretionary bonus after termination and the Ninth Circuit granted review. A few months later, the district court certified a different cl of employees who received a wage statement with a slight mislabeling of the employer name. The retailer retained Gibson Dunn as appellate counsel and the firm obtained Ninth Circuit review of the order certifying the wage statement class. The Circuit adopted Gibson Dunn's position in unanimously affirming the denial, and reversing the grant, of certification.

- Secured unanimous reversal from the Nebraska Supreme Court of the lower court's refusal to dismiss a former employee's case against BNSF Railway Co. for lack of jurisdiction over the company. The

Supreme Court ruled that the U.S. Constitution does not permit states to exercise personal jurisdiction over corporate defendants merely because they register to do business in the state. The plaintiff, who was injured while working, sued BNSF in the Nebraska district court, which had refused to dismiss on the theory that BNSF "consented" to general jurisdiction by registering to do business in Nebraska. In reversing, the Nebraska Supreme Court, at Gibson Dunn's urging, overruled its own precedent as inconsistent with U.S. Supreme Court cases, including *Daimler AG v. Bauman*, a Gibson Dunn win. The Nebraska Supreme Court also rejected plaintiff's argument – that BNSF was sufficiently "at home" in Nebraska for purposes of general personal jurisdiction – as inconsistent with the U.S. Supreme Court's *BNSF Railway Co. v. Tyrrell* decision, also a Gibson Dunn win.

- Won a historic victory for three pro bono clients born in American Samoa, a U.S. territory, but denied citizenship under 8 U.S.C. §1408(1), which brands those born in American Samoa as "nationals, but not citizens, of the United States." The District of Utah held that "[p]ersons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment" and therefore that "§1408(1) is unconstitutional both on its face and as applied" to our clients. While persons born in American Samoa owe "permanent allegiance" to the United States, the fact that they were not recognized as citizens meant that the clients could not vote, run for federal or state office, serve on juries, or become officers in the U.S. Armed Forces. Their passports carried Endorsement 09, stating that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." Gibson Dunn sued the United States, the State Department, and various State Department officials alleging that §1408(1) and its implementing regulations were unconstitutional under the Fourteenth Amendment's Citizenship Clause. The court agreed, rejected the arguments in opposition from the United States, joined by intervenors the American Samoan Government and the Honorable Aumua Amata, and enjoined the government from enforcing §1408(1) or its implementing regulations. Before Gibson Dunn's involvement, no court had accepted the argument that those born in unincorporated territories were entitled to birthright citizenship.

- Won unanimous Ninth Circuit reinstatement of a lawsuit brought by the pro bono client over delayed and neglectful medical treatment he received while incarcerated in federal prison. The client had sued several of his former medical providers alleging that they violated the Eighth Amendment by failing to promptly or adequately treat his serious thyroid and kidney problems. The district court first dismissed multiple defendants on its own and later entered judgment against the two remaining defendants. Gibson Dunn was appointed to represent the client on appeal to the Ninth Circuit, which reversed judgment against his frontline care provider because evidence showed that she failed to report his clinic visits or schedule further care, despite his reports of serious symptoms. The Circuit also allowed the client to amend his complaint against two of the dismissed defendants. M. Perry 2019

- Won unanimous affirmance from the Ohio Fifth District Court of Appeals for Rover Pipeline LLC of the dismissal of the State of Ohio's suit against Rover and its five contractors alleging violations of state water quality laws during construction of the Rover Pipeline, a 713-mile interstate natural-gas pipeline subject to Federal Energy Regulatory Commission (FERC) approval and oversight. Although Rover had remediated any construction-related environmental issues to FERC's satisfaction, Ohio sought to impose additional penalties and procedures based on the same issues. The trial court dismissed on three grounds including that the State waived its authority to regulate the project's water quality impacts by failing to issue a timely water quality certification under Clean Water Act §401. The Court of Appeals adopted Gibson Dunn's arguments in affirming on that ground, resolving an important and recurring issue of first impression with respect to the division of federal and state authority to regulate environmental impacts from federally licensed projects.

- Secured a major victory for CTIA–The Wireless Association® and NCTA–The Internet & Television Association when the D.C. Circuit upheld the FCC's authority to pursue a "market-based, light-touch policy" for broadband Internet access service. CTIA and NCTA had joined other industry groups in intervening to defend the FCC's Restoring Internet Freedom Order, which restored the status quo after the agency, in 2015, departed from its decades-old, bi-partisan approach to regulating broadband

Internet access service and classified it as a “telecommunications service” subject to utility-style regulation under Title II of the Telecommunication Act of 1996. The Order reclassified broadband as an “information service" immune to Title II regulation, and repealed the agency’s 2015 “net neutrality" rules. The D.C. Circuit rejected most challenges by consumer advocates, state and local governments and technology companies, although ordering the FCC to address certain issues on remand. The court vacated the portion of the Order purporting to preempt state and local regulations that impose net neutrality rules. Gibson Dunn has been at the forefront in the net neutrality debates in the United States, previously winning a high-profile round of litigation in the D.C. Circuit for client Verizon.

- Won relief for Swisher International Inc. from a $44 million antitrust verdict in the Central District of California when the court set it aside on grounds of fraud on the court, newly discovered evidence and other misconduct by plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (TSI). Plaintiffs had alleged that Swisher violated Sherman Act §2 and breached its supply agreement with them, among other things. Gibson Dunn was retained to handle post-trial proceedings after a jury found against Swisher on plaintiffs’ antitrust and contract claims, resulting in the $44 million trebled damages award. The court granted Swisher relief but the Ninth Circuit reversed. Thereafter Swisher discovered that TSI’s CEO had engaged in a massive tax evasion scheme, illegally lowering TSI’s costs and artificially boosting profits, undermining the theory of injury and damages presented to the jury and the court. Swisher then successfully sought relief in the district court, which vacated the jury's verdict on the antitrust and contract claims and ordered a new trial. *The Daily Journal* named the victory for Swisher when the Central District of California set the $44 million verdict aside a Top Defense Result in California for 2019.

- Secured enforcement of a $21 million Tennessee state court judgment in favor of Nissan North America, Inc. from the California Superior Court. The Tennessee court awarded Nissan the $21 million against the former service manager of a Nissan Southern California dealership, finding that the defendant was an “active and controlling participant" in a “brazen, intentional, and malicious multi-million dollar scheme" to defraud Nissan by submitting fictitious warranty claims for reimbursement. Nissan sought to enforce the judgment in California but the company’s prior counsel failed to oppose the defendant’s request to vacate it on jurisdictional grounds, and the Superior Court ordered it vacated. Nissan then retained Gibson Dunn, which obtained relief from that order and defeated the request to vacate on its merits. The court ordered that the award be enforced.

- Secured a complete victory for NeoPollard Interactive LLC and Pollard Banknote Limited, operators of online lotteries for the States of New Hampshire and Michigan, on their challenge in the District of New Hampshire to the U.S. Department of Justice’s reinterpretation of the federal Wire Act. Under the DOJ’s 2011 interpretation, only interstate transmissions of sports bets or sports-betting information were unlawful. A 2019 reinterpretation concluded that the Wire Act extended beyond the sports-betting context to criminalize the interstate transmissions of all bets or wagers, sports-related or not, thereby threatening to shut down a burgeoning industry. Gibson Dunn, working alongside the New Hampshire Lottery Commission, sought a declaratory judgment that the reinterpretation was based on an incorrect statutory reading. Adopting nearly all of Gibson Dunn’s arguments, the court held that the Wire Act applied “only to transmissions related to bets or wagers on a sporting event or contest” and ordered the new opinion be set aside.

- Agreeing with Gibson Dunn’s arguments on behalf of Health Management Systems, Inc. (HMS), the Fifth Circuit unanimously upheld the U.S. Department of Health and Human Services’ denial of whistleblower claims under the American Recovery and Reinvestment Act of 2009 (ARRA) against HMS. Interpreting ARRA’s whistleblower provisions for the first time, the Circuit agreed that the alleged whistleblowing activity was not a contributing factor in the whistleblower’s termination, and that he would have been terminated regardless as part of a company-wide reduction in force.

- Defeated a nearly $1 million attorneys’ fee claim against fashion brand Louis Vuitton (LV) in connection with its copyright and trademark claims against My Other Bag, Inc. (MOB). MOB sells handbags with

copies of designer handbags displayed as images on one side of the bags. After a loss on summary judgment and on Second Circuit appeal when represented by other counsel, LV turned to Gibson Dunn to defend against MOB's attorneys' fees claim. The Southern District of New York rejected the fee request, determining that this was not litigated in a vexatious manner such as to merit fees under the Copyright Act or an "exceptional case[]" under the Lanham Act. The Second Circuit affirmed, accepting all of Gibson Dunn's arguments.

- Secured an appellate costs award and reversal, from the California Court of Appeal, of a nearly $70 million judgment against Angela Chen Sabella, the daughter of deceased Hong Kong multibillionaire Chen Din-Hwa, founder of Hong Kong's Nan Fung Group and one of Asia's leading billionaire tycoons. In two consolidated appeals presenting questions of gift law, promissory estoppel, indispensable-party, California procedural law and the law of attorneys' fees, the court reversed a summary judgment and attorneys' fee award won by plaintiff Rostack Investments, Inc. and remanded to the lower court for the appellate costs' calculation. Gibson Dunn had been retained as appellate counsel after the adverse judgment to brief and argue several appeals, including these two, part of a broader-ranging cross-border dispute between Chen Din-Hwa's two daughters and their various companies and affiliates. Gibson Dunn subsequently secured the Court of Appeal's unanimous affirmance of the lower court's seven-figure appellate costs award to our client. Ruling on an issue of first impression, the Court of Appeal held that an appellate costs award is a separate, independent and final order, immediately enforceable even if further proceedings (e.g., a forthcoming trial) are pending in the lower court, and that a party's appellate costs may be reasonable and necessary, and thus recoverable, even if less expensive alternatives may have been available.

- Secured a crucial stay from the California Court of Appeal for the coffee industry of an impending trial with the potential to impose massive penalties and require the addition of a cancer warning to the sale and distribution of the industry's products in California. The coffee industry had lost multiple defenses in years-long litigation begun by the Council for Education and Research on Toxics (CERT) to impose penalties on the industry for failing to warn that coffee contained a chemical, acrylamide, known to the State of California to cause cancer under Proposition 65, the state's Safe Drinking Water and Toxic Enforcement Act of 1986. Gibson Dunn was then retained to assess strategy and avenues for appellate review. After the trial court denied a request to renew the previously denied First Amendment defense and refused to reopen its liability finding, Gibson Dunn secured the appellate stay. California's Office of Environmental Health Hazard Assessment (OEHHA) has since enacted a regulatory change exempting coffee from the Prop 65 labelling requirements.

- Secured a landmark, favorable ruling for a commercial real estate partnership from the New York State Court of Appeals, which construed provisions of New York's Partnership Law (NYPL) regarding partnership dissolution, and resolved open questions regarding minority partner interest valuation. The case arose when a minority partner attempted to unilaterally dissolve the partnership and force a liquidation of its assets, arguably in accordance with the NYPL. The partnership retained Gibson Dunn after the Court of Appeals granted review. The Court ruled squarely in the partnership's favor, interpreting the statute to preclude unilateral dissolution whenever a partnership agreement delineates the terms of dissolution in any respect.

- Obtained an Internet privacy win for Facebook, Inc. when the District of Columbia Court of Appeals ruled that the Stored Communications Act (SCA) prohibits criminal defendants from subpoenaing service providers for a prosecution witness's social media records. The case arose on the eve of a criminal defendant's high-profile quadruple murder trial, when the defendant subpoenaed Facebook for the social media records of a key prosecution witness. After the trial judge denied Facebook's request to quash the subpoena, finding that to apply the SCA would violate criminal defendants' constitutional due process rights, Gibson Dunn took over the case and secured the appeal. In reversing, the Court of Appeals adopted Facebook's arguments that the subpoenas were "barred by the plain text" of the SCA, and that the defendant had not established "a serious constitutional concern that could warrant a departure from the plain language" of the statute.

- Successfully challenged the constitutionality of the federal Indian Child Welfare Act (ICWA), and the legality of interpretive federal regulations, in the Northern District of Texas on behalf of pro bono clients, three non-Indian families seeking to adopt or that have adopted Indian children as well as the biological mother of one of them. Gibson Dunn was joined in its suit against the federal government by the states of Texas, Louisiana and Indiana; several Indian tribes intervened to defend the law. ICWA establishes special rules that state courts must follow in any foster or adoption proceeding involving an "Indian child," defined as any child that is (i) a member of a tribe or (ii) the biological child of a member and eligible for membership. In particular, ICWA creates a preference that Indian children be placed with members of the child's tribe or members of any other Indian tribe before being placed with non-Indian families. ICWA also allows the validity of adoptions of Indian children to be collaterally attacked for up to two years after the adoption is finalized, much longer than state law. The Northern District of Texas held that ICWA is a racially discriminatory statute that violates the U.S. Constitution's guarantee of equal protection, the non-delegation and anti-commandeering doctrines, and that it exceeded the power of Congress under the Indian Commerce Clause. The court also struck down the regulations.

- Won a major victory for Uber Technologies, Inc. when the Ninth Circuit decertified a class of hundreds of thousands of current and former drivers alleging they were misclassified as independent contractors. Relying on its 2016 decision in *Mohamed v. Uber Technologies, Inc.*, which upheld the enforceability of Uber's arbitration agreements with drivers, the unanimous panel reversed the district court's class certification orders, orders denying Uber's motions to compel arbitration, and orders regulating Uber's communications with drivers under Rule 23(d). The Ninth Circuit's decision effectively halted the most high-profile set of cases challenging independent contractor classification in the gig economy. *The Daily Journal* named the *O'Connor* win among the Top 5 Appellate Reversals in California for 2018.

- Obtained a major victory for Coventry Health and Life Insurance Company, a subsidiary of Aetna Inc., when the Kentucky Supreme Court held that a Medicaid enrollee who received full treatment from her health care provider, but whose provider was denied reimbursement from the managed care organization, could not seek judicial review of the denial of reimbursement to the provider. As a matter of first impression, the Court further held that "all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court, because the issue of constitutional standing is not waivable." The decision has significant implications for the standing doctrine in Kentucky's courts.

- Secured unanimous Fifth Circuit affirmance of the dismissal of a RICO fraud class action against Stream Energy, one of the largest retail energy companies in Texas. Plaintiff sued in 2015 alleging that Stream operated an illegal pyramid scheme. Gibson Dunn compelled arbitration the following year based on the arbitration clause plaintiff signed when he joined Stream as an independent sales associate. Following plaintiff's subsequent inaction for 18 months the district court dismissed the case without prejudice, and the Fifth Circuit affirmed based on plaintiff's "clear record of intentional delay and contumacious conduct." Agreeing with Gibson Dunn, the Circuit also declined to address the merits of the interlocutory order compelling arbitration.

- Preserved more than $3 billion in compensatory damages judgments against the Republic of Sudan when the D.C. Court of Appeals unanimously ruled in favor of our clients, victims of the 1998 African embassy bombings that were perpetrated by al Qaeda and sponsored by Sudan. The clients sued Sudan under the Foreign Sovereign Immunities Act's "terrorism exception" for intentional infliction of emotional distress under D.C. law. On an appeal in the D.C. Circuit Sudan argued that a subset of the clients—non-U.S. nationals who were the immediate relatives of those killed or injured in the terrorist attacks—could not recover because they were not physically present at the site of the attack. The D.C. Circuit certified this question to the D.C. Court of Appeals, which answered that presence was not required, granting our clients a complete victory.

- Obtained a significant affirmance for BNSF Railway Co. in three cases consolidated for appeal to the Montana Supreme Court, which held that corporations do not consent to the general jurisdiction of Montana courts by registering to do business and appointing an agent for service of process. The affirmance of the lower courts' decisions dismissing the actions forced those plaintiffs to refile their claims in appropriate jurisdictions. Significantly, the Montana Supreme Court was also the first to hold squarely that several early 20th century U.S. Supreme Court cases suggesting that registration in a state could give rise to consent jurisdiction were no longer good law in light of *International Shoe* and Gibson Dunn's key jurisdictional wins *Daimler AG v. Bauman*, and *BNSF Railway Co. v. Tyrrell*.

- Won Federal Circuit affirmance of a judgment for Palantir USG, Inc. in a pre-award bid protest arising from the Army's decision to acquire a new data management platform. The Federal Acquisition Streamlining Act (FASA) requires federal agencies to procure commercial items "to the maximum extent practicable" but, while Palantir informed the Army it had a commercial platform that could meet the Army's requirements, the Army issued a developmental contract that would take six years to complete and cost hundreds of millions of dollars. Palantir sued in the Court of Federal Claims alleging that the Army violated FASA §2377 by failing to determine whether its needs could be met with readily available commercial items. The court enjoined the Army from awarding a contract and Palantir retained Gibson Dunn for the Army's appeal. The Federal Circuit affirmed the judgment below that "only after the Army has complied with 10 U.S.C. §2377 should it proceed to award a contract."

- Successfully represented Bayou Bridge Pipeline, LLC (BBP) when the Fifth Circuit ruled in favor of it and the U.S. Army Corps of Engineers (Corps), vacating a preliminary injunction that halted construction of the Bayou Bridge Pipeline through the Atchafalaya Basin, a Louisiana wetland. The 163-mile pipeline is the final section of a pipeline system carrying oil from North Dakota to Louisiana. Plaintiffs Atchafalaya Basinkeeper and others filed suit against the Corps seeking to vacate two permits that it issued for the pipeline, and to enjoin construction, claiming that the permits violated the National Environmental Policy Act and the Clean Water Act. After Gibson Dunn intervened on behalf of BBP, plaintiffs sought and received, from the Middle District of Louisiana, a preliminary injunction stopping construction. Gibson Dunn successfully sought a stay of the injunction in the Fifth Circuit, and then on appeal, the Circuit adopted several of our arguments in vacating it.

- Secured multiple favorable decisions from the Northern District of Texas in a lawsuit concerning Facebook's Oculus Rift virtual reality gaming system. The jury found against ZeniMax on its trade secrets claim but returned the $500 million verdict for breach of contract, copyright infringement, and violation of the Lanham Act. Gibson Dunn was retained after trial and spearheaded post-trial proceedings, successfully arguing that the $250 million Lanham Act verdict could not stand and that the requested injunction would be inappropriate. The court denied the requested injunction, entered judgment for Oculus on the Lanham Act claim and, finding that ZeniMax had engaged in discovery misconduct, imposed a substantial monetary sanction. Gibson Dunn was preparing to challenge the remainder of the claims on appeal when the parties successfully settled the matter.

- Secured unanimous Sixth Circuit affirmance for Uber Technologies, Inc. of the district court's enforcement of Uber's arbitration agreement with drivers. In this proposed class action brought by two Michigan men, Uber was accused of violating the Fair Labor Standards Act and Michigan labor law by classifying plaintiffs as independent contractors and denying them wages and other benefits. The district court compelled individual arbitration of plaintiffs' claims pursuant to an arbitration agreement in Uber's Licensing Agreements. On appeal, plaintiffs, joined by the NLRB as amicus curiae, unsuccessfully argued that the arbitration agreement violated the National Labor Relations Act because it contains a class waiver.

- Secured dismissal for Kimberly-Clark Corporation (KCC) of a lawsuit filed by Halyard Health in the California Superior Court, and affirmance by the California Court of Appeal, effectively shifting the parties' contractual indemnification dispute back to Delaware. The case arose after a nearly half-billion-dollar jury verdict against KCC and Halyard in the Central District of California (the "Bahamas"

litigation) relating to the sale of surgical gowns. Halyard, KCC's former healthcare division, had been spun off and, in the spin-off agreement, agreed to defend and indemnify KCC for liabilities resulting from the Bahamas lawsuit and others around the United States involving KCC's former healthcare business. But following the Bahamas verdict, Halyard filed the California suit seeking to partially repudiate those obligations. KCC immediately filed suit to enforce the parties' agreement in the Delaware Chancery Court, that court stayed the case pending the outcome of the California action, and Gibson Dunn then secured its dismissal and the affirmance.

- Secured a 95% reduction of a combined $454 million verdict against Kimberly-Clark and Halyard Health when the Central District of California ordered a post-trial remittitur of the punitive damages awards against them from $450 million to just over $20 million. Gibson Dunn was retained following the jury trial in this class action involving claims of fraud and unfair competition under California law concerning defendants' alleged failure to disclose material deficiencies in the fluid resistance of their MicroCool surgical gown. The jury awarded compensatory damages of just under $4 million against Kimberly-Clark and approximately $260,000 against Halyard, and punitive damages of $350 million against Kimberly-Clark and $100 million against Halyard. Gibson Dunn filed post-trial motions for judgment as a matter of law, new trial, and to decertify the class. Gibson Dunn later defeated an attempt by Halyard, Kimberly-Clark's spun-off former health care division, to repudiate its defense and indemnification obligations in a California state court lawsuit. *The Daily Journal* named the 95% verdict reduction a Top Defense Result in California for 2018.

- Successfully represented the U.S. Chamber of Commerce in a D.C. Circuit challenge to the Federal Communications Commission's 2015 Declaratory Ruling and Order that vastly expanded the scope of the Telephone Consumer Protection Act. The court, ruling for the petitioners on two significant issues, unanimously vacated part of the order, which was extremely important to the business community because it exposed legitimate companies across the United States to liability for attempting in good faith to communicate with customers who previously provided valid consent to be contacted. This decision substantially reduced the increasing burden of class action liability under the TCPA and helped to restore the open lines of communication necessary to consumers and businesses in our modern economy.

- Successfully represented Uber Technologies, Inc. in a putative class action filed in the Southern District of New York on behalf of Uber riders and alleging that Uber's driver-partners conspired to fix prices in violation of Section 1 of the Sherman Act. Plaintiff claimed that Uber controlled the prices by its algorithm, including the use of "surge pricing," and that the driver-partners agreed to charge the fares set by the algorithm. Gibson Dunn was retained after the court denied the dismissal request of the defendant, former Uber CEO Travis Kalanick, and we secured the company's joinder as an additional defendant. The district court, however, then denied Uber's request to compel arbitration based on the contract that plaintiff, an Uber user, had formed when he registered for an account using his smartphone. Gibson Dunn won a stay of the impending trial and Second Circuit reversal. The Circuit held that the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law, and that plaintiff's agreement to arbitration was unambiguous in light of the objectively reasonable notice of the terms. The Southern District granted Uber's request to compel arbitration and dismissed the claims against the company.

- Won two unanimous rulings from the California Court of Appeal for Parsons Corporation, reversing a $93 million breach of contract judgment (more than $126 million with interest), and affirming dismissal of False Claims Act (FCA) claims, in related 24-year-old cases arising out of Parsons' work on the Los Angeles subway system. This was one of the longest-running FCA cases in history. A former employee of the Parsons-Dillingham Metro Rail Construction Manager Joint Venture sued under federal and state FCAs, claiming the joint venture defrauded the Los Angeles County Metropolitan Transportation Authority (MTA) in providing construction management services on the Metro Red Line. The MTA then filed a breach of contact action. Parsons retained Gibson Dunn after the trial court had issued the more than $93 million judgment, refused to dismiss the FCA claims, and set them

for trial. Gibson Dunn won eve-of-trial dismissal of the FCA claims and a $309,535.57 award of costs and fees. In reversing the judgment, the Court of Appeal also rejected MTA's attempt to recover an additional $86 million in subcontractor labor costs. In affirming dismissal of the FCA claims, the court also affirmed the award of costs to Parsons from MTA. The California Supreme Court denied MTA's attempt to appeal further.

- Secured, and later preserved on appeal, a precedent-setting victory for MetLife, Inc. when the District Court for the District of Columbia ruled that MetLife's designation as a nonbank systemically important financial institution (SIFI) by the Financial Stability Oversight Council (FSOC) was arbitrary and capricious and must be rescinded. This was the first legal challenge to a designation by FSOC, established by the U.S. Congress in the Dodd-Frank Act to identify and designate as SIFIs financial companies that are "too big to fail" and whose material financial distress could cause instability in the U.S. economy. FSOC appealed but, after MetLife filed a supplemental brief demonstrating the inconsistencies between FSOC's position in the case and a recent Treasury Department report on the FSOC designation process, FSOC agreed to file a joint motion to dismiss the appeal. The D.C. Circuit granted the request, thus preserving MetLife's historic district court victory.

- Won a major appeal for real party in interest BNSF Railway under the California Environmental Quality Act (CEQA) when the California Court of Appeal reversed in part a judgment and writ of mandamus setting aside the City of Los Angeles' approval of a state-of-the-art railway facility near the Ports of Los Angeles and Long Beach, called the Southern California International Gateway Project (SCIG). BNSF proposed SGIG in 2005 as a new, environmentally friendly rail facility to be located only four miles from the ports; SCIG would replace millions of miles of truck trips that otherwise go to BNSF's current facility located 24 miles from the ports. After the City of Los Angeles approved the facility and certified the environmental impact report (EIR), lawsuits ensued under CEQA and the Attorney General intervened on behalf of the petitioner-plaintiffs. When the trial court invalidated several key sections of the EIR, BNSF retained Gibson Dunn for the appeal. The Court of Appeal adopted virtually all of Gibson Dunn's arguments, and the California Supreme Court then denied review.

- Secured unanimous reversal from the Massachusetts Supreme Judicial Court (SJC) of a judgment against two biotech investors under the Massachusetts Wage Act. The plaintiff, co-founder of Genitrix, LLC, a biotech startup, served as its president and sole officer. Defendants Johnson invested in the company, and Rose served on its board of directors. The company began to fail, Segal elected not to take a salary, but later sued Johnson and Rose for unpaid wages. A jury found the defendants liable and the trial court awarded treble damages, prejudgment interest, attorneys' fees, and costs. Gibson Dunn secured direct review in the SJC, bypassing the Massachusetts Appeals Court, and the SJC rejected the trial court's expansive interpretation of the Wage Act, making clear that the SJC decision was to definitively establish the governing legal framework for Wage Act cases going forward.

- Defeated an original action filed against AT&T, Inc. in the Oklahoma Supreme Court seeking over $14 billion in refunds on behalf of a putative class of millions of Oklahoma AT&T customers. A 1989 rate order of the Oklahoma Corporation Commission (OCC) had allowed Southwestern Bell Telephone Company, a predecessor entity, to invest certain funds rather than refund them to customers but it was later uncovered that the OCC vote approving the order included a favorable vote resulting from a bribe. Working with Oklahoma counsel to AT&T, Gibson Dunn successfully argued that the Court could not revisit the 1989 rate order. A later attempt to have the OCC reconsider the 1989 order sought the issuance of refunds to AT&T consumers for a potential liability of $16 billion. The OCC declined and the Oklahoma Supreme Court, before which Gibson Dunn represented AT&T with local counsel, affirmed.

- Secured dismissal, and affirmance from the California Court of Appeal, for Facebook in an action brought by an advertiser claiming that Facebook overcharged on the advertising contract and committed various torts and antitrust violations. After Gibson Dunn persuaded the California Superior Court to sustain Facebook's demurrer to the complaint, we successfully argued the case before the

Court of Appeal, which affirmed the earlier judgment. On the plaintiff's further appeal. the California Supreme Court denied review.

- Successfully challenged a Surface Transportation Board (STB) rule on behalf of the Association of American Railroads, securing a unanimous Eighth Circuit opinion striking it down. The rule established on-time performance standards for Amtrak trains running on tracks owned by freight railroads, and provided that failure to meet the standards could trigger federal investigations into whether the delays were caused by the host railroads' failure to give Amtrak preference over freight traffic. Gibson Dunn led the freight railroad industry's challenge, and the court's opinion was historic, representing the first time it had struck down an STB rule. The challenged rule was an effort to replace a similar one promulgated by Amtrak and the Federal Railroad Administration that Gibson Dunn successfully challenged on constitutional grounds in the D.C. Circuit.

- Successfully served as lead appellate counsel to MHC Operating Limited Partnership and MHC Financing Limited Partnership, affiliates of real estate investment trust Equity LifeStyle Properties (MHC), challenging a multimillion-dollar jury verdict in favor of residents of Cal Hawaiian, a 1,500-resident mobile home park in San Jose, California. Plaintiffs sued for breach of contract, negligence and nuisance, alleging unsafe and dangerous conditions at the mobile home park. Gibson Dunn assisted trial counsel in securing a new trial on damages. On appeal, plaintiffs sought reinstatement of the $111 million damage verdict, while MHC sought a new trial on both liability and damages, and dismissal of plaintiffs' $11.5 million emotional distress claims, and $95.8 million punitive damage claims. Plaintiffs agreed to settle while the appeals were pending.

- Successfully represented the Association of American Railroads in a years-long constitutional challenge to a provision of the Passenger Rail Investment and Improvement Act (PRIIA) that gave Amtrak an equal role with the Department of Transportation in issuing regulations governing Amtrak's operations. A unanimous panel of the D.C. Circuit agreed with Gibson Dunn that PRIIA was unconstitutional, and on appeal the U.S. Supreme Court referred the matter back to the D.C. Circuit, which again unanimously agreed with Gibson Dunn, holding that PRIIA violates the U.S. Constitution's Due Process Clause and Appointments Clause. The District Court for the District of Columbia then declared PRIIA void and unconstitutional.

- Defeated a False Claims Act case for Kaplan Inc. in which a former admissions representative-turned-plaintiff/relator alleged that a Kaplan-affiliated school in Las Vegas knowingly received federal financial aid on behalf of "phantom students" who either never attended the school or had previously withdrawn. Gibson Dunn first won dismissal of the case in the District of Nevada. After the Ninth Circuit reversed, we won again – on summary judgment, showing that the plaintiff could not point to one false claim. The Ninth Circuit then unanimously affirmed the grant of summary judgment.

- Scored Eleventh Circuit victories for Kaplan Higher Education Corporation, Kaplan, Inc., and Kaplan University in two consolidated FCA cases.

    - The Circuit affirmed the Southern District of Florida's grant of summary judgment in *U.S. ex rel. Gillespie v. Kaplan University*, dismissing claims that Kaplan had falsely certified that it was in compliance with the Rehabilitation Act of 1974 in order to falsely continue to receive federal student aid funds. Accepting Gibson Dunn's arguments, the Eleventh Circuit adopted a high threshold for the scienter requirement in FCA actions and, perhaps more importantly, held that in a false certification case the relator must demonstrate that the defendant had the requisite knowledge at the time it made the false certification.

    - The Circuit in 2019 affirmed the Southern District of Florida's grant of summary judgment on the plaintiff-relator's one remaining claim, which the Circuit had remanded in 2015 while at the same time affirming the district court's dismissal on the pleadings of the

plaintiff-relator's three other claims. In *U.S. ex rel. Diaz v. Kaplan University* the relator had alleged that Kaplan had falsely certified compliance with multiple requirements of the Department of Education. In its 2015 affirmance, the Circuit established useful precedent not just for for-profit-education and other FCA defendants, but also for defendants moving for dismissal under Federal Rule of Civil Procedure 12(b) in a broad range of other contexts. The Circuit's 2019 affirmance was across the board on both grounds advanced in Gibson Dunn's briefing.

- Defeated unconstitutional Pennsylvania horse racing regulations for Churchill Downs, the sponsor of the Kentucky Derby (CD) when, following litigation instituted by Gibson Dunn on CD's behalf, the Governor of Pennsylvania signed legislation repealing provisions that CD had challenged. CD accepted horse race wagers from Pennsylvanians on its online wagering platform, TwinSpires.com. However, in 2016 the Pennsylvania Legislature enacted Act 7 excluding out-of-state companies like CD from accepting online wagers from most Pennsylvanians, and imposing high fees on wagers accepted from the rest. CD filed suit in the Commonwealth Court of Pennsylvania challenging Act 7. The Governor's signature on Act 42 removed the out-of-state company exclusion and greatly reduced the related fee, achieving CD's goals in bringing suit.

- Secured Ninth Circuit affirmance of the dismissal of an antitrust-based False Claims Act suit against Aventis (now Sanofi) by competitor Amphastar Pharmaceuticals involving the blockbuster prescription drug Lovenox and seeking damages and fines in excess of $5 billion. Amphastar's qui tam suit charged Aventis with improperly securing a patent that allowed it to overcharge the government for a drug, and alleged anticompetitive exclusion of generic competition. The Central District of California ruled after a four-day hearing that Amphastar's allegations had been publicly disclosed before it filed its suit and that it did not have direct and independent knowledge of the information on which its allegations were based. In affirming, the Ninth Circuit confirmed the applicability of the public disclosure bar, and remanded for consideration of a fee award, which the district court granted, directing Amphastar to pay Sanofi's attorneys' fees for having filed a frivolous suit.

- Secured unanimous Fifth Circuit reversal of the largest judgment in the history of the False Claims Act for Trinity Industries Inc. The judgment, which followed a Texas federal jury verdict against Trinity, totaled more than $663 million in damages and civil penalties. Trinity hired Gibson Dunn to lead its appeal before the Fifth Circuit, which rendered judgment as a matter of law for Trinity, holding that "the finding of fraud cannot stand," and announcing that the ruling hereby "ends this litigation." The U.S. Supreme Court denied review. Gibson Dunn has also secured dismissals of many of the suits filed by the relator under various states' false claims acts, which had been paused while the federal case was being litigated. The relator has lost or abandoned his state claims including in Delaware, Florida, Georgia, Indiana, Iowa, Minnesota, Montana, Nevada, Rhode Island, Tennessee and New Jersey.

- Won dismissal for Trinity Industries, Inc. from the New Jersey Superior Court of the amended complaint in a New Jersey False Claims Act suit that the relator had filed during the pendency of his federal False Claims Act litigation against Trinity, which Gibson Dunn defeated. This was the relator's latest defeat by Gibson Dunn in his ongoing litigation against Trinity, and marked the eleventh state false claims act dismissal in the litigation regarding the "ET Plus," an "end terminal" that is mounted on the ends of highway guardrails and that Trinity manufactures. During the pendency of his federal case, the relator had filed suit against Trinity under multiple states' false claims acts, including New Jersey, all of which had been paused pending resolution of the federal litigation.

- Won dismissal for Trinity Industries, Inc. from the First Circuit Court for Davidson County, Tennessee of a Tennessee False Claims Act suit that the relator had filed during the pendency his federal False Claims Act litigation against Trinity, which Gibson Dunn defeated. In dismissing the relator's amended complaint the court agreed in all respects with Trinity's arguments. This was the relator's latest defeat by Gibson Dunn in his ongoing litigation against Trinity, and marked the tenth state false claims act dismissal in the litigation regarding the "ET Plus," an "end terminal" that is mounted on the ends of

highway guardrails and that Trinity manufactures. During the pendency of his federal case, the relator had filed suit against Trinity under multiple states' false claims acts, including Tennessee, all of which had been paused pending resolution of the federal litigation.

- The en banc Sixth Circuit upheld a county board's practice of opening its sessions with non-coercive, faith-specific prayers, drawing significantly from a Gibson Dunn amicus brief submitted on behalf of more than 30 members of Congress. The Jackson County, Michigan Board of Commissioners had for years opened its meetings with an invocation. The plaintiff sued to enjoin the practice but the federal district court upheld it, relying on the U.S. Supreme Court's 2014 *Town of Greece, N.Y. v. Galloway* decision, a Gibson Dunn win. On appeal, the Sixth Circuit struck down the practice but, following its sua sponte grant of en banc rehearing, Gibson Dunn filed the amicus brief in support of Jackson County. The en banc court then affirmed the district court for reasons that echoed the arguments and relied on the historical evidence set forth in the firm's brief.

- Obtained unanimous Fifth Circuit affirmance of the denial of plaintiff's preliminary injunction request in a lawsuit he filed against the City of Dallas and two of its police officers. Plaintiff's suit, in the Northern District of Texas, alleged that the City violated his First and Fourteenth Amendment rights because Klyde Warren Park, which connects downtown and uptown Dallas, declined to issue him a permit to erect a 6.5-foot-tall sketch board on a pedestrian walkway in the park. The district court denied plaintiff's preliminary injunction request. In affirming, the Fifth Circuit held that the park's permitting requirement for structures was narrowly tailored, left open ample alternative channels of communication, was not subject to the unbridled discretion doctrine, and was not unconstitutionally vague. The Circuit also ruled that plaintiff's challenge was moot.

- Secured a victory when the California Supreme Court ruled unanimously in favor of Gibson Dunn's clients, an international law firm and one of its partners. When the client found itself less than a month away from oral argument before California's highest court, but with existing counsel too ill to present argument, it turned to Gibson Dunn to fend back a potentially damaging malicious prosecution suit. Adopting the narrative, arguments, and distinctions developed and advanced by Gibson Dunn at oral argument, the California Supreme Court sided with the client on both issues of broad significance to attorneys and their clients in California.

- Secured victory for Yamaha Motor Corporation when the Ninth Circuit unanimously affirmed the district court's dismissal of a putative nationwide class action in which plaintiffs alleged that certain four-stroke outboard Yamaha motors contained a design defect that caused premature corrosion in the motors' dry exhaust system. Plaintiffs sued in the Central District of California under 12 different states' consumer protection statutes. The Ninth Circuit affirmed dismissal of Yamaha Motor Co., the Japanese manufacturer, for lack of general personal jurisdiction under the U.S. Supreme Court's *Daimler* decision, also a Gibson Dunn win, and for lack of specific personal jurisdiction. The Circuit also affirmed the dismissal of all claims against Yamaha Motor Corporation, U.S.A. for plaintiffs' failure to plead a consumer fraud case.

- Won several False Claims Act appeals before the Ninth and Eleventh Circuits involving proprietary institutions of higher education.

- Won a multimillion-dollar appeal for victims of international terrorism when the D.C. Circuit issued a unanimous opinion substantially in favor of Gibson Dunn's clients, victims of the 1998 U.S. embassy bombings in Kenya and Tanzania perpetrated by al Qaeda and sponsored by the Republic of Sudan. The Circuit held that our clients are entitled to enforce judgments against Sudan totaling $556 million, and certified to the D.C. Court of Appeals a question regarding the judgments of other clients worth in excess of $400 million. Rejecting almost every argument put forward by Sudan, the Circuit affirmed that terrorist bombings constitute "extrajudicial killings" within the meaning of the Foreign Sovereign Immunities Act (FSIA) and affirmed the district court's finding that Sudan was liable for providing material support to al Qaeda that was indispensable to the bombings. The Circuit did, however, vacate

other plaintiffs' punitive damages against Sudan on the ground that such damages are not possible for conduct pre-dating the 2008 FSIA amendments.

- Successfully represented Exxon Mobil Corporation when the California Court of Appeal ruled in its favor in a case raising cutting-edge issues of asbestos liability. Plaintiffs Marline and Joseph Petitpas alleged that she was exposed to asbestos dust while visiting the gas station where her future husband worked from 1966 to 1967, as well as to asbestos fibers that he carried off-site on his clothing (so-called "take-home" exposure). The court's favorable, published decision established important new limitations on asbestos liability, resulting in a complete victory for Exxon. Gibson Dunn handled the appellate arguments, working closely with trial counsel.

- Secured unanimous Eleventh Circuit affirmance of a district court order enforcing arbitration agreements between Uber Technologies, Inc. and Uber driver-partners. Plaintiffs filed a putative class and collective action in the Middle District of Florida alleging that Uber misclassified them as independent contractors and, as a result, violated state and federal minimum wage and overtime laws. The district court compelled individual arbitration pursuant to an arbitration agreement contained in Uber's licensing agreements. Plaintiffs' arguments on appeal, which the Eleventh Circuit rejected, were that Uber's arbitration agreement fell outside the protection of the Federal Arbitration Act because drivers purportedly are "transportation workers" involved in interstate commerce, the arbitration agreement's class waiver allegedly violated the National Labor Relations Act, and the arbitration agreement was supposedly unenforceable on its own terms.

- Obtained Fifth Circuit reversal of a $6.1 million verdict, including $2.7 million in punitive damages, for MAPEI Corp., which retained Gibson Dunn after a jury in the Northern District of Texas awarded that amount on plaintiff's tortious interference claim and an additional $1.5 million on a breach of contract claim against the company. The appellate victory reduced the total $7.6 million verdict by more than 80 percent. The case arose from MAPEI's contracting with plaintiff Stelluti Kerr, LLC to purchase a machine capable of packaging cementitious powders into airtight, waterproof plastic bags. A dispute arose and MAPEI began to purchase directly from the machine's designer and manufacturer, rather than from Stelluti, a distributor. Following Gibson Dunn's post-trial briefing the district court set aside the jury's verdict, and Stelluti appealed. While reversing the $6.1 million verdict, the Fifth Circuit reinstated the $1.5 million breach of contract verdict, agreeing that Gibson Dunn presented "a very close case" but concluding the strongest arguments had been waived by trial counsel.

- Preserved a significant victory for Microsemi Corporation when the U.S. Supreme Court denied certiorari following Ninth Circuit affirmance of the dismissal of a False Claims Act qui tam relator suit brought by a former employee of Microsemi's prior subsidiary, White Electronic Designs Corporation (WEDC). Plaintiff alleged that Microsemi defrauded the government out of more than $1.6 billion by submitting claims for payment that falsely asserted Microsemi was in compliance with the International Traffic in Arms Regulations (ITAR). In fact, plaintiff alleged, Microsemi violated ITAR when, shortly after acquiring WEDC, Microsemi combined its private intranet domain with WEDC's domain, providing foreign Microsemi employees the opportunity to access sensitive and protected defense information on WEDC's server. Gibson Dunn represented Microsemi during an investigation by the Department of Justice, which we convinced not to intervene in the case. We then secured dismissal from the District of Arizona, which the Ninth Circuit affirmed.

- Secured unanimous Third Circuit reversal of a $36 million award against Travelers Surety and Casualty Company in a closely watched case with potentially significant ramifications for the insurance industry. Plaintiff General Refractories Company (GRC) manufactured refractory products containing asbestos, and Travelers had issued excess insurance policies to GRC containing an exclusion for losses "arising out of asbestos." Some 20 years later, GRC sued Travelers and other insurers claiming that the exclusion applied only to raw asbestos fibers, not GRC's manufactured products. The other insurers settled, Travelers defended its exclusion, but the district court required Travelers to pay more than $36 million under the policies. Travelers then retained Gibson Dunn for appeal. The Third Circuit

adopted Gibson Dunn's arguments wholesale and directed the district court to enter judgment in Travelers' favor.

- Won a jurisdiction victory for BNSF Railway from the Oregon Supreme Court, which reversed a trial court's order denying BNSF's motion to dismiss for lack of personal jurisdiction. Although the plaintiff's suit, predicated on the Federal Employers' Liability Act, arose from a workplace injury in Washington State, the trial court had ruled that it could exercise general personal jurisdiction over BNSF because of its substantial business activities in Oregon. The Supreme Court disagreed, because BNSF – incorporated in Delaware and headquartered in Texas – was not "at home" in Oregon under the U.S. Supreme Court's *Daimler AG v. Bauman* decision, also a Gibson Dunn win. The Oregon Supreme Court also unanimously rejected the argument that BNSF had "consented" to personal jurisdiction in Oregon courts by registering to do business in the state.

- On behalf of more than 40 leading U.S. companies, including Yahoo! Inc., Hewlett Packard Enterprise Co., Uber Technologies, Inc. and Chobani LLC, filed an amicus brief urging the Eastern District of New York to grant injunctive relief against the recent Executive Order restricting travel and immigration into the United States. The brief explained the multiple ways in which the order negatively impacted both amici and their employees, and addressed the order's constitutional infirmities.

- Successfully defended a reporter for *The New York Times* from being excluded from the courtroom for testimony in the Los Angeles murder case against Robert Durst. Mr. Durst's counsel had moved to exclude the reporter for testimony of a "secret witness," arguing that the reporter had interviewed the witness and might himself be called as a witness at trial, and that the reporter's presence could impact his own future testimony. The court denied the motion citing First Amendment implications and the speculative nature of the reporter's possible testimony.

- Secured unanimous First Circuit affirmance of a judgment in favor of Aetna Life Insurance Co. in an employee-benefits dispute arising from the fact that Aetna insured and administered a long-term disability-benefits plan for General Dynamics Corp. governed by ERISA. The plaintiff, an employee of a General Dynamics subsidiary and a participant in the plan, became disabled, began receiving plan benefits, and was also awarded Social Security Disability (SSD) benefits for the same condition. Pursuant to the plan's terms, Aetna offset from the benefits it paid the plaintiff the full amount of her SSD benefits without accounting for the taxes she paid on them. Plaintiff asked Aetna to reduce the offset to only her after-tax SSD, Aetna refused, and plaintiff sued in the District of Rhode Island. The district court granted summary judgment for Aetna, denied plaintiff's broad discovery request, she appealed, and Aetna retained Gibson Dunn to handle the appeal.

- Represented BNSF Railway Company before the California Supreme Court in a "take-home" asbestos liability case. The Court held that a premises owner owes a duty to prevent take-home liability, but that the duty extends only to members of an employee's household. The Court established this bright-line limitation in recognition of Gibson Dunn's argument that unfettered take-home liability would burden businesses and premises owners in California, and exacerbate the asbestos litigation crisis by greatly expanding the pool of potential plaintiffs and defendants. Gibson Dunn was retained to handle briefing and oral argument before the Supreme Court.

- Secured reversal from the California Court of Appeal of a $7 million punitive damages award, and a dramatic reduction of compensatory damages, for Breg, Inc., a medical device manufacturer and co-defendant in a personal injury suit. The court reduced the jury's $5.1 million non-economic damages award to $1.3 million and ruled Breg liable for only 40% of the lower amount under California's Proposition 51. This reduced Breg's total liability to approximately $527,000., down from a verdict against the company of over $9 million. Breg retained Gibson Dunn after a San Diego jury determined that the company was partially liable to Whitney Engler, a young woman who was prescribed Breg's Polar Care 500, a cold therapy device, for injuries that she incurred during her recuperation from arthroscopic surgery.

- Won Federal Circuit victory for Acorda Therapeutics Inc. when the court held defendant Mylan Pharmaceuticals Inc. subject to specific personal jurisdiction in the District of Delaware in a Hatch-Waxman Act patent infringement suit. Acorda sued after Mylan filed an Abbreviated New Drug Application seeking approval to market a generic version of Acorda's Ampyra®, a drug used in treating multiple sclerosis, and challenging Acorda's patent. West Virginia-based Mylan sought dismissal for lack of personal jurisdiction and the district court certified the question for interlocutory appeal to the Federal Circuit, where Gibson Dunn argued for Acorda. The Circuit held Mylan subject to jurisdiction because it "seeks approval to sell its generic drugs throughout the United States, including in Delaware, and it is undisputed that Mylan plan to direct sales of its generic drugs to Delaware."

- Obtained dismissal with prejudice, and subsequent Eleventh Circuit victory, in connection with class allegations brought by a group of current and former female employees of one of the world's leading retailers. This case was an offshoot of the *Dukes v. Wal-Mart* case, which involved a nationwide class of such employees. (*Wal-Mart v. Dukes*, S. Ct. 2011; N.D. Cal., 9th Cir. 2013) In the present case plaintiffs argued that their smaller, regional class could overcome the Supreme Court's decision in *Dukes*. Gibson Dunn persuaded the court that plaintiffs' allegations were untimely, arguing that tolling principles do not apply to successive class actions. Thereafter the claims of the named plaintiffs were litigated and settled and the parties dismissed the cases by stipulation. Former members of the putative class then sought to intervene to appeal the earlier dismissal of the class allegations. The district court denied intervention and on appeal to the Eleventh Circuit Gibson Dunn successfully argued that the appeal was untimely.

- Won a unanimous victory for Catastrophe Management Solutions (CMS) in the Eleventh Circuit, which affirmed dismissal of an EEOC complaint alleging that CMS discriminated against a job applicant on the basis of her race by conditioning an offer of employment on compliance with a facially neutral grooming policy that CMS interpreted to prohibit dreadlocks. Gibson Dunn persuaded the Eleventh Circuit that Title VII protects against discrimination on the basis of immutable racial characteristics, which do not include grooming preferences such as hairstyle, even when they may be culturally associated with race.

- Successfully represented Uber Technologies, Inc. when the Ninth Circuit handed the company a unanimous victory regarding the enforceability of its arbitration agreements with drivers. The published opinion in *Mohamed v. Uber Technologies Inc.* overruled a district court order that invalidated hundreds of thousands of Uber's arbitration agreements and paved the way for several class and putative class actions to proceed. The Ninth Circuit concluded that Uber's arbitration agreements with drivers clearly delegate most issues of arbitrability to an arbitrator, such that the district court never should have reached those issues in the first place. Although the plaintiffs argued (and the district court found) that these delegation clauses are unconscionable, the Ninth Circuit held otherwise, and concluded that binding Ninth Circuit precedent forecloses a finding of unconscionability where – as here – the arbitration agreements contain an opt out clause.

- Won unanimous Second Circuit affirmance of the district court's determination that a $9.5 billion judgment issued against Chevron Corporation in Ecuador was the product of fraud and corruption and could not be enforced in the United States. The Circuit affirmed the district court's holding that defendant Steven Donziger violated the federal RICO statute, and upheld the relief necessary to prevent Donziger and two representatives of the Ecuadorian plaintiffs from benefitting from their wrongdoing. Gibson Dunn then persuaded the U.S. Supreme Court to deny review

- Secured unanimous Ninth Circuit affirmance of orders granting summary judgment in favor of Toyota Motor Corp. and denying class certification in a putative product defect class action involving the anti-lock braking system of the Generation II Prius. Plaintiff alleged that the braking system had a common defect that resulted in unsafe stopping distances. The Circuit agreed with Toyota and the district court that the plaintiff's anecdotal evidence and flawed expert testimony did not establish the existence of a common defect.

- Secured a victory for Comcast in the D.C. Circuit in a long-running dispute with The Tennis Channel (TC) over the terms of carriage of TC's programming to Comcast's cable subscribers. TC, a tennis-themed cable network, challenged Comcast before the Federal Communications Commission, alleging that Comcast unlawfully discriminated against TC in violation of the Communications Act by declining TC's request to carry its programming as broadly as Comcast carried that of two Comcast-affiliated sports networks. Gibson Dunn convinced the D.C. Circuit to vacate an adverse FCC ruling and, following TC's unsuccessful return to the agency for further proceedings and its petition for review by the D.C. Circuit, Comcast successfully intervened to defend the agency's ruling and secure denial of review.

- Secured a Texas Supreme Court victory for one of the world's leading retailers when the Court ruled that the Fifth Circuit had correctly agreed with Gibson Dunn and vacated $1.4 million in civil penalties awarded after a jury found the retailer liable for violations of the Texas Optometry Act. Because this test case involved four named plaintiffs out of a proposed class of over 400 optometrists across the State of Texas, the $1.4 million had exposed the retailer to a potential future judgment of over $100 million. Gibson Dunn was retained for the appeal.

- Obtained a ruling in favor of Energy Future Holdings and its subsidiary Luminant Energy, Texas' largest energy provider, from the Texas Court of Appeals, which overturned a take-nothing judgment on Luminant's claim for breach of a contract to supply wind energy. The ruling would allow Luminant to recover over $25 million in current and future awards. Gibson Dunn previously obtained victory in the Texas Supreme Court for Luminant that it did not breach wind energy contracts and could accordingly pursue a damages award on remand.

- Secured unanimous Eighth Circuit affirmance of the dismissal of all claims brought against current and former directors and executives of one of the world's leading retailers in a consolidated shareholder derivative action, bringing to a close four years of litigation over federal and state claims brought in the Western District of Arkansas in several consolidated actions. The district court had dismissed the complaint, with prejudice, on the basis that the shareholders failed to meet the strict pleading standards for establishing demand futility under Federal Rule of Civil Procedure 23.1 and substantive Delaware law.

- Secured Tenth Circuit affirmance of the District of Colorado's dismissal of a securities class action complaint filed against Deloitte & Touche, LLP asserting claims under Section 10(b) of the Securities Exchange Act. Plaintiffs alleged that Deloitte's audit of its client, shoe manufacturer Crocs, Inc., was deficient because it failed to recognize "red flags" indicating inventory problems Crocs was experiencing during the height of the Great Recession – and that Deloitte's unqualified audit opinions amounted to false statements. The Tenth Circuit unanimously rejected plaintiffs' arguments, and also affirmed the district court's denial of leave to amend the complaint.

- Secured an important Federal Circuit win for Facebook, Inc. that provided new, helpful guidance for patent claims construction. Plaintiff Indacon, Inc., the owner of a patent that allegedly claimed a system and method for indexing, searching and perusing a database, sued Facebook in the Western District of Texas alleging infringement of its patent by aspects of the Facebook system, including Facebook users' "profile picture" and the display of certain user names. The district court adopted Facebook's proposed constructions of four disputed patent terms and the Federal Circuit unanimously affirmed each of the district court's claim constructions in a precedential decision.

- Helped secure an important Eleventh Circuit victory against the Securities and Exchange Commission on behalf of the Securities Industry and Financial Markets Association (SIFMA), as amicus curiae. The district court found that the SEC's claims for disgorgement, declaratory relief, and an injunction were time-barred under the applicable statute of limitations, 28 U.S.C. § 2462. The Eleventh Circuit affirmed in significant part, accepting many of Gibson Dunn's arguments. This decision represented a significant victory for securities market participants.

- Persuaded the Northern District of Texas to deny a preliminary injunction sought by Three Expo Events, L.L.C., which organizes and promotes adult-themed conventions, against the City of Dallas. In support of the City Gibson Dunn represented amicus the Dallas Citizens Council, joined by the Texas Attorney General. Three Expo had sought to rent the Dallas Convention Center for a proposed event and the City Council passed a resolution prohibiting the center from contracting with Three Expo, which then requested the preliminary injunction pursuant to the First Amendment to the U.S. Constitution requiring the City to host the event. Gibson Dunn developed arguments that neither party had presented and that the court ultimately adopted, citing our brief numerous times in denying the injunction and upholding the resolution.

- Won unanimous Fifth Circuit ruling invalidating certain provisions of the Texas Alcoholic Beverage Code on behalf of out-of-state alcohol retailer Fine Wine & Spirits of North Texas, L.L.C. The provisions permitted only in-state residents and companies owned predominantly by in-state residents to obtain licenses to sell alcohol in Texas; Fine Wine retained Gibson Dunn to prevent enforcement of those provisions as a violation of the dormant Commerce Clause of the U.S. Constitution.

- In the culmination of Gibson Dunn's five-year effort to support client Altria, the Texas Supreme Court unanimously upheld a fee on non-settling tobacco manufacturers against a claim that the fee violated the Texas Constitution and its requirement of equal and uniform taxation, reversing the district court and court of appeals. Gibson Dunn defended the fee against constitutional challenge when it was first proposed during the 2011 and 2013 sessions of the Legislature and, after its enactment in 2013, coordinated closely with the Texas Attorney General's office to ensure its robust enforcement and defense by state officials.

- Secured victory for Aetna Life Insurance Co. when the Arizona Court of Appeals held that the Federal Employees Health Benefits Act (FEHBA) preempts Arizona state law barring FEHBA carriers (including Aetna) from enforcing subrogation or reimbursement rights under their federal contracts. The case arose when Aetna sought reimbursement from a federal employee's third-party recovery after having paid for his medical benefits. Aetna retained Gibson Dunn after adverse trial court and appellate rulings; victory followed a successful U.S. Supreme Court certiorari petition, an intervening Office of Personnel Management regulation, and the Court's remand of the case for further consideration.

- Won victory for Acorda Therapeutics Inc. when the Federal Circuit held defendant Mylan Pharmaceuticals Inc. subject to specific personal jurisdiction in the District of Delaware in a Hatch-Waxman Act patent infringement suit begun by Acorda after Mylan filed an Abbreviated New Drug Application seeking approval to market a generic version of Acorda's Ampyra®, used to treat multiple sclerosis, and challenging Acorda's patent. West Virginia-based Mylan sought dismissal for lack of personal jurisdiction and the district court certified the question for interlocutory appeal to the Federal Circuit, where Gibson Dunn argued for Acorda.

- Secured a major appellate victory for Yahoo! Inc. and Yahoo Mexico (Yahoo) when the Mexican Supreme Court of Justice ruled that an unprecedented $2.75 billion Mexican trial court judgment against them was improperly issued and was correctly set aside by the underlying appellate court. Gibson Dunn subsequently won dismissal without leave to amend for Yahoo of a $2.75 billion RICO, fraud and conspiracy lawsuit in the Southern District of New York arising from the Mexican case.

- Successfully urged in an amicus brief filed on behalf of an ideologically diverse coalition of experts in the fields of constitutional and criminal law that the indictment against former Texas Governor Rick Perry for "coercion of a public official" and "abuse of official capacity" should be dismissed. In agreeing, the Texas Court of Criminal Appeals singled out, as the trial court had done, Gibson Dunn's brief as "persuasive." The case arose out the arrest of the Travis County District Attorney for driving under the influence, in response to which then-Governor Perry demanded her resignation and threatened a certain bill veto if she did not.

- Secured unanimous Ninth Circuit reversal for Quik Pick Express, LLC, a California-based trucking and logistics company, of the Central District of California's rejection of the company's request to enforce its arbitration agreement in a putative class action filed by a former truck driver. Gibson Dunn was retained following the district court's action. The Ninth Circuit decision is notable for setting out the manner in which district courts should handle petitions to compel arbitration in cases involving both class claims, and representative (Private Attorney General Act, or PAGA) claims. While the California Supreme Court had previously held that PAGA claims cannot generally be forced to arbitration, the Ninth Circuit made clear that where class action waiver exists, the case is to be sent to individual arbitration first, and only if plaintiff there proves individually that he is "an 'aggrieved employee' " may the PAGA claims proceed in district court. This victory followed Gibson Dunn's California Court of Appeal win in *Franco v. Arakelian Enterprises, Inc.*, upon which the Ninth Circuit relied heavily.

- Obtained reversal from the California Supreme Court, on behalf of Arakelian Enterprises, Inc., of a trial court order denying Arakelian's petition to compel arbitration of the truck driver plaintiff's individual labor code claims, and two California Court of Appeal decisions also rejecting arbitration. On reconsideration, the Court of Appeal concluded that the arbitration agreement's waiver of plaintiff's right to pursue claims that were not under California's Private Attorneys General Act (PAGA) as a class representative was enforceable, held plaintiff's PAGA claims not subject to arbitration, and directed a trial court stay pending arbitration of the non-PAGA claims because that could determine whether plaintiff was able to proceed with a more far-reaching PAGA representative action on behalf of others. This was an important victory for employers throughout the state because the California Supreme Court's *Iskanian* decision was silent on how non-PAGA claims and PAGA claims should proceed when the non-PAGA claims are subject to arbitration and the PAGA claims must be litigated in court. Plaintiff settled after remand.

- Won reversal of a $32.5 million punitive damages award against BorgWarner Morse TEC LLC in the California Court of Appeal. The award included in the jury's $35 million verdict in the wrongful death suit was named one of the largest plaintiff verdicts in California for that year. BorgWarner Morse TEC LLC hired Gibson Dunn to handle the post-trial and appellate process; the Court of Appeal struck the punitive damages award in its entirety as a matter of law, without remanding for retrial.

- Won a key Second Circuit victory for UBS Financial Services, Inc. and UBS AG (UBS) over the enforceability of arbitration and class waiver agreements with former UBS financial advisors. Alleging compensation-related claims against UBS, plaintiffs filed a putative class action in federal court rather than seeking resolution in individual arbitrations pursuant to their employment agreements. The Second Circuit unanimously affirmed the district court's grant of UBS's motion to compel arbitration on a non-class basis.

- On behalf of the U.S. Chamber of Commerce, the National Association of Manufacturers and the American Petroleum Institute, filed an amicus brief on which the Texas Supreme Court relied heavily in holding Shell Oil Company entitled to an absolute privilege against a defamation lawsuit brought by a former employee based on statements made by Shell in its internal investigation and report to the U.S. Department of Justice regarding alleged violations of the Foreign Corrupt Practices Act.

- Won a Ninth Circuit voting rights appeal when the court, agreeing with Gibson Dunn's arguments, reinstated a lawsuit challenging voting laws that restrict eligibility for a referendum designed to solicit the views of Guam residents on the territory's future relationship with the United States. The Circuit held that, even though the referendum has not yet been scheduled, the lawsuit was ripe, and the plaintiff had standing, because the government of Guam has denied plaintiff the right to register to vote in the referendum.

- Won a key Fifth Circuit victory for BP Exploration & Production Inc., BP America Production Company and BP, p.l.c. in connection with the Deepwater Horizon accident and resulting oil spill in the Gulf of Mexico. The Circuit held that BP has the right to appeal from district court determinations regarding

individual awards under the multibillion-dollar Deepwater Horizon Economic and Property Damages Settlement Program, one of the largest and most complex settlements in history. BP argued that it had the right to appeal from adverse award determinations issued through the settlement program's claims process and that the district court had improperly adopted rules that effectively precluded such appeals.

- In the continuation of our battle for marriage equality, Gibson Dunn won an appellate victory when the Fourth Circuit affirmed the Eastern District of Virginia's decision to strike down that state's ban on same-sex marriage. The U.S. Supreme Court's denial of review allowed this ruling to take effect in Virginia and same-sex marriages to begin.

- Won Federal Circuit reinstatement of declaratory judgment claims for non-infringement, invalidity, and priority of invention for Danisco US Inc., against an adverse patent owned by Novozymes A/S. After the district court dismissed for lack of jurisdiction the appeal presented a question of first impression: Could declaratory judgment jurisdiction be based exclusively on Novozymes's pre-patent issuance conduct (and thus during a period before Novozymes even could have filed an infringement suit)? The Federal Circuit agreed with Gibson Dunn and unanimously reversed in a decision representing the first time the Circuit squarely held that declaratory judgment jurisdiction can be established in a patent case based on pre-patent issuance conduct.

- Won unanimous affirmance from the Fourth Circuit for Republic Energy of summary judgment quieting title to a gas lease underlying 3,800 acres of land in the Marcellus Shale in Northern West Virginia. The opinion both resolved the title dispute over the specific gas lease at issue, valued in the tens of millions of dollars, and will be of significant benefit to Republic Energy in subsequently filed and anticipated litigation between the same parties addressing additional Marcellus Shale gas leases, valued in the hundreds of millions of dollars.

Legal and Strategic Counseling

In addition to our traditional appellate litigation activities, the Appellate and Constitutional Law Practice Group provides strategic counseling and advice regarding constitutional and other issues arising outside the appellate context. We brief and argue constitutional and other complex legal issues in trial courts and assist in ensuring that legal arguments are developed and preserved for appeal. We also develop and advance constitutional and policy arguments concerning proposed legislation and regulations. For example, we have been leading national advocates of civil justice reform, testifying before Congress and state legislatures and writing and speaking out about costly, capricious and unpredictable aspects of America's civil justice system.

Members of our practice group develop and manage complex litigation involving constitutional issues – and secure landmark decisions with far-reaching consequences. For example, on behalf of Daimler AG we won a unanimous ruling from the U.S. Supreme Court that it violates the U.S. Constitution for a U.S. court to exercise general personal jurisdiction over a non-U.S. corporation with no employees or facilities in the United States, based solely on the fact that an indirect corporate subsidiary conducts business in the forum state. We secured a historic marriage equality victory when the Court left intact the district court's broad injunction against the enforcement of California's Proposition 8, an amendment to the California Constitution restricting marriage in the state to between one man and one woman. And we secured a groundbreaking decision from the Court that portions of the McCain-Feingold campaign finance law violated the First Amendment.

We assist clients in developing novel or complex legal theories, sometimes long before suit is filed. For example, we often are asked to advise clients as to whether a constitutional challenge can be mounted against governmental statutes or whether regulations stand as an obstacle to a proposed transaction or business plan. Working closely with the firm's Public Policy Practice Group, we also analyze proposed legislation and regulations from both legal and policy perspectives, testify before the U.S. Congress and state legislatures, and engage in other forms of legislative and public policy advocacy.

We also provide strategic counseling to government entities on a wide array of legal issues, allowing them to anticipate legal challenges and to avoid needless litigation. We have served as advisors to several governors in California and Florida and served as former Governor Arnold Schwarzenegger's lead negotiator for tribal-state compacts under the Indian Gaming Regulatory Act.

Shaping the Litigation Environment

We are known for being aggressive, creative appellate lawyers and constitutional law experts. Not only do we try to win each case, but we also seek to address the root causes of our clients' legal difficulties and, if possible, improve the legal, social and policy environments in which our clients' rights will be decided.

When a client confronts a recurring or otherwise significant issue on appeal, it very often is not enough simply to win the case at hand. Some issues are so important, and implicate so many different legal, social and policy concerns, that they deserve special attention. We specialize in assisting clients in developing and implementing a comprehensive approach to such problems, and ensuring, to the greatest extent possible and appropriate, that our clients' positions are fully and properly understood by the public, the media and all relevant decision makers.

ERISA and Employee Benefits Litigation Experience

Gibson Dunn has one of the most sophisticated and wide-ranging executive compensation and employee benefits practices in the United States, representing some of the largest employers and multiemployer funds in both compliance and litigation matters.

The firm's benefits lawyers also have extensive experience representing insurance companies, banks, and other financial institutions in designing products offered to employee benefit plans. Two of the firm's partners previously served as Solicitors of the U.S. Department of Labor, with nationwide responsibility for ERISA interpretation and enforcement. Our litigators have been at the forefront of ERISA litigation for many years, representing fiduciaries, sponsors, and directed trustees, and have handled as many or more high-profile ERISA cases as has any other defense firm in the country.

Gibson Dunn's ERISA lawyers handle the full range of benefits issues for a wide variety of clients. Lawyers in the practice assist clients with designing and implementing qualified and nonqualified retirement plans and welfare benefit plans and deal extensively with the Internal Revenue Service, Department of Labor, and other government agencies, as well as Congress, on matters relating to employee benefit plans. On the litigation front, Gibson Dunn's lawyers have handled numerous high-profile ERISA preemption and class action cases, representing clients at both the trial and appellate levels. Engagements have involved disputes centering on employee stock ownership plans, fiduciary breach and prohibited transaction issues, employer withdrawal liability, and managed health care matters.

Gibson Dunn's lawyers have handled many 401(k) "stock drop" cases against companies and their officers and directors, successfully representing, among others, the outside directors of JPMorgan, Merrill Lynch in the WorldCom litigation, Computer Sciences Corp., Janus, KB Home Inc., King Pharmaceuticals and KV Pharmaceuticals. We have handled benefits litigation throughout the United States for clients such as Aetna, Agilent, Boeing, Dow Jones, Hewlett-Packard and Beverly Enterprises. Representative matters include:

Representative ERISA Litigation

- Gibson Dunn was retained by the University of Southern California to defend the University against a putative class action brought in the U.S. District Court for the Central District of California. Six current and former USC employees allege that USC breached its fiduciary duty under ERISA in administering its retirement program. Plaintiffs seek to certify a nationwide class of all participants in the USC plans from August 17, 2010 to the present, which they claim to include more than 28,000 people. The case

is one of twelve nearly identical suits brought by Schlichter, Bogard & Denton against prestigious universities, including Yale, Duke, Johns Hopkins, MIT, and others.

- With co-counsel, secured a $243,189.70 judgment for Ford Motor Company from the Eastern District of Michigan in an ERISA case Involving overpayment of retirement benefits that the plaintiff wanted to keep. She was the former spouse of a Ford retiree who had been receiving benefits pursuant to a qualified domestic relations order and had received a substantial benefits overpayment due to a clerical error. She admitted that she realized the payment was significantly more than she was entitled to when the lump sum was paid-out in 2013, but she maintained that the Plan's decision not to forgive or reduce the amount of her repayment was arbitrary and capricious and that Ford should be estopped from seeking recoupment. In rejecting plaintiff's arguments and granting judgment to Ford, ordering the plaintiff to repay $243,189.70, the court drew heavily from Gibson Dunn's brief.

- Obtained denial of class certification for Aetna Inc. in a long-running nationwide ERISA breach-of-fiduciary duty lawsuit in the Western District of North Carolina. The action challenges Aetna's handling of "administrative fees" charged by a vendor (OptumHealth Care Solutions, a UnitedHealth subsidiary), which provided pre-built networks of chiropractic and therapy providers, claims processing, and utilization management services. Plaintiff claimed that for more than seven years Aetna and Optum had been improperly "burying" millions of dollars in Optum's "administrative fees" and causing plan members and self-funded plan sponsors to pay inflated amounts for covered medical services. Adopting many of Gibson Dunn's arguments, the court denied certification of both a nationwide class of plan members charged the alleged improper "administrative fees," and a derivative claim on behalf of a nationwide class of self-funded plans also allegedly overcharged Gibson Dunn had earlier obtained dismissal of claims challenging Aetna's other vendor relationships involving similar reimbursement methodologies, as well as civil RICO claims arising from multiple alleged conspiracies involving Aetna, Optum, and other vendors.

- Obtained complete victory for Aetna Inc. in 11-year-old litigation in the District of New Jersey in which plaintiffs had sought more than $2 billion in damages on behalf of nationwide classes of health care providers and health plan subscribers. Plaintiffs voluntarily dismissed their claims against Aetna following Gibson Dunn's defeat of class certification of a putative nationwide class of millions of health plan members and providers. Plaintiffs had claimed, among other things, that Aetna systematically underpaid claims for services rendered by "out-of-network" providers by using intentionally-depressed pricing data in a database called Ingenix. The court's opinion denying certification drew heavily on the arguments raised by Gibson Dunn, which earlier in the litigation had secured dismissal of 13 of 15 causes of action under RICO, the Sherman Act, and various ERISA and state law theories.

- Secured dismissal of four claims in a confidential executive compensation arbitration on behalf of a private equity firm (Firm) from an International Institute for Conflict Prevention and Resolution (CPR) arbitrator. A former CEO of one of the Firm's portfolio companies alleges that the Firm breached his employment agreement and committed promissory estoppel, fraud and securities fraud by failing to issue him "profits interests," a type of equity compensation. He also named a managing partner of the Firm as a defendant, alleging that he aided and abetted the supposed fraud and securities fraud. In addition to dismissing the former CEO's claims for fraud, securities fraud, aiding and abetting fraud, and aiding and abetting securities fraud, the CPR Arbitrator — a former federal judge — narrowly

denied Gibson Dunn's dismissal request as to a fifth claim for promissory estoppel, allowing the former CEO to bring it only as an alternative to his breach of contract claim, and giving the Firm permission to reassert its related arguments at the summary judgment stage.

- Won affirmance from the California Court of Appeal of summary judgment in favor of Cigna in a suit by a chiropractic clinic arising out of Cigna's administration of an ERISA benefits plan. Plaintiff sued both Cigna and the ERISA plan, seeking $1.6 million for allegedly covered services rendered to plan members. Cigna had investigated plaintiff for submitting fraudulent claims and determined that many were not payable and billed under suspicious circumstances. The Court of Appeal agreed with Gibson Dunn that plaintiff's intentional misrepresentation claim was fundamentally a claim for benefits under an ERISA plan and thus preempted by ERISA. The appellate court also affirmed summary judgment for Cigna on the merits.

- Obtained denial of class certification by the District of New Jersey in three complex ERISA class actions against Aetna, in which plaintiffs alleged that certain of the company's practices used to prevent fraudulent billing, and to recoup overpayments made to health care providers, violated ERISA. Plaintiffs sought class certification on every possible basis: Rule 23(b)(1), (b)(2), (b)(3), and (c)(4). The court determined that plaintiffs' proposed classes were plagued by a number of individualized issues that precluded class treatment. These victories were particularly significant given that other providers lost similar battles at class certification and summary judgment stages.

- Won judgment on the pleadings for PricewaterhouseCoopers dismissing an ERISA action in the Southern District of New York brought on behalf of a 17,000+ member certified class, seeking more than $500 million in additional retirement plan benefits. The case was filed in 2006 and the district court rejected three dispositive motions filed by the company before it engaged Gibson Dunn, which successfully advanced an entirely different legal argument. The court adopted our position and dismissed plaintiffs' claims with prejudice.

- Defeated an ERISA challenge to Ford Motor Company's administration of its retirement plan when the Eastern District of Michigan granted Ford judgment on the administrative record and denied the cross-motion of the plaintiff, who brought the claim for wrongful denial of benefits as personal representative of her deceased husband/retirement plan participant. The Sixth Circuit unanimously affirmed. The plaintiff had unsuccessfully argued that her husband should have been able to elect to take the lump sum distribution of his retirement benefits prior to his assigned election window period. The case is one in a series of matters for which Ford retained Gibson Dunn to defend the administration of key elements of Ford's retirement plans, including its lump sum payment program, and in which Gibson Dunn has obtained multiple victories.

- Obtained an important Sixth Circuit victory for Ford Motor Company after the estate of a deceased retirement plan participant sued for a lump sum payout of an amount larger than that authorized by the plan, but mistakenly communicated by it. Plaintiff alleged breach of fiduciary duties and wrongful denial of benefits under ERISA for the plan's refusal to pay her the larger, miscalculated lump sum. The Circuit affirmed the district court's grant of judgment on the administrative record with respect to the ERISA claims, dismissal of the breach of fiduciary claims, and rejection of plaintiff's estoppel claims. This case is one in a series of matters for which Ford has retained Gibson Dunn to defend the administration of key elements of its retirement plan, including its lump sum payment program.

- Obtained a significant victory for Ford Motor Company when the U.S. District Court for the Northern District of Ohio granted the company's motion for judgment on the administrative record with respect to ERISA claims brought by the widow of a deceased retirement plan participant.

- Secured a complete victory for Cigna when the U.S. District Court for the Central District of California granted the company's motion to dismiss with prejudice. Plaintiffs alleged that they were duped into believing that they would be reimbursed for medical treatments rendered to members of the International Longshore & Warehouse Union, but were later told that payment was being denied. They brought ERISA and state law fraud claims against Cigna and other defendants. The court agreed with Gibson Dunn that Cigna was not an appropriate defendant for the relevant ERISA claims, and also held that plaintiffs had failed to allege their fraud claim with particularity, which claim was also preempted by federal law because it "related to" the ERISA plan at issue.

- Obtained dismissal in the Southern District of New York of an ERISA action on behalf of JPMorgan's independent directors in connection with the company's $6 billion "London Whale" trading losses. Plaintiff alleged that the directors breached their fiduciary duties under ERISA by continuing to offer participants in the company's 401(k) plan an opportunity to invest in JPMorgan stock, and by providing them with inaccurate information concerning the prudence of such investments. The court rejected plaintiff's arguments. Gibson Dunn simultaneously obtained dismissal of two shareholder derivative actions on behalf of the independent directors arising out of the same trading losses. Gibson Dunn worked closely with counsel for JPMorgan in the defense of these lawsuits.

- Won summary judgment for ABF Freight System, Inc. in the Eastern District of California on the claim of plaintiff, a former ABF employee, for violation of ERISA Section 5. He alleged that his employment was wrongfully terminated after he exercised a purported right to receive ERISA-governed pension benefits while continuing to work at his previous level of seniority. The court adopted ABF's argument that because plaintiff's pension plan did not provide a right to receive pension benefits while continuing to work at the same level of seniority, he did not invoke an ERISA-protected right. The court also agreed with ABF that plaintiff did not suffer an adverse employment action, and that ABF did not act with intent to interfere with plaintiff's ERISA-protected rights. The court previously had dismissed plaintiff's four other causes of action asserted under California state law.

- Represented ABF Freight in the Northern District of Illinois in a case in which multi-employer pension and health and welfare plans associated with Local 710 of the International Brotherhood of Teamsters claimed that ABF Freight failed to make necessary contributions to the plans, allegedly in violation of ERISA. ABF Freight answered the complaint and filed a counterclaim, asking the Court to enter a declaratory judgment seeking, among other things, a declaration that the Local 710 plans could not meet the burden of showing entitlement to additional employer contributions under the standard set forth in the collective bargaining agreement between ABF Freight and representatives of the Teamsters. The case was settled favorably.

- Obtained a preliminary injunction from the Northern District of Georgia, blocking a Georgia law on behalf of America's Health Insurance Plans just one day before the law was slated to go into effect. Gibson Dunn argued that the challenged law—which would require health plans to pay claims in Georgia within 15 days or face substantial penalties—was preempted by federal law, the Employee

Retirement Income Security Act of 1974 (ERISA). The court agreed, blocking Georgia state officials from enforcing the new law. The court concluded that the new law was preempted because it would undermine ERISA's uniform regulation of self-funded health benefits plans, which are used by most large corporations to provide benefits to their employees and dependents.

- Obtained a landmark ERISA ruling involving the relationship between summary plan descriptions (SPDs) and official plan documents, in *CIGNA Corp. v. Amara*. When Cigna converted its pension plan from a defined benefit plan to a "cash balance" plan, Cigna issued SPDs describing the change, which differed in certain ways from the actual language in the official plan documents. The participants in the plan sued, alleging that they were entitled to rely fully on the SPDs rather than the language of the plan itself. After a trial, the district court ruled for the plaintiffs, and the Second Circuit affirmed. Cigna then turned to Gibson Dunn, which persuaded the Supreme Court to hear the case – over the objection of the Solicitor General, who also opposed Cigna on the merits. Gibson Dunn prevailed, winning a unanimous 8-0 decision, authored by Justice Breyer, who made clear that the district court had wrongly awarded relief to the class because an SPD is not part of a plan's official document. The unanimous ruling ensured that ERISA plans are governed by actual plan documents, rather than partial summaries, bringing clarity and predictability to plan management. .

- Secured summary judgment for Computer Sciences Corporation. Plaintiffs claimed that reports of options backdating at the company caused the stock price to decline, making continued investment in company stock imprudent. The court held that plaintiffs had failed to produce evidence that the disclosures regarding the alleged backdating of stock options or the purported weak controls had, in fact, caused a decline in the price of CSC stock, or that a prudent fiduciary in the same circumstances would have acted any differently than the plan's fiduciaries.

- Obtained summary judgment for Merrill Lynch Trust Company, FSB in a class action by participants in WorldCom's 401(k) plan. Plaintiffs claimed that Merrill Lynch, as trustee of WorldCom's 401(k) plan, breached its fiduciary duty by allowing participants to maintain investments in WorldCom stock. The court determined, however, that plaintiffs failed to show that, prior to its announcement of accounting irregularities, public information regarding WorldCom warranted Merrill Lynch taking unilateral action to disinvest plan participants of their WorldCom holdings.

- Represented Aetna Health Inc. in 2004 before the U.S. Supreme Court. The Court held that ERISA completely preempts state law causes of action based on a plan administrator's denial of coverage for medical care. Gibson Dunn briefed and argued the case, in which Aetna won a unanimous victory.

- Successfully represented the petitioner before the U.S. Supreme Court in a 7-2 decision that overturned the State Supreme Court of Washington and affirmed the scope of ERISA's statutory preemption provision as it relates to state regulation of pension and life insurance benefits.

- Represented underwriters, including Morgan Stanley, Goldman Sachs, Credit Suisse, Barclays, UBS, Deutsche Bank, J.P. Morgan, and Citigroup, in a putative securities, derivative and ERISA class action filed in the wake of the collapse of Washington Mutual, the largest bank failure in U.S. history. Plaintiffs asserted claims under Sections 11 and 12(a)(2) of the Securities Act of 1933, and alleged misrepresentations regarding WaMu's lending and home valuation practices. Gibson Dunn

obtained the dismissal of several of the offerings upon which the underwriter defendants were sued and secured a favorable settlement relating to the remaining claims.

Representative ERISA 401(k) "Stock Drop" Litigation

Gibson Dunn has represented clients in numerous successful ERISA 401(k) stock drop cases, including Kodak, J.P. Morgan , KV Pharmaceutical, King Pharmaceuticals, Broadwing (Cincinnati Bell), Computer Sciences Corp., Janus Capital, KB Home, Krispy Kreme Donut Corp., Merrill Lynch (three cases), Royal Ahold, N.V., Syncor International, and Textron (2 cases). We have successfully resolved many of these cases either by outright wins (King Pharmaceuticals, KV Pharmaceutical, RCN, Textron (I), Worldcom, CSC); voluntary dismissals (Royal Ahold, Southern), or by settlements (Broadwing, Krispy Kreme, Janus, Textron (II)), where the settlement amount in each case was substantially less than the average 401(k) stock drop settlement. Representative successes include:

- Gibson Dunn successfully represented the U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association (SIFMA), and several other leading trade associations when the Fifth Circuit struck down the U.S. Department of Labor's controversial Fiduciary Rule, which would have expanded who is a "fiduciary" under ERISA and the Internal Revenue Code, imposing significant new obligations and liabilities on broker-dealers and insurance agents who sell annuities to IRAs. Gibson Dunn filed suit on behalf of its clients and presented oral argument before the Fifth Circuit on their behalf as well as for plaintiffs in two parallel actions. The Circuit, ruling for plaintiffs, held that the Rule and the exemptions adopted alongside it were arbitrary, capricious, and unlawful under the Administrative Procedure Act, and vacated them.

- Gibson Dunn represented the Board of Directors and certain executives of Eastman Kodak Company in an ERISA stock drop case filed in the United States District Court for the District of Western New York. Gibson Dunn vigorously defended Kodak representatives against claims that they breached their fiduciary duties under ERISA by offering Kodak stock as an investment option in two retirement plans. The team moved to dismiss the plaintiffs' complaint on behalf of the Kodak defendants, and in December 2014, the district court denied the motion. The Kodak defendants filed their answer to the complaint on February 17, 2015, and the parties subsequently exchanged discovery requests and responses and filed cross-motions to compel. Ultimately, the parties agreed to participate in mediation, and a favorable settlement was reached, which received final court approval in October 2016.

- Gibson Dunn successfully persuaded the U.S. Court of Appeals for the Seventh Circuit to rule in favor of Gibson Dunn client The Boeing Company and vacate certification of a class of more than 180,000 participants in Boeing's 401(k) plan seeking more than $4 billion in damages – the largest ERISA class action ever certified. The plaintiffs alleged that Boeing mismanaged its 401(k) plan by including imprudent investment options in the plan. Supported by the U.S. Department of Labor, the district court certified a non-opt out class of all 180,000 participants. But, adopting Gibson Dunn's arguments, the U.S. Court of Appeals for the Seventh Circuit reversed, holding that the class failed to meet the typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure. The Seventh Circuit's decision was an important development in the evolving law of ERISA class actions and likely a

significant impediment to plaintiffs who attempt to obtain certification of a class of all participants in a defined contribution plan, particularly under the mandatory provisions of Rule 23.

- Gibson Dunn successfully represented Janus Capital Group in a 401(k) plan suit brought by plan participants claiming that the value of their 401(k) accounts declined due to alleged improper market timing trading. The Court granted Gibson Dunn's motion to dismiss on the grounds that the plaintiff, a former participant in Janus' 401(k) plan, lacked standing to sue. Persuaded by Gibson Dunn's arguments, the Court reversed its holding in four related cases that former plan participants had standing to sue.

- Gibson Dunn obtained dismissal in the Southern District of New York of an ERISA action on behalf of J.P. Morgan's independent directors in connection with the company's $6 billion "London Whale" trading losses. Plaintiff alleged that the directors breached their fiduciary duties under ERISA by continuing to offer participants in the company's 401(k) plan an opportunity to invest in J.P. Morgan stock, and by providing them with inaccurate information concerning the prudence of such investments. The court rejected plaintiff's arguments. Gibson Dunn simultaneously obtained dismissal of two shareholder derivative actions on behalf of the independent directors arising out of the same trading losses. Gibson Dunn worked closely with counsel for J.P. Morgan in the defense of these lawsuits.

- Gibson Dunn represented certain outside directors of J.P. Morgan in an ERISA 401(k) stock drop case in the Southern District of New York, *Scrydloff v. J.P. Morgan*. The district court granted the defendants' motion to dismiss in 2014.

- Gibson Dunn successfully argued a motion to dismiss an ERISA "stock drop" 401(k) fiduciary breach class action case on behalf of King Pharmaceuticals and various officers on grounds of standing and lack of commonality. The case involved approximately 10,000 putative class members. The plaintiff claimed that King Pharmaceuticals and various officers breached their fiduciary duties by allowing plan participants to maintain investments in company stock. The court, however, determined that the former participant lacked standing and would be an inadequate class representative because his claim lacked commonality and typicality with the purported class.

- Gibson Dunn represented KB Home in *Bagley, et al. v. KB Home*, a stock drop case asserting that the illegal backdating of stock options, when revealed, resulted in a material decline in the price of KB Home stock. The district court granted defendant's motion to dismiss, but allowed plaintiffs to replead. The case then settled while the subsequent motions to dismiss were pending.

- Gibson Dunn represented KV Pharmaceutical Co. in the United States District Court for the Eastern District of Missouri in an ERISA 401(k) "stock drop" case in which the district court dismissed the complaint on KV's motion and the case settled on terms very favorable to the defendants after the appeal was filed with the Eighth Circuit United States Court of Appeals.

- Gibson Dunn represented Computer Sciences Corporation (CSC) in one of the most important trends in labor and employment litigation in the last decade involving the emergence of ERISA 401(k) "stock drop" litigation, which typically follows on the heels of related securities class action

litigation. Plaintiffs often allege that fiduciaries responsible for 401(k) plans violated their fiduciary duties by continuing to include company stock as an investment option in the plan. Gibson Dunn was a leader in litigation in this area, continuing its success by securing summary judgment for CSC. Plaintiffs had claimed that reports of options backdating at the company, as well as purportedly weak internal controls, had caused the stock price to decline, making continued investment in company stock imprudent. The court recognized Gibson Dunn's argument that eliminating CSC stock as an investment option for its employees could have had a "catastrophic" effect on CSC's stock price. The Ninth Circuit affirmed the decision, accepting CSC's argument.

- Gibson Dunn won dismissal of putative ERISA class claims asserted against Deloitte & Touche Netherlands in connection with alleged accounting improprieties at Royal Ahold, the world's third largest supermarket group. In addition to being sued in the United States, Deloitte & Touche Netherlands was investigated by the SEC and DOJ and authorities in the Netherlands. The Fourth Circuit affirmed the dismissal of plaintiffs' claims under Section 10(b) of the Securities Exchange Act of 1934 for failure to adequately plead scienter.

- Gibson Dunn secured a victory for Textron Inc. when the United States District Court for the District of Rhode Island issued a ruling granting summary judgment to Textron and denying class certification in an ERISA action. The Court held that the putative class representatives, two former employees of Textron, lacked standing to sue. Former employees who have no expectation of returning to employment only may be deemed "participants" under ERISA with standing to sue if they have a colorable claim to vested benefits. Alleged money damages do not suffice to confer "participant" standing. The plaintiffs argued that they did have a colorable claim to vested benefits because defendants breached their fiduciary duties by allowing the Textron Savings Plan to be over-concentrated in Textron stock and Plan participants suffered significant losses when the price of Textron stock dropped more than 43% in 2000 and 2001. The Court agreed with Gibson Dunn that the "the difference between what [plaintiffs'] accounts actually earned and what they might have earned is not a benefit provided for, or promised under, the terms of the Plan" and granted Textron's motion for summary judgment.

- Gibson Dunn represented Textron Inc. in another 401(k) stock drop case, *Lalonde v. Textron, Inc., et al.*, which settled on favorable terms for the Company.

- Gibson Dunn successfully represented Merrill Lynch in a suit under ERISA brought by participants in a 401(k) plan sponsored by the RCN Corporation. Merrill Lynch was the directed trustee of the plan. The plaintiffs argued that Merrill Lynch was an ERISA fiduciary and breached its duties to participants by allowing the plan to continue to invest in RCN stock given the company's precarious financial condition. The federal district court in New Jersey granted Gibson Dunn's motion to dismiss, agreeing that as directed trustee, Merrill Lynch had very limited responsibilities of inquiry regarding plan investments, and that those responsibility were not triggered in the case.

- Gibson Dunn obtained summary judgment for Merrill Lynch Trust Company, FSB in a class action by participants in WorldCom's 401(k) plan. Plaintiffs claimed that Merrill Lynch, as trustee of WorldCom's 401(k) plan, breached its fiduciary duty by allowing participants to maintain investments in WorldCom stock. The court determined, however, that plaintiffs failed to show that, prior to its announcement of

accounting irregularities, public information regarding WorldCom warranted Merrill Lynch taking unilateral action to disinvest plan participants of their WorldCom holdings.

- Gibson Dunn represented Merrill Lynch in another class action 401(k) plan case, *Woods v. Southern, Inc.*, as the directed trustee of the 401(k) plan, persuading the plaintiffs to voluntarily dismiss Merrill Lynch as a defendant.

- Gibson Dunn represented Merrill Lynch in *In Re BellSouth Corporation ERISA Litigation*, as the directed trustee of the 401(k) plan. We persuaded the plaintiff to voluntarily dismiss Merrill as a defendant. The claims against Bell South were subsequently settled.

- Gibson Dunn represented Merrill Lynch in *Thomas v. McCourt et al.*, as the directed trustee of the 401(k) plan. The court granted Merrill's motion to dismiss, that as a directed trustee, Merrill has very limited fiduciary responsibilities. The case was fully resolved by a favorable settlement. .

- Gibson Dunn obtained a favorable settlement for Cincinnati Bell, Inc., a century-old telecommunications company, in an ERISA class action in the Southern District of Ohio. The company offered a 401(k) plan to employees, which provided for investment in company stock. After the telecommunications sector plummeted in late 2001 and 2002, with negative impacts on the value of company stock, participants filed suit alleging that the Company and its officers and directors violated ERISA by continuing Plan investment in company stock when it was imprudent to do so. A vigorous examination by Gibson Dunn lawyers of plaintiffs' fiduciary breach expert revealed a serious defect in the plaintiffs' case. A favorable settlement was reached short by thereafter.

- Gibson Dunn successfully represented the former Krispy Kreme CEO and chairman, in obtaining a favorable settlement with the SEC in connection with its investigation of the Company's alleged misrepresentations of financial performance between February 2003 and May 2004. The Staff contended that the client was aware of the Company's alleged misrepresentations and profited significantly from stock sales shortly before they were revealed. Gibson Dunn ultimately persuaded the Commission to settle favorably on the client's behalf. The Staff's four-year investigation culminated in a March 2009 complaint against Company, the former CEO, and other senior executives that contained just one narrow substantive charge against the client, which concerned his alleged approval of a reversed accrual related to an executive incentive compensation plan. The settlement involved no scienter-based fraud charges and did not impose any type of officer or director bar on the client.

- Gibson Dunn represented Broadwing and various officers who were fiduciaries of its 401(k) plan in *In re Broadwing, Inc. ERISA Litigation*. The case was settled favorably while the motion to dismiss was pending.

- Gibson Dunn secured summary judgment for Syncor International Corporation (now operating as a subsidiary of our client Cardinal Health, Inc.) in an ERISA action in federal court in Los Angeles. Plaintiffs, a certified class of Syncor's ERISA plan participants, sought over $65 million in damages, alleging that Syncor breached its ERISA fiduciary duties of prudence and monitoring by offering Syncor stock under the company's ERISA plan. Quoting liberally from Syncor's motion for summary judgment,

the Court granted summary judgment on all claims. The order addressed favorably to defendants a number of important issues concerning the burgeoning field of ERISA company stock cases.

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PRACTICE

Appellate and Constitutional Law

Administrative Law and Regulatory Practice

Antitrust and Competition | Class Actions | Intellectual Property

Labor and Employment | Life Sciences | Litigation

Securities Litigation

BIOGRAPHY

Mark A. Perry is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP and Co-Chair of the Firm's nationwide Appellate and Constitutional Law Practice Group. His practice focuses on complex commercial litigation at both the trial and appellate levels.

Mr. Perry is an accomplished appellate lawyer who has briefed and argued many cases in the Supreme Court of the United States—including winning the landmark decisions in *Lucia v. SEC*, *Alice Corp. v. CLS Bank,* and *Janus Capital Group v. First Derivative Traders*—and the federal courts of appeals. (See Overview of Section 101 Patent Cases Decided After *Alice v. CLS* (as of March 1, 2019)). He has served as chief appellate counsel to Fortune 100 companies in significant securities, intellectual property, and employment cases. He also appears frequently in federal district courts, serving both as lead counsel and as legal strategist in complex commercial cases. He has special expertise in class actions, and teaches the upper-level course in Class Action Law and Practice at Georgetown University Law Center.

Mr. Perry is ranked by *Chambers USA* in Nationwide Appellate Law, which noted that he "is described as a '*master strategist and a brilliant writer*.'" He has also been recognized by *Best Lawyers in America*® in the fields of Appellate Practice and Securities / Capital Markets Law, by *Super Lawyers* in the Appellate category, and by *IAM Patent*—which called him "undoubtedly one of the top appellate specialists in the country"—for his work in the Federal Circuit. Mr. Perry has been named a National Litigation Star for both Appellate and General Commercial by *Benchmark Litigation* (which has also awarded him Appellate Lawyer of the Year), identified as a "Securities MVP" and an "Appellate MVP" by *Law360*, and named a Litigator of the Week by *The American Lawyer*. He is a Fellow of the Litigation Counsel of America.

Before joining Gibson Dunn, Mr. Perry served as a law clerk to Justice Sandra Day O'Connor of the Supreme Court of the United States, and to Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. He also worked as what is now called a Bristow Fellow in the Office of the Solicitor General of the United States. Mr. Perry earned his law degree with high honors from the University of Chicago Law School, where he served as Executive Editor of the *Law Review*. His undergraduate degree was conferred by the University of California at Berkeley.

Mr. Perry is the global co-editor, and co-author of the U.S. chapter, of the international publication *Getting the Deal Through: Appeals*, and he is the author of the class certification chapter in the PLI treatise *Securities Litigation: A Practitioner's Guide*. Other recent publications and additional information are available below. Representative matters and references are available on request.

EDUCATION

University of Chicago - 1991 Juris Doctor

University of California - Berkeley - 1988 Bachelor of Arts

ADMISSIONS

California Bar

District of Columbia Bar