SUPREME COURT REVIEW 2021: A Discussion of Decisions at the Highest State and Federal Judicial Levels

October 21, 2021

9:00 AM – 12:15 PM

DSBA and via Zoom

Welcome

9:00 a.m. – 9:15 a.m.

The Honorable Karen L. Valihura *Supreme Court of the State of Delaware*

Delaware Supreme Court

9:15 a.m. – 10:30 a.m.

Corporate Law

Jenness E. Parker, Esquire *Skadden Arps Slate Meagher & Flom LLP*

Criminal Law

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Jenness Parker is a partner at Skadden, Arps, Slate, Meagher & Flom. She litigates significant business matters related to corporate governance disputes, statutory proceedings, mergers and acquisitions, federal securities laws and a variety of complex commercial contractual disputes.

James Turner is an attorney in the Delaware Office of Defense Services Superior Court Felony Trial Unit. He has extensive jury trial and felony case experience, and he has argued before the Delaware Supreme Court.

Megan McGovern is an associate at Bayard, P.A. in the family law group where she handles a range of matters from divorce and custody to child support and protection from abuse cases. Megan also volunteers for pro bono representations from the Office of Child Advocate representing children placed in foster care

Delaware Supreme Court Review 2021: Corporate Law Developments

October 21, 2021

Jenness E. Parker, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP

Overview

- ❑ Section 220 Inspection Rights
- ❑ Standing
- ❑ Inequitable Conduct
- ❑ Coverage for Fraudulent Conduct
- ❑ Waiver of Appraisal Rights
- ❑ Derivative Claims

Section 220 Inspection Rights

AmerisourceBergen Corp. v. Lebanon Cty. Emps.' Ret. Fund, 243 A.3d 417 (Del. 2020)

AmerisourceBergen Corp. v. Lebanon Cty. Emps.' Ret. Fund, 243 A.3d 417 (Del. 2020)

Affirmed broad stockholder inspection rights.

BACKGROUND:

- Series of investigations related to opioid crisis.
- Stockholder sought books and records regarding potential wrongdoing, asserting four purported purposes.

HOLDING:

- Stockholder seeking inspection is not required to specify the ends to which it might use the books and records.
- Stockholder need not demonstrate that the alleged wrongdoing or mismanagement is actionable.
- Court of Chancery has discretion to authorize a deposition to discover types and location of books and records authorized for inspection.

Standing

Urdan v. WR Cap. P'rs, LLC, 244 A.3d 668 (Del. 2020)

Brookfield Asset Mgmt., Inc. v. Rosson, 2021 WL 4260639 (Del. 2021)

Morris v. Spectra Energy P'rs (DE) GP, LP, 246 A.3d 121 (Del. 2021)

Urdan v. WR Cap. P'rs, LLC, 244 A.3d 668 (Del. 2020)

Clarified that dilution claims are not personal to the stockholder when stock is voluntarily relinquished.

BACKGROUND:

- Controller WR Capital caused Energy Efficient Equity, Inc. ("E3") to enter into financing arrangements.
- Former E3 principals filed lawsuit against WR Capital asserting, among other things, a breach of fiduciary duty claim for economic dilution.
- While lawsuit was pending, E3 recapitalized. The new capital led to a partial settlement via a settlement agreement and two stock repurchase agreements pursuant to which plaintiffs sold all "right, title and interest" in their stock to E3.
- Court of Chancery dismissed breach of fiduciary duty claim for lack of standing.

HOLDING:

- Overruled in part *Schultz v. Ginsburg* and held that dilution claims, whether direct, derivative or both, followed the stock and were not claims personal to the stockholder.
- Explained difference between the personal nature of a claim and whether a claim is direct or derivative.
- Noted that some dilution claims are personal – such as coerced sale to avoid dilution or a squeeze-out merger – but here plaintiffs voluntarily relinquished their shares.

Brookfield Asset Mgmt., Inc. v. Rosson, 2021 WL 4260639 (Del. 2021)

Equity overpayment/dilution claims involving controllers are exclusively derivative under *Tooley*; *Gentile* overruled.

BACKGROUND:

- Plaintiff stockholders challenged company's private placement of stock to its controlling stockholder, asserting claims against directors and controllers that the transaction undervalued the stock and diluted both the financial and voting interests of the minority stockholders.
- After plaintiffs filed complaint, the controlling stockholder acquired the Company's remaining shares in a merger.
- Defendants moved to dismiss the complaint for lack of standing, arguing that dilution claims are "quintessential derivative claims" under the *Tooley* test, and that the derivative claims had been extinguished by the merger.
- Court of Chancery held plaintiffs did not state a direct claim under *Tooley*, but did state a direct claim under *Gentile v. Rossette*. On appeal, defendants/appellants argued that *Gentile* should be overruled.

HOLDING:

- Reversed the dismissal, "not because the Court of Chancery erred, but rather, because the Vice Chancellor correctly applied the law as it existed, recognizing that the claims were exclusively derivative under *Tooley*, and that he was bound by *Gentile*."
- Held that overpayment/dilution claims are exclusively derivative under *Tooley* and overruled *Gentile*'s holding that such claims can be "dual-natured," *i.e*., both derivative and direct.
- Reaffirmed *Tooley's* two central inquiries of who suffered the harm and who would receive the recovery, and rejected *Gentile's* reliance on "special injury" or "who was the wrongdoer" tests.
- Noted that where derivative claims will pass to the buyer, equity holders still have the right to challenge the merger itself as a breach of the duties they are owed, such as a claim the seller's board failed to obtain sufficient value for the derivative claims.

Morris v. Spectra Energy P'rs (DE) GP, LP, 246 A.3d 121 (Del. 2021)

Clarified pleadings stage standing analysis for direct claims challenging merger where board failed to value derivative claims.

BACKGROUND:

- After merger, plaintiff equity holder lost standing to litigate derivative claims. Plaintiff restyled derivative claims as direct claims, alleging that the merger exchange ratio was unfair because it did not reflect the material value of his derivative claims.
- Court of Chancery held that plaintiff lacked standing on a motion to dismiss because the derivative litigation value (alleged to be $661 million) was immaterial to the $3.3 billion merger.

HOLDING:

- Applied the *Primedia* standing inquiry, the second prong of which is that the value of the derivative claim must be material in the context of the merger.
- "If the plaintiff has alleged a viable derivative claim, where it is reasonably conceivable that the claim is material when compared to the merger consideration and could result in the damages pled in the complaint, the plaintiff has satisfied the materiality requirement at the motion to dismiss stage for standing purposes."

Inequitable Conduct

Coster v. UIP Cos., Inc., 255 A.3d 952 (Del. 2021)

Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81 (Del. 2021)

Coster v. UIP Cos., Inc., 255 A.3d 952 (Del. 2021)

Reaffirmed *Schnell v. Chris-Craft* holding that "inequitable action does not become permissible simply because it is legally possible."

BACKGROUND:

- Equal stockholders were deadlocked and could not elect new directors.
- Board voted to issue a one-third interest in company to a long-time employee to dilute stockholders ownership interest below 50%, block her attempts to elect directors, and avoid a possible court-appointed custodian.
- The motive for the stock sale was not seriously disputed.
- Court of Chancery held that because entire fairness was satisfied (the board approved the stock sale at a fair price and set that price through a fair process), the board did not breach any fiduciary duty owed to diluted stockholder.

HOLDING:

- The entire fairness analysis did not substitute for further equitable review.
- Under *Schnell*, if the board approved the stock sale for inequitable reasons (interfering with stockholder voting rights to entrench themselves in office), the Court of Chancery should have cancelled it.
- Under *Blasius*, if the board acted in good faith by approving the stock sale for the "primary purpose of thwarting" the stockholder's vote to elect director or reduce her leverage, the board must demonstrate a compelling justification for such action to withstand judicial scrutiny.

Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81 (Del. 2021)

Equity can void deceptive conduct even where no technical violations of the DGCL.

BACKGROUND:

- Defendant CEO was removed due to workplace misconduct.
- Before the new CEO's appointment could be ratified, two of the five board members resigned allowing former CEO an opportunity to capture control of the board.
- Prior to the meeting, former CEO supported new CEO. But at the meeting, former CEO ignored the proposed resolutions and put forth his own agenda to terminate the new CEO, reinstate himself as CEO, and increase the amount of board seats, among other things.

HOLDING:

- "Regardless of the type of meeting or form of communications, Delaware law does not countenance deception designed to manufacture a quorum or otherwise induce director action."
- Lack of an advance notice requirement for regular board meetings does not grant parties a license to deceive.

Coverage for Fraudulent Conduct

RSUI Indem. Co. v. Murdock, 248 A.3d 887 (Del. 2021)

RSUI Indem. Co. v. Murdock, 248 A.3d 887 (Del. 2021)

Delaware public policy allows insurance coverage for fraudulent conduct.

BACKGROUND:

- Following a trial, Court of Chancery found that CEO and COO engaged in fraud in connection with take-private merger.
- Thereafter, the company and stockholders sought to settle outstanding disputes.
- D&O insurers denied obligation to fund settlements, and sought a declaratory judgment in Delaware Superior Court, arguing in part that insurance should not be available for intentional wrongdoing.
- Superior Court entered judgement against insurer in the amount of policy limits plus prejudgment interest.

HOLDING:

- Delaware does not have a public policy against the insurability of losses occasioned by fraud so strong as to vitiate the parties' freedom of contract.
- DGCL Section 145 reflects the corporation's statutory authority to obtain D&O insurance for liability arising from bad-faith conduct.
- The Court reaffirmed "respect for the rights of sophisticated parties to enter into insurance contracts as they deem fit."

Waiver of Appraisal Rights

Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 2021 WL 4165159 (Del. 2021)

Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 2021 WL 4165159 (Del. 2021)

Appraisal rights may be contractually waived in exchange for valuable consideration.

BACKGROUND:

- In 2008, in connection with a merger, the stockholders entered into a stockholders agreement that included a waiver of their appraisal rights.
- In 2017, pursuant to a merger, the common stockholders received little consideration and sought appraisal. Court of Chancery dismissed petition because of the waiver.

HOLDING:

- There are "certain fundamental features of a corporation that are essential to that entity's identity that cannot be waived," but the individual right to seek judicial appraisal is not one of them.
- "Section 262 does not prohibit sophisticated and informed stockholders, who were represented by counsel and had bargaining power, from voluntarily agreeing to waive their appraisal rights in exchange for valuable consideration."

- DISSENT: (1) Waiver language was not sufficiently clear and unambiguous; and (2) waiver of fundamental corporate governance rights in a stockholders agreement, as opposed to in the corporation's constitutive documents, is problematic.

Derivative Claims

United Food and Com. Workers Union v. Zuckerberg, 2021 WL 4344361 (Del. 2021)

United Food and Com. Workers Union v. Zuckerberg, 2021 WL 4344361 (Del. 2021)

Adopts the Court of Chancery's refined three-part demand futility test, now applicable to all derivative cases.

BACKGROUND:

- Stockholder filed a derivative action challenging a reclassification that was ultimately abandoned.
- Court of Chancery granted Rule 23.1 dismissal, applying a three-part test for demand futility that blended the *Aronson* and *Rales* tests.

HOLDING:

- Adopts the Court of Chancery's three-part test for demand futility; assessed director-by-director, whether at least half of the board:

  (i) received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;

  (ii) faces a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and

  (iii) lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.
- Exculpated claims do not satisfy the substantial likelihood of liability standard.
- No longer necessary to determine whether *Aronson* or *Rales* applies; those cases remain good law.

2021 DELAWARE SUPREME COURT REVIEW

CRIMINAL LAW CASES

By: James Turner

Juliano v. State, 254 A.3D 369 (Del. 2020)

(Fourth Amendment/Pretextual stops)

Traynor, J

In *Juliano*, Officers stopped a car for a seatbelt violation of the passenger. Officers would later admit that the stop was really to investigate a more serious violation of the law. Juliano argued that this type of pretextual stop violates the Delaware Constitution which gives more protections against unreasonable searches and seizures than the federal constitution does.

The Delaware Supreme Court acknowledged that there can be issues with pretextual stops. The court was especially concerned if racial profiling was ever involved- but the Court ultimately found consistent with the US

Supreme Court in *Whren* and the vast majority of other states that pretextual stops are allowed. As long as a stop is based on a violation of the law, no matter how small, it does not matter what an officer's subjective intent is to investigate a more serious crime, the stop will be considered reasonable.

The Court did acknowledge that these stops can raise concerns of arbitrariness by law enforcement, so the court held that an analysis of the post-stop conduct can remedy any concerns about arbitrariness.

Waters v. State, 242 A.3D 778 (Del. 2020)

(Cellular Site Location Information/Subpoenas)

Montgomery-Reeves, J

Waters was charged with the murder of Thompson. In April of 2018, the State provided the Defense with recorded prison calls that the State planned to use at trial. The defense asked for a continuance. The Court denied the

continuance and Waters was convicted of manslaughter. After trial and before sentencing, a US Supreme Court case-*United States v. Carpenter* was issued on cellular site location information (CLSI). (CSLI data now requires a search warrant). The defense asked for a new trial as the decision would have impacted this case. The Superior Court held that, although Waters' CSLI was unlawfully obtained under *Carpenter*, Waters' guilt was established beyond a reasonable doubt despite inclusion of the CSLI evidence because the CSLI evidence was cumulative. The Delaware Supreme Ct agreed with the Superior Court that a new trial was not warranted.

The Court also held that the Superior Court did not err in denying the motion to exclude the prison calls. The Court agreed with the Superior Court that the subpoena for the prison calls was reasonable in that it furthered a substantial government interest particularly since Waters was previously convicted of witness tampering. Finally, the Court held that the Superior Court did not abuse its discretion in denying the motion for a continuance.

Trala v. State, 244 A.3D 989 (Del. 2020).

(Improper Prosecutorial Comments/DUI)

Valihura, J

Trala was charged with DUI. His blood test was over the legal limit at .15. In Closing arguments, the defense challenged the blood results-specifically the testing procedures used by the chemist. In the rebuttal Closing argument, the State then argued several times that the defense didn't object during trial. The State argued that there was never an objection during trial about whether or not the blood collection was proper. Trala was convicted of DUI and appealed.

The Delaware Supreme Court held that it was improper for the prosecutor to comment several times in closing argument about the fact that the defense attorney never objected. It's not evidence and it's not an appropriate thing for a prosecutor to comment on in closing argument.

The Court held that the comments by the prosecutor were highly improper, but they did not rise to the level of warranting a reversal and new trial.

The Court employed the 3 part *Hughes* test to determine whether the comments warranted a reversal. The Court held that the first and third *Hughes* factor that 1) it wasn't a close case and 3) the Judge gave the jury a curative instruction-weighed against a new trial. (The Court found that factor 2-the centrality of the issue to the case, weighed in favor of Trala). The Court also applied the *Hunter* test to see if the errors were so repetitive that they would require a reversal. The Court did not find reversal to be warranted under the *Hunter* test.

The Court also cited the *Walker* case for the principle that "although the prosecutor has wide latitude in summation, he or she may not employ argument to denigrate the role of defense counsel by injecting his or her personal frustration with defense tactics." The Court ended by urging the State to undertake appropriate measures to address the court's concerns.

Gordon v. State, 245 A.3d 499 (Del. 2021) January 6, 2021 ("Collective Knowledge" doctrine)

Traynor, J

Detectives told Trooper Holl about ongoing surveillance of a blue Mazda that was a part of a drug and wiretap investigation. To maintain the secrecy of the drug and wiretap investigation, detectives told Trooper Holl to find a justification to stop the blue Mazda which Detective Holl did by discovering a headlight violation. The car was stopped and Gordon, the passenger, was eventually searched. Gordon challenged the stop a.) because the weather conditions did not require headlights and b.) the officer relied on information provided by other officers to conduct a traffic stop.

The Superior Court found that the stop could not be upheld on the basis of the headlight violation, but could be upheld under the "collective knowledge" doctrine. The

Court held that the officers involved in the drug investigation conveyed enough facts to Detective Holl for him to have justification for the stop based on the knowledge and information provided by other officers.

On appeal, the Supreme Court agreed that under the "collective knowledge" doctrine, an officer can rely on information conveyed by other officers for reasonable suspicion to conduct a traffic stop and that in this case, enough facts were communicated to give Detective Holl reasonable suspicion that the blue Mazda contained contraband. The Supreme Court upheld the stop and affirmed the convictions.

Daniels v. State, 246 A.3d 557 (Del. 2021)

(DUI Sentencing/Predicates)

Traynor, J.

Daniels was sentenced as a DUI 3rd offender based on 2 prior DUI's-a 2000 Delaware DUI conviction and a 2012 NJ conviction under a statue called Driving while

intoxicated (DWI). In order for an out of state conviction to count as a predicate to enhance a sentence, it must be similar to the Delaware DUI statute. The issue in this case was that the New Jersey DWI statute punishes more conduct than the Delaware DUI statute. It punishes allowing another person to drive your car under the influence. The information known about Daniels' DWI conviction did not specify the conduct that he was convicted under. Accordingly, the Supreme Court reversed the Superior Court's finding that the NJ predicate could be used as a prior conviction and remanded for re-sentencing.

The Court also made clear that its holding is not necessarily that the NJ DWI statute can never be a predicate, but it must be clear that the person was convicted for conduct that fits under the Delaware DUI statute. In this case, that was not clear.

Swan v. State, 248 A.3d 839 (Del. 2021)

(Improper Prosecutorial Comments/Rule 61)

Montgomery-Reeves, J.

After being convicted of murder, Swan appealed, arguing that his trial and initial Rule 61 counsel were ineffective on several grounds. One of those grounds involved comments made at closing argument by the prosecutor and a lack of objection to those comments by trial counsel. The comments were: "Remember the standard of proof in a criminal case is guilt beyond a reasonable doubt. Remember your job is to search for truth not doubt."

The Court held that the claim was untimely under *Rule 61* but the Court held that the State's comment was improper as prosecutors are not to disparage the reasonable doubt standard. The Court analyzed the comment using the *Hughes* test, found that it was not a close case and affirmed the Superior Court's ruling that Swan did not suffer

prejudice. The Court would go on to analyze Swan's other 39 claims finding that they were either procedurally barred, they had been litigated before and/or that he did not show that the result would have been different.

Hairston v. State, 249 A.3d 375 (Del. 2021)

(Chain of Custody)

Traynor, J

An SUV was pulled over by police with Hairston as the driver. The officer detected an odor of marijuana, and a bag with a powdery substance was in plain view in the car. Officers removed Hairston to conduct a search of the car. Hairston fled and was caught. A search incident to arrest yielded $768. A search of the car revealed the bag with the white powdery substance and a bag with a green leafy substance.

Before trial, Hairston made a demand under *Title 10 Del. C. 4332* for the presence of all persons in the chain of custody for the drug evidence. At trial, the officer that

seized and packaged the drugs was out on medical leave. The Court allowed an officer who observed the recovery of the drugs yet did not himself handle the drugs, to testify in his place. Hairston was found guilty at trial of possession of drugs and other offenses.

On appeal, the Delaware Supreme Court makes clear that if the defense makes a timely demand under *10 Del. C. 4332* for the chain of custody witnesses in a drug case to be present at trial, those witnesses must be produced. *Delaware Rule of Evidence 901* does not provide an exception to the rule. Accordingly, the drug convictions were reversed.

Lloyd v. State, 249 A.3d 768 (Del. 2021)

(Trial Severance/Racketeering)

Seitz, C.J.

Lloyd was the leader of a drug dealing enterprise. Lloyd and White, who was the subject of an earlier Opinion from this term, were charged with Criminal Racketeering, Drug Dealing and other charges. White, on the other hand, was charged with attempted murder for a shooting in which a bounty was placed on Stanford for drawing the attention of the police. The shooter missed Stanford and a 6 year old boy was hit, causing paralysis and brain damage.

Along with the Racketeering and Drug charges, White was also charged with attempted murder. The cases were tried together. Lloyd moved to sever his trial from White's, arguing that the attempted murder had nothing to do with the Racketeering charges and that he and White had different defenses to the charges which would have been prejudicial to him. The Superior Court denied the motion to sever.

On appeal, the Delaware Supreme Court held that the attempted murder was related to the activities of the drug dealing enterprise, so the Superior Court did not abuse its discretion in denying the motion to sever. Also, because the two co-defendants have different defenses does not automatically mean the case must be severed if the prejudice can be cured by a proper jury instruction. In this case the Court upheld the denial of the severance motion.

Another issue in the case was that Lloyd was misidentified by a witness as "Boop" who was an individual who tried to bribe a witness. Lloyd moved for a mistrial because of the mistaken identification. The Superior Court denied the mistrial and added a stipulation by the state and defense that White, in fact, was the one that bribed the witness. For review of the improper identification, the Supreme Court utilized the *Pena* factors- 1) the nature and frequency of the offending comment; 2) the likelihood of resulting prejudice; 3) the closeness of the case and 4) the adequacy of the judge's actions to mitigate any potential prejudice. The Supreme Court held that the Superior Court's instruction cured any potential prejudice.

Ultimately, the Court affirmed the convictions.

Anderson v. State, 249 A.3d 785 (Del. 2021)

(Trial Severance/Racketeering)

Seitz, CJ

Anderson worked under White and Lloyd in the aforementioned drug dealing enterprise. Anderson, like Lloyd, argued that his trial should have been severed from White's attempted murder trial. He argued that because his defense was different than White's defense, the jury would have a hard time separating the defenses. (White was admitting to drug dealing as part of his defense but Anderson wasn't). He argued that the tone of the trial in which he was charged with less serious charges than his co-defendant, was prejudicial to him.

The Supreme Court agreed with the Superior Court that the jury instructions were sufficient to deal with any prejudice and the facts of the case made it possible for the jury to review Anderson's guilt separate from that of the co-defendant's.

Anderson also argued that there was not enough probable cause in the search warrant to give officers the right to search his car and house. The Supreme Court agreed with the Superior Court that there was enough probable cause. Four past and proven reliable confidential informants advised police that White and Anderson were part of a drug dealing enterprise, police intercepted a call between White and Anderson where Anderson was asked to place a large wager for White, and Anderson was observed leaving White's stash house with a large bag.

He also challenged the search warrant for the phones, but the Court agreed with the Superior Court that there was enough probable cause in the affidavit. The officer explained in the affidavit the significance of Anderson owning 7 phones, he explained that the phones were used to make calls about sports betting which was related to the enterprise's activity in hiding money.

Finally, the Court held that there was in fact sufficient evidence of money laundering and tax fraud for a rational finder of fact to find him guilty beyond a reasonable doubt. The State presented evidence of expensive vacations and designer clothes despite only having a reported income of

$16,156. The Delaware Supreme Court affirmed the convictions.

Risper v. State, 250 A.3d 76 (Del. 2021)

(*Brady*/Discovery/D.R.E. 404(b))

Traynor, J

Risper was found guilty of the murder of Corey Bailey. The theory of the prosecution was that Risper killed Bailey as revenge for Bailey's theft of drugs and firearm belonging to Risper. Risper claims on appeal that the evidence of Bailey's theft and Risper's subsequent efforts to recover the stolen drugs and firearm was prior misconduct evidence and therefore inadmissible under D.R.E. 404(b). The Delaware Supreme Court concluded that the Superior Court did not abuse its discretion in admitting the evidence. It was not admitted to show that Risper was a bad person, instead, it was admitted to show his motive to commit the crime for which he was charged.

Risper also claimed that he did not receive a fair trial because the state did not disclose in a timely manner evidence favorable to the defense under *Brady v. Maryland.* Specifically, the State did not disclose a recorded interview until the afternoon before trial of an individual who told the chief investigating officer that another person had confessed to killing Bailey. As a result, the Supreme Court reversed the conviction. The Court stated that the continuance requested by the defense after the late disclosure should not have been denied.

Houston v. State, 251 A.3d 102 (Del. 2021)

(D.R.E. 701/Odor of Cocaine)

Traynor, J

Traffic stop for suspicion of DUI in which the officer smelled an odor of cocaine. Houston was removed from the vehicle, the officer sees a plastic bag in the car, and Houston takes off running. Cocaine was found in the car. Houston argued on appeal that it was error for the Superior Court to consider evidence of a chemical odor of cocaine

and allow it to form the basis for the officer to improperly extend the duration of the stop.

In the Superior Court, Houston requested a *Daubert* hearing on the testimony. The Court did not allow a *Daubert* hearing but did allow Houston extensive *voir dire* of Detective Radcliffe on his relevant training and experience on the odor of cocaine, before the court allowed the testimony to stand.

The Supreme Court held that, for the purposes of a suppression hearing where the Rules of Evidence are a bit more relaxed as opposed to a trial, it was not error for the officer to testify as to the odor of cocaine, and it did not require expert testimony. It was allowable as lay testimony under D.R.E. 701. It was enough for Detective Radcliffe to testify that he has come into contact with cocaine hundreds if not thousands of times and could relate the odor.

Ayers v. State, 251 A.3d 637 (Del. 2021)

(Improper Prosecutorial Comments/Closing Arg.)

Vaughn, J

Ayers was convicted of Riot, Kidnapping and Assault for participating in the February 2017 Vaughn prison riot where an officer lost his life. At the rebuttal closing argument at trial, the prosecutor said to the jury: "You spent the better part of the last month with Jarreau Ayers. What about Mr. Ayers suggests that he is that person? That he's not going to do exactly what he wants to do, which is to go inside and join what's happening there." Ayers, who was *pro se*, objected, saying that argument implicated his conduct in the courtroom which is improper. The Court disagreed. The Court found Mr. Ayers not guilty of murder but guilty of the other charges.

The Delaware Supreme Court employed the *Hughes* test to assess an improper comment at trial. The Court reiterated that it is improper for a prosecutor to comment

on a defendant's demeanor at trial. The Court was not convinced that the prosecutor's comment was actually intended to invite a consideration of Ayers' demeanor but the Court did hold that even if it was, applying the *Hughes* test-the case was not close and the comments did not relate to a central part of the case. The Court affirmed the convictions.

Heald v. State, 251 A.3d 643 (Del. 2021)

(Inappropriate Prosecutorial Comments/Closing Argument/Unlawful Sexual Contact)

Traynor, J

Heald was convicted of Unlawful Sexual Contact for inappropriate touching of a child during tickling. The appeal centered around prosecutorial misconduct, specifically, inappropriate comments by the prosecutor at closing argument. One of the comments was that Ann-the victim-did everything right and her parents did everything right regarding reporting the incident. On appeal the Supreme Court cited *Whittle v. State* where the Court held that it was improper for a prosecutor to use the word "right"

or “correct” to refer to a witness. It expresses a prosecutor’s favorable opinion of a witness. The Court also held that the comment: “the system worked” was improper. Additionally the Court held the comment: “no one wants to think or believe that a family member could ever do something as heinous as what we are alleging here,” was also improper.

The Court applied the 3 part *Hughes* test for improper comments during trial and found, here unlike some earlier cases, the case was close and witness credibility was central to the case. The prosecutor’s comments related to witness credibility. There was no physical evidence. As a result, the Court reversed the conviction.

Upon remand, the Court also urged the trial court to take another look at whether the child’s statement to her father should come in as an excited utterance hearsay exception as there were several intervening events between the alleged incident and the statement.

McMullen v. State, 253 A.3d 107 (Del. 2021)

(*11 Del. C. Section 3507*/D.R.E. 403)

Valihura, J

In a murder case, the State sought to admit witness Mills' prior statement under *11 Del. C. Section 3507*. On appeal, McMullen claimed the prior statement was cumulative or the same as the trial testimony under *Evidence Rule 403* and, therefore, should not have come in.

The Delaware Supreme Court held that the prior statement differed in an important way from the trial testimony. In the prior statement, Mills says McMullen confessed to killing Gibbs to her, but on the witness stand, she gave an ambiguous response on that issue. The Court held that it was not cumulative and the prior statement was properly allowed in. The Court also found that witness Keyshawn's prior *3507* statement was materially different than what was said on the witness stand and therefore not cumulative. The Court affirmed the judgment of the Superior Court.

Purnell v. State, 254 A3d 1053 (Del. 2021)

(Rule 61/Conflict/Murder)

Valihura, J

Tameka Giles was walking with her husband in Wilmington and was shot during a robbery involving 2 men. Both men escaped. Eventually, Purnell was developed as a suspect, mainly from the statements of others, including statements in which he bragged about the crime. The main issue in this case was that, earlier in the case, trial counsel represented Dawan Harris for gun possession, but counsel was later appointed to represent Purnell. The gun that Harris pled guilty to possessing was involved in a search warrant for the Giles murder investigation. Additionally, Harris was initially a suspect in the Giles murder.

The Delaware Supreme Court held that the Harris gun charge was substantially related to the Giles murder, and the conflict of representing Harris earlier, prevented trial counsel from investigating and presenting evidence at the Purnell murder trial that implicated Dawan Harris, his former client. Trial counsel was also ethically precluded

from going after Dawan at trial as it would have been a position directly adverse to a former client. The Court held that it was error for trial counsel and for the Superior Court to assume it would only be a conflict if Dawan testifies.

Because this was a Rule 61 appeal and it was untimely, Purnell had to rely on the actual innocence exception. The evidence must be new and sufficiently persuasive. The Court analyzed the new evidence, including witness recantations, new medical evidence questioning whether Purnell could run fast on the day of the murder, and evidence inculpating Dawan Harris-along with the conflict. The Court held that this case met the high standard for new evidence. The matter was reversed and vacated for a new trial.

Mayfield v. State, 2021 WL 2672149 (Del. 2021)

(Self Representation/Continuance Request)

Vaughn, J

Mayfield was charged with a series of rapes in Wilmington. After being represented by counsel, he

decided to go *pro se*. The day before trial, he changed his mind and decided he wanted to be represented by counsel and requested a continuance. The prosecutor opposed the continuance on the basis that the alleged victims were extremely fragile individuals and one of them would not be appearing at trial, in part, due to the amount of time it had taken for the case to get to trial. The trial Judge denied Mayfield's continuance request as requested but stated that it an attorney enters his or her appearance, he would hear that attorney on continuance. In denying the continuance request, the Court factored in that it would necessitate a 4-5 month continuance, that the State had already lost one complaining witness, and that Mr. Mayfield had been very thorough in his pretrial motions and had standby counsel, which affected his argument that he was not prepared for trial.

The Delaware Supreme Court cited the 3rd Circuit case of *United States v. Leveto* that once waived, the right to counsel is no longer absolute, and as the trial date draws near, the court should consider the practical concerns of managing its docket. The Supreme Court reviewed the circumstances of this case and found that the trial Judge

carefully weighed the competing interests and it was not an abuse of discretion for the Judge to deny the continuance. The convictions were affirmed.

White v. State, 2021 WL 3438379 (Del. 2021)

(D.R.E. 901/Improper Prosecutorial Comments)

Montgomery-Reeves, J

A search warrant of White's home was executed and Officers found drugs and cell phones. One of the phones contained drug dealing messages, and that phone appeared to belong to White. First, the Delaware Supreme Court held that the Superior Court did not abuse its discretion in admitting the text messages from the phone. There was enough evidence of authenticity under D.R.E. 901 as the cell phone was recovered from White's bedroom, numerous messages from his significant other were on the phone, and the chief investigating officer was present when the phone was recovered and could testify as to how the text messages are downloaded. The Court did suggest that

the subscriber information would have been helpful but that authenticity was nevertheless satisfied in this case.

The second issue in this appeal was whether the prosecutor made improper remarks during rebuttal closing argument. The Court held that the prosecutor did not denigrate the role of defense counsel or suggest that the reasonable doubt standard should be viewed with suspicion. With regard to the prosecutor's use of the word "I," while inartful and the Court did state that it is typically inappropriate for a prosecutor to use "I," here it was not an attempt to express a personal opinion about the evidence. The Supreme Court affirmed the conviction.

Reed v. State, 2021 WL 3520945 (Del. 2021)

(Motion to Withdraw a Guilty Plea)

Valihura, J

Prior to Sentencing, Reed sought to withdraw his guilty pleas. His counsel refused to file the motion and the Court refused to consider Reed's *pro se* motion because he was represented by counsel. The Delaware Supreme Court

held that prior to Sentencing, counsel must either obey an instruction to file a motion to withdraw a guilty plea or seek leave to withdraw so the defendant can file the motion *pro se* or with other counsel.

Reed pled guilty to Manslaughter. Eight days later, Reed wrote to the trial judge seeking to withdraw his guilty plea. Reed was later Sentenced. First, the Supreme Court held that it, potentially, constituted ineffective assistance of counsel if counsel advised Mr. Reed that he should plea because a black man will not get a fair trial in Sussex County. The Supreme Court also held that prior to Sentencing, counsel must either obey an instruction to file a motion to withdraw a guilty plea or seek leave to withdraw so the defendant can file the motion *pro se* or with other counsel. This applies even if the motion is without merit, but counsel is permitted to urge the client to reconsider if the motion is unwise.

The Court remanded the case to the Superior Court to conduct an evidentiary hearing on the prejudice prong as to whether the result would have been different-is there a reasonable probability that the motion to withdraw would have been granted-to satisfy the 2 part Strickland test of ineffectiveness. The Court was particularly concerned

about counsel's advice to Reed about his race or the racial mix of the Sussex jury pool and the impact of those comments on the voluntariness of the plea.

The big takeaway from this case is that the Court clears up any ambiguity that might have existed and makes clear, it is, at the very least prong 1 deficient performance to not allow the client to file a motion to withdraw guilty plea before sentencing when that is the client's desire.

Taylor v. State, 2021 WL 4095672 (Del. 2021)

(Cell phone search warrant)

Seitz, CJ

Taylor was convicted of First Degree Murder. The appeal centered on one issue-whether the warrant to search his smart phones was an unconstitutional general warrant. The warrant in this case authorized a search of any and all data and was not limited in scope or time limit. The Court reiterated that cell phones implicate privacy concerns far beyond those of other searches and, accordingly, receive heightened constitutional scrutiny. The Court looked at the

2018 *Buckham* case, also a cell phone case. In that case, the Court held that a cell phone search should be limited to a relevant time frame and limited only to data for which there is probable cause to search. The Court also discussed the *Wheeler* case-a case in which the Court wrote extensively on general warrants.

The Court held that the warrant was overbroad and that the evidence found on the cell phone should have been suppressed. The Court made clear that specificity as to what to search for is required in a search warrant. The Court then found that without the illegally seized evidence, the verdict might have been different. In this case, there was text message evidence in the cell phone where Taylor insinuated he shot Miller and Wingo, so the evidence was significant. The Court reversed the convictions and remanded for new trial.

Juliano v. State, 2021 WL 4127187 (Del. 2021)

(Odor of marijuana/Probable cause to search)

Traynor, J

After being remanded in 2020 (the original appeal on the issue of pretextual stops was discussed earlier in this Supreme Court Review), this case was back up on appeal in September 2021. The Court held that in this case, the odor of marijuana alone was not enough to provide probable cause to arrest and conduct a search incident to arrest of Juliano. In this Opinion, the Court writes extensively on marijuana and probable cause. The Court discussed the 2015 decriminalization of personal use amounts of marijuana (one ounce or less), the effect this has on probable cause that an individual has a criminal amount of marijuana, and the right to search an individual. The Court reversed and vacated Juliano's adjudication of adjudication.

Patrick v. State, 2021 WL 4347744 (Del. 2021)

(Double Jeopardy/Multiplicity/Possession of a Firearm by a Person Prohibited)

Seitz, C.J.

The Court held that when a person is charged with multiple counts of Possession of a Firearm by a Person Prohibited for the same gun, only one conviction is allowed under the Double Jeopardy Clause. The Court looked at legislative intent. Accordingly, the Court reversed one of Patrick's counts of Possession of a Firearm by a Person Prohibited.

2021 SUPREME COURT CASE REVIEW
Family Court Cases

By: Megan McGovern, Esquire
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***Jarvis v. Mole*, 2020 WL 6606459 (Del. Nov. 12, 2020)**

This case involved a Petition for Third Party Visitation in which a child's former step-grandfather was seeking visitation with the child over both parents' objection. The former step-grandfather alleged that he spent substantial time with the child while he was still married to the maternal grandmother, bought him presents, and contributed

The Mother objected to visitation because of conflict between herself and former step-grandfather—he spoke to and about her in a derogatory manner and while Mother and the child briefly moved into the home where former step-grandfather lived with maternal grandmother, former step-grandfather made repeated calls to the police to have Mother and the child removed, claiming that Mother (and on one occasion, the child) was too noisy and not permitted in the home.

The Father objected to visitation because he believed that former step-grandfather was creating problems between Father and Mother. Shortly after his divorce from maternal grandmother, former step-grandfather began contacting Father to arrange visits with the child. He arranged these visits without Mother's knowledge and did not disclose to Father that Mother would not permit him contact with the child. When Mother learned that Father was allowing contact, she became upset with Father which put a strain on their relationship.

To prevail on a Petition for Third Party Visitation where a parent objects to visitation, the movant must show i) that the visitation is in the child's best interests under 13 *Del. C.* § 722; ii) that the parents' objections are unreasonable by clear and convincing evidence; and iii) that the visitation would not substantially interfere with the parent/child relationship by a preponderance of the evidence. Ultimately, the Family Court held that former step-grandfather failed to demonstrate by clear and convincing evidence that the parents' objections to visitation were unreasonable.

On appeal, the grandfather argued that the Family Court erred by failing to consider the best interest factors in its analysis, and when it determined that he failed to prove that the parents' objections were unreasonable.

The Supreme Court held that it was unnecessary for the Family Court to consider all elements of the analysis if it was clear that one element is unsatisfied. In other words, because the Family Court could not grant visitation, even if the best interest factors weight in favor of visitation, it did not need to perform the full analysis. Further, the evidence presented as to each parent's objections allowed the Family Court to consider many of the best-interest factors in context.

The Court also rejected the former step-grandfather's argument that the Family Court erred in determining that he failed to show that the parents' objections were unreasonable, noting the strained or toxic relationship between Mother and former step-grandfather and recognizing the special weight given to parents' views on visitation with third parties and their children's best interest. The Family Court's ruling was affirmed.

***Sanders v. Sanders*, 2020 WL 7213218 (Del. Dec. 3, 2020).**

Sanders v. Sanders involves an appeal from a default order granting guardianship to the maternal grandparents. In this case, the maternal grandfather and step-grandmother ("Grandparents") filed a Petition for Guardianship of the mother's child alleging that the child was in the care of Maternal Grandmother, and that the current address of the child's parents was unknown. The Grandparents did not complete the portion of the guardianship petition relating to why they sought guardianship but alleged in a motion and affidavit for ex parte order that the parents were homeless, using drugs, and unable to care for the child, and that Maternal Grandmother was mentally ill, using drugs, and verbally abused the child. Notice to the parents was published in the newspaper, and Father was ultimately served where he was incarcerated. Neither parent appeared for a case management conference. The Family Court found that both parents had notice, failed to file an Answer, and failed to appear, and entered a default order granting Grandparents guardianship of the child.

Mother appealed, claiming that she did not receive proper notice and that Grandparents were keeping the child away from Mother and Maternal Grandmother. Mother provided text messages showing that she gave Grandfather her address in November, but then learned shortly before the holidays that he filed his Petition in October and there was a hearing scheduled in January. Mother went to the courthouse on the date of the hearing where she learned that the hearing was by teleconference, and she could not be seen by the judge.

This Court did not resolve the notice issues, but instead found that the Family Court abused its discretion in entering a default judgment on the guardianship petition. The Court held that a trial court is required to make findings required by statute even where one of the parties is in default. Thus, in this instance, the Family Court was required to consider the grounds for guardianship set forth at 13 *Del. C.* § 2330 – specifically the Family Court must find that each parent voluntarily consents, or after a hearing on the merits and by preponderance of the evidence, that the child is dependent, neglected or abused, and that guardianship is in the best interest of the child. The matter was remanded for an evidentiary hearing on the Petition.

***Fletcher v. Feutz*, 246 A.3d 540 (Del. Jan. 22, 2021).**

This case involves an appeal from Fletcher's petition to modify or terminate his alimony obligation to Feutz. The parties entered into a consent order at the time of their divorce pursuant to which Fletcher ("Husband") is to pay Feutz ("Wife") alimony in the amount of $2,250 per month. The Agreement allowed Husband to seek modification/termination of his obligation in three instances: i) if Wife were to die, remarry or cohabitate; ii) based on the appropriateness of Wife's employment; and iii) based upon a real and substantial change of circumstances.

After trial, the Family Court denied Husband's petition, finding that Wife's part-time employment was appropriate, that Wife was not cohabitating, and that there was no real and substantial change in circumstances. The Family Court also awarded Wife her attorneys' fees incurred defending the matter. Husband challenged the Family Court's findings on appeal.

First, regarding Wife's employment, Husband challenged the Family Court's findings based on the lack of medical evidence and its failure to accept his expert's opinion.

As to medical evidence, the Supreme Court noted that Wife's obligation is to maintain appropriate employment, however the statute does not necessarily require full-time employment. The Court rejected Husband's contention that there should be a blanket rule that requires objective medical evidence as proof of a severe and incapacitating mental or physical illness or disability. Rather, the Court noted that, while it is best practice to require medical evidence, it is not prerequisite to any such determination and the Family Court retains the ability to weigh all evidence, medical or otherwise.

As to Husband's expert's testimony, the Court found that the Family Court was justified in rejecting the expert's opinion after finding that his conclusions were tainted by confirmation bias where he admittedly excluded data that did not support his conclusions or his client's positions, i.e., the lack of full-time employment available in Wife's home area. Given the testimony at trial regarding Wife's impairment, the fact that Husband presented no evidence to the contrary, and the gaps in Husband's expert's testimony, the Supreme Court upheld the Family Court's finding related to Wife's employment.

Second, regarding the Family Court's findings as to a real and substantial change in circumstances, Husband argued that Wife should have been attributed with additional income during the period in which she had a tenant, and the Family Court erred when it concluded there was no substantial change in Wife's circumstances despite her increased income and simultaneous decreased expenses.

The Supreme Court remanded the matter on both issues for reconsideration as the final order of the Family Court either failed to address the arguments or used incorrect facts for its analysis.

Third, as to cohabitation, the Court found that the record sufficiently supported Family Court's finding that Wife was not cohabitating. Although they spent weekends together, had keys to each other's house, and assisted with errands and chores, neither contributed to the other's mortgage or left personal items at the other's home and requested permission to visit the other's home.

Finally, the Court reversed the award of attorneys' fees based on provision in the Order that each party waived any and all claims against the other, including attorney's fees.

Mother and Guardian began dating in late 2013, when Mother's child was an infant. Mother, Guardian and the child moved in with Guardian's parents in early 2014, and Mother and Guardian had a child together in September 2014. Mother and Guardian separated in early 2016, at which time Mother moved into her great grandmother's home. Mother did not take the child with her because she did not believe the home was suitable for children. Instead, Mother agreed for the child to live with Guardian, and Mother visited and provided care regularly at Guardian's parents' home.

In April 2016, Mother and her then-significant other (?) (the "Guardian") executed a consent agreement awarding guardianship of Mother's son to the Guardian. The parties agreed to a guardianship order because the Guardian was a father figure to the Child, and so that he could make legal decisions on the child's behalf while he was living there.

In 2017, Mother moved into her grandfather's home and began having regular overnight visits with the children. Mother and her fiancé then moved into their own home and the regular Tuesday and weekend visits continued.

In May 2019, Mother filed a Petition to Rescind Guardianship. After an evidentiary hearing, the Family Court granted Mother's petition and awarded her sole legal custody and residential placement of the child. The Family Court found that Mother made a preliminary showing that the guardianship was no longer necessary because she found suitable housing, has maintained consistent visitation with the child, is willing and able to care for the child full-time, and although she was not as involved with the child's schooling and therapy as the Guardian, she did not abandon the child. The Family Court further found that the Guardian failed to establish that the child would be dependent, neglected or abused in Mother's care, or that he would suffer physical or emotional harm if the guardianship were rescinded. In granting Mother's petition, the Family Court recognized that Mother—as the biological parent—has a fundamental right to care for the child if she is able to do so.

On appeal, the Guardian argued that the Family Court erred in finding that he "failed to make a preliminary showing that the minor child would be dependent, neglected, or abused in Mother's care." This Court notes that the Guardian misstated the Family Court's findings and applicable legal standard. This Court rejected the Guardian's argument that the Family Court improperly shifted the burden of proof and persuasion to the Guardian. Rather, after Mother made the preliminary showing that the guardianship was no longer necessary for the reason it was established, the burden shifted to the Guardian to establish either dependency, neglect or abuse, or that the child would suffer physical or emotional harm. The fact that the Guardian believed he provided higher quality care for the child than Mother was not the standard and may have rendered a different result if the best interest standard applied. The Family Court's ruling was affirmed.

***Tremont v. Tremont*, 2021 WL 682162 (Del. Feb. 22, 2021).**

This case involved cross-petitions to modify visitation. The prior custody order, entered on May 11, 2017, granted the parties joint legal custody and awarded Father primary residential placement, and Mother visitation one overnight each week, and alternating weekends. Father filed a Petition seeking to eliminate Mother's weeknight visit in exchange for one additional weekend, and Mother filed an Answer and Cross-Petition, requesting that the Family Court deny Father's petition, but award Mother one additional weekly overnight.

After a hearing in which the parties presented six (6) witnesses, including Mother's therapist, the parties' co-parenting counselor, family members, and each of the parties, the Family Court determined that Father failed to prove that Mother's mid-week visitation with the Child endangered the child's physical health or significantly impaired the child's emotional development, and concluded that certain of the best interest factors weighed in favor of granting Mother additional visitation with the child.

Father raised three issues on appeal: first, that the Family Court erred by requiring Father to establish that the current visitation order "posed a threat to the Child's physical health or emotional development before considering the modification he proposed; second, that the Family Court erred by concluding that factors (4) and (6) favored more visitation with Mother without discussing the basis for its conclusion or applying the same analytical framework to Father's petition; and third, that the Family Court's conclusions were not the product of an orderly and logical deductive process.

This Court noted that 13 *Del. C.* § 728(a) requires the Family Court to

> determine, whether the parents have joint legal custody of the child or 1 of them has sole legal custody of the child, with which parent the child shall primarily reside and a schedule of visitation with the other parent, consistent with the child's best interest and maturity, which is designed to permit and encourage the child to have frequent and meaningful contact with both parents unless the Court finds, after a hearing, that contact of the child with 1 parent would endanger the child's physical health or significantly impair his or her emotional development."

Because Father was seeking to significantly reduce Mother's visitation by eliminating 4-5 overnight visits each month in exchange for only 1 weekend visit, the Family Court properly placed the burden on Father to justify his request by showing that the mid-week visitations he sought to eliminate endangered the child's physical health or significantly impaired the child's emotional development. The Supreme Court found that the Family Court's conclusions were supported by the evidence, specifically Mother's significant improvements in managing her anger and her continued participation in therapy.

As to analysis of the best interest factors, this Court found that the Family Court is not required to set forth a full analysis on each factor with regard to each petition and rather, may weigh the factors as it deems appropriate given the facts of the particular case. The record reflected that the Family Court gave consideration to all best interest factors even though it did not set forth detailed findings as to each. The Family Court's ruling was affirmed.

In this case, the Family Court terminated the parental rights of the biological parents in two children and transferred the rights to the Division of Family Services for purposes of adoption. There was no appeal from the termination of parental rights.

Just less than five months later, the appellant filed a petition for guardianship of the children. He identified himself as the children's uncle, and alleged that each child was dependent, neglected or abused. Ultimately, the Family Court denied the petitions for guardianship, citing 13 *Del. C.* § 1114 for the proposition that adoption or permanent guardianship were the only options for permanency for a child whose parents' parental rights were terminated. The Family Court denied Harris' petition because he sought only standard, not permanent, guardianship and did not meet the criteria for permanent guardianship.

On appeal, Harris argued that the Family Court and DFS conspired to keep the children away from him and other family members. DFS sought to affirm the Family Court's Order, and further argued that the appeal was moot in light of the children's adoption and Harris' failure to appeal the termination or adoption orders. The Office of Child Advocate ("OCA") appeared on behalf of the children, arguing that the Family Court's interpretation of § 1114 was erroneous, but the error was moot because the children achieved permanency through adoption.

This Court concluded that the Family Court erred in its interpretation of Section 1114 as prohibiting standard guardianship for a child whose parents' parental rights were terminated. Rather, the section reflects the preference for adoption, but also recognizes that adoption may not always be possible. Nothing in Section 1114 prohibits standard adoption for a child whose parents' parental rights were terminated.

This Court further found that the denial of Harris' Petition for Guardianship should be affirmed because Harris failed to plead any facts in his petitions suggesting that the children were dependent, neglected, or abused. Both children were in the care of DFS and residing with adoptive resources at the time of his Petition. He knew that the children were in foster care and attended Family Court proceedings leading to the termination of parental rights. Despite his knowledge, Harris did not seek guardianship until after the termination of parental rights. This Court found denial of his petitions appropriate under the circumstances and affirmed the Family Court's ruling.

***Allen v. Scott*, 2021 WL 3136705 (Del. July 26, 2021).**

This matter involves an appeal from a Family Court Order determining property division ancillary to a divorce. The issue on appeal is whether the Family Court abused its discretion in designating funds to purchase joint real property as "marital" where the Ancillary Pretrial Stipulation describes the funds as "premarital" and how that designation impacted the trial court's division of the marital estate.

The parties were married in 2017 and moved to Colorado in late 2018 where they purchased a home in joint name. Allen paid the down payment for the home. The parties lived in the home for approximately three (3) weeks and then moved back to Delaware and sold the Colorado home at a loss.

The parties separated in early 2019 and were divorced by decree of the Family Court in September 2019. The Family reserved jurisdiction to determine property division. The parties submitted an Ancillary Pretrial Stipulation ("APS"), which became an Order of the Family Court on April 24, 2020. In the APS, both parties expressly stated that Allen used premarital funds to make the down payment on the Colorado home. Although Scott acknowledged that Allen used premarital funds, she argued that the down payment was a gift unto the marriage and thus the proceeds from the sale of the Colorado home were marital and subject to division. Per the APS, the dispute was not whether Allen used premarital funds to make the down payment, but rather, whether the down payment, made using Allen's premarital funds was a gift unto the marriage.

At trial, Allen testified that she used "private funds" from her "personal checking account" to pay the down payment, but never specifically used the word "premarital" to describe the funds used. In closing, Scott's attorney argued for the first time that the parties could not be sure that the funds were premarital or marital because there was no documentation provided to the Court reflecting the nature of the funds. Each party's counsel submitted post-trial letters to the Family Court addressing the nature of the funds. Allen maintained that the funds were premarital as expressly acknowledged in the APS and the only issue for the Family Court was whether the funds were a gift unto the marriage; Scott argued that the funds for the down payment must have been marital, or in the alternative that the funds were a gift unto the marriage.

In its decision, the Family Court found first that Allen's use of the terminology "separate account" as opposed to "premarital funds" was a material change to the APS which the parties had an affirmative duty to update. Next, the Family Court found that Allen failed to present evidence to indicate that she paid the down payment of the parties' Colorado home using premarital funds and concluded that Allen used funds "stemming from the capital from both parties' employment." The Family Court in turn held that the equity in the Colorado property was marital and awarded Scott one-half of the proceeds. The Family Court divided the remaining marital estate using a 60/40 allocation in Scott's favor. The Family Court denied Allen's request for reargument despite Scott's acknowledgement that the parties previously stipulated prior to trial that Allen paid the down payment using premarital funds.

On appeal, this Court found that the Family Court abused its discretion in classifying the funds as marital where "the parties entered into a binding stipulation that unambiguously referred to the funds used for the down payment as premarital, that stipulation was made an Order of the Court, and neither party moved to amend the stipulation" finding that "there was no factual question for the Family Court to address related to the classification of the funds used for the down payment at the time the June 23 hearing began."

Per the Supreme Court, "a material change in information that permits the court to modify a pretrial stipulation may occur, for example, if the issue could not have been considered at the time of the stipulation." The designation of the down payment funds as premarital was contemplated at the time of the Stipulation and neither party sought to introduce evidence to the contrary or otherwise challenge the stipulated fact until after the evidentiary record closed. Recognizing that Allen never referred to the funds as marital, and that Allen's testimony that she used "private funds" from a "personal checking account" does not contradict her APS position that the funds were premarital, the Supreme Court explained there was no need for Allen to submit evidence on a point that she had no notice was at issue.

The matter was remanded for the Family Court to consider whether the premarital payment was a gift unto the marriage. As to the issue of percentage division, the Supreme Court found no error, but noted that the Family Court may revisit that issue after determining whether the down payment was a gift unto the marriage.

***Lowell v. Cline*, 2021 WL 784890 (Del. Mar. 1, 2021), *aff'g M.L. v. B.C.*, 2020 WL 8921424 (Del. Fam. Jul. 14, 2020).**

This matter involves the Partition for Partition of a piece of real property (the "Property") owned by the parties as joint tenants with rights of survivorship. Cline purchased the property with another individual prior to 2010. In 2009, Lowell moved in with Cline, and in 2010, Cline's first co-owner sold her interest in the property to Lowell. Lowell paid $50,000 and became a co-borrower on a mortgage with Cline. The parties were married in May 2014, and divorced in ____, at which time the Family Court retained jurisdiction to determine property division.

In 2016, the Delaware Divorce and Annulment Act (the "Act") was amended to expand the definition of marital property to include jointly titled property acquired by the parties before they were married. *See* 13 *Del. C.* § 1513(b)(2). Lowell argued to the trial court that Section 1513(b)(2) did not apply to the Property, because that subsection did not exist at the time the parties purchased the Property or at the time the Parties were married, and therefore, the Property could only be divided by partition. Cline disagreed, arguing that Section 1513(b)(2) was applicable retroactively to include the Property.

The parties agreed to a basic understanding of Delaware law that, absent an express legislative intent otherwise, statutes have prospective application, except that even absent a stated intent, statutes may be applied retrospectively if they are remedial in nature. In determining whether a statute is remedial, "[o]ne consideration is whether the new statute, if applied retrospectively, would interfere with, impair, or divest vested rights." Thus, the question before the Family Court was whether Section 1513(b)(2) impacted Lowell's vested rights or was it remedial.

Lowell argued that retrospective application of the expanded definition would impair her vested right in the Property, as a partition action would likely lead to a sale of the property and a narrower focus on compensation for the funds invested, whereas division on Section 1513 would involve consideration of equitable factors beyond the parties' financial contributions.

The Family Court rejected Lowell's argument, noting that the question is not whether the outcome would be changed, but whether any change that may result would impact vested rights. The trial court held that Lowell had a vested right in the *ownership* of the Property, but not a vested right to the *disposition* of the Property as a result of her subsequent marriage and divorce. The Family Court noted that "[v]iewing Section 1503(b)(2) [*sic*] as applicable only to property obtained after its effective date would be contrary to the goas of the Act, as it would exclude portions of property owned by divorcing couples from the equitable scheme that was created with the express purpose of helping to ensure a less harmful and more amicable way to settle such disputes."

Lowell appealed, and the Supreme Court affirmed the decision below.

2020 – 2021
United States Supreme Court Cases and Upcoming Cases

10:45 a.m. – 12:15 p.m.

Rodney A. Smolla

Dean and Professor of Law Widener University
Delaware Law School

Alan E. Garfield

Distinguished Professor Widener University
Delaware Law School

Rod Smolla is in his seventh year as Dean of the Widener Delaware Law School. He is the author of many legal treatises, casebooks, and general interest books on constitutional law issues, and remains an active litigator, briefing and presenting argument in state and federal courts across the country.

Alan E. Garfield has been teaching at Delaware Law School for 35 years. He is a native of Los Angeles and a graduate of the UCLA School of Law, where he was a member of the UCLA Law Review and the Order of the Coif. Prior to joining the Delaware faculty, Professor Garfield worked for three years in the litigation department of Weil, Gotshal & Manges in New York City. He writes and teaches in the areas of Constitutional Law, Copyright, and Contracts. His scholarship has appeared in numerous journals including the *Columbia Law Review Sidebar*, the *Cornell Law Review*, and the *Washington University Law Review*.

2021 Supreme Court Review CLE Outline
United States Supreme Court Update
Rod Smolla & Alan Garfield[1]

Carney v. Adams

In *Carney v. Adams*[2] the Supreme Court was presented with challenges to two aspects of the Delaware system. One provision of the Delaware Constitution, known as the "bare majority" provision, applies to all five of Delaware's principal courts, and provides that no more than a "bare majority" of judges on those courts may be members of any one party. A second constitutional provision, known as the "major party" provision, restricts on the state's three most influential courts, the Supreme Court, the Court of Chancery, and the Superior Court, to membership among one of the two "major parties," which in modern times means Republicans or Democrats. Delaware is unique among American states in the manner in which judges are appointed to its courts. The Delaware Constitution requires political balance on the state judiciary. The Delaware Supreme Court, for example, is comprised of five Justices. No more than three at one time may ever be from one major party, with the other two from the other major party. This translates to meaning that at any given moment there will either be three Democrats and two Republicans, or three Republicans and two Democrats, on the state Supreme Court. Similar balance provisions apply to various lower courts. Delaware created this system to ensure that the state judiciary would be bipartisan. Ironically, Delaware was *using* politics as a tool to *limit* the role of politics in its judicial system. For its courts to be "bipartisan" they needed to be politically "balanced," and to maintain balance, Governors nominating persons to fill vacancies were often limited to considering candidates from only one party. In an anti-climactic resolution, the Court dismissed the case for lack of standing.

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[1] These materials are abridged from updates to two treatises authored by Rod Smolla, *Federal Civil Rights Acts*, and *Smolla and Nimmer on Freedom of Speech* (Thomson Reuters West), Copyright © by Rodney Smolla, used with permission.

[2] *Carney v. Adams*, 141 S. Ct. 493, 208 L. Ed. 2d 305 (2020) Author's disclosure: Rod Smolla participated in the case at the Supreme Court level, serving as lead counsel for an *amicus* brief filed on behalf of constitutional law and corporate law scholars from around the country in support of the Petitioner, the Governor of Delaware, defending the Delaware selection system, arguing that the system did not violate the First Amendment.

California v. Texas

In *California v. Texas*,[3] the Supreme Court applied standing doctrines to dismiss claims brought by individuals and various states, led by Texas, to the Patient Protection and Affordable Care Act, often described by its nickname "Obamacare." The case involved the mandate under the Act requiring most Americans to obtain minimum essential health insurance coverage. As originally enacted, the law imposed a monetary penalty upon most individuals who failed to do so. However, Amendments to the Act in 2017 effectively nullified the penalty by setting its amount to $0. The Court held that that the plaintiffs did not have standing to challenge the minimum essential coverage provision because they had not shown a past or future injury fairly traceable to defendants' conduct enforcing the specific statutory provision they attack as unconstitutional. The individual plaintiffs lacked standing, the Court held, because while the law told them to obtain coverage, the no means of enforcement. With the penalty zeroed out, the Court reasoned, the Internal Revenue Service could no longer seek a penalty from those who fail to comply. Because of this, the Court held, there was no possible Government action that is causally connected to the plaintiffs' injury—the costs of purchasing health insurance. The Court also held that Texas and the other state plaintiffs had similarly failed to show that they have alleged an injury "fairly traceable to the defendant's allegedly unlawful conduct." Any injury to the states was based on too highly attenuated a chain of possibilities to support standing. Justice Alito, joined by Justice Gorsuch, dissented, noting wryly: "Today's decision is the third installment in our epic Affordable Care Act trilogy, and it follows the same pattern as installments one and two. In all three episodes, with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue."

Fulton v. City of Philadelphia

The future of *Employment Division v. Smith*[4] was cast into serious doubt by the Supreme Court's 2021 decision in *Fulton v. City of Philadelphia, Pennsylvania*.[5] The Supreme Court in *Fulton* dealt with a First Amendment challenge to Philadelphia's requirement that private foster care agencies agree to accept same-sex couples as foster parents. The City of Philadelphia's foster care system relied on

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[3] *California v. Texas*, 141 S. Ct. 2104, 2114 (2021).

[4] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

[5] *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021).

cooperation between the City and private foster care agencies. Among the private providers that Philadelphia had used for over 50 years was Catholic Social Services, an arm of the Roman Catholic Church. Catholic Social Services maintained that as a matter of religious principle and belief, marriage is a sacred bond between a man and a woman. Catholic Social Services, adhering to this religious brief, would not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples, as foster parents. Other private foster care agencies in Philadelphia were available to certify same-sex couples as foster parents. The City concluded that the refusal of Catholic Social Services to work with same-sex couples violated Philadelphia's anti-discrimination laws, including its "Fair Practices Ordinance," and accordingly terminated its contract with Catholic Social Services and ceased referring foster children to it. Catholic Social Services filed suit in federal court against Philadelphia, arguing that the City's action violated its rights under the First Amendment. A The federal district court and the United States Court of Appeals for the Third Circuit upheld Philadelphia's termination, reasoning that Philadelphia was enforcing a neutral law of general applicability, and thus not a violation of the Free Exercise Clause or the Free Speech Clause of the First Amendment.

The United States Supreme Court granted review, in a case that many thought could result in the overruling of the long-vexing decision in *Employment Division v. Smith*. The Supreme Court *unanimously* held that Philadelphia's actions did violate both the Free Speech Clause and the Free Exercise Clause of the First Amendment, but did not reach the issue of whether *Smith* remains or does not remain good law. While the outcome was 9-0, the Court was quite divided over the rationale. Several concurring Justices, however, were quite candid in their willingness to overrule *Smith.*

The opinion of the Chief Justice for the Court held that the case fell outside the parameters of *Smith* because Philadelphia had burdened the religious exercise of Catholic Social Services through policies that did not meet the requirement of being neutral and generally applicable, but instead fell within the proscription of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.[6] Government fails to act neutrally, the Court explained, "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."

A law is not generally applicable, the Court explained, if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism

[6] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

for individualized exemptions. The Court used the example of *Sherbert v. Verner*[7] to illustrate. In *Sherbert*, the Court explained, a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits.[8] The State denied her application under a law prohibiting eligibility to claimants who had failed, without good cause to accept available suitable work. The Supreme Court in *Sherbert* held that the denial infringed the claimant's free exercise rights and could be justified only by a compelling interest.

Justice Barrett, concurring, appeared to signal that she was poised to reconsider *Smith*. Justice Alito, joined by Justices Thomas and Gorsuch, was far more assertive in his attack on *Smith*. In an opinion saturated in critique of *Smith*, Justice Alito pointedly stated:

> We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially expected, Smith has not provided a clear-cut rule that is easy to apply, and experience has disproved the Smith majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to "anarchy."

Justice Gorsuch, joined by Justices Thomas and Alito, was similarly antagonistic to what he called the majority's sidestepping of the important question of whether to overrule *Smith*:

> It's not as if we don't know the right answer. *Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution.

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[7] *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).
[8] *Fulton v. City of Philadelphia, Pennsylvania*,

Roman Catholic Diocese of Brooklyn v. Cuomo

In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[9] suit was brought by a Jewish Synagogue and Agudath Israel of America, and the Roman Catholic Diocese of Brooklyn, against New York Governor Andrew Cuomo, challenging Governor Cuomo's COVID-19 pandemic restrictions as applied to religious organizations. The Supreme Court held that the religious organizations made the required strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. The Court held that the New York regulations singled out religious organizations for more onerous treatment than other activities. The Court noted that in a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" could admit as many people as they wished. Moreover, as recounted by the Court, the list of "essential" businesses included things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. While attendance at houses of worship was limited to 25 persons, the Court noted, even non-essential businesses in New York could decide for themselves how many persons to admit. In summarizing its position, the Court explained that even in a pandemic the Constitution cannot be put away and forgotten:

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

The Court, applying these principles, enjoined the ongoing application of the New York restrictions.

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[9] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ——, —— – ——, 141 S.Ct. 63, 67-68, 208 L.Ed.2d 206 (2020) (per curiam).

Mahanoy Area School District v. B.L.

In *Mahanoy Area School District v. B. L. by & through Levy*,[10] the Supreme Court addressed the vexing problem of what First Amendment principles should apply to offensive speech by a public high school student on an off-campus social media platform involving matters connected to school activities. The majority opinion was written by Justice Stephen Breyer.

B.L. was a student at Mahanoy Area High School in Mahanoy City, Pennsylvania. As recounted by the Court, at the end of her freshman year, B. L. tried out for a position on the varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position. B.L. was offered a spot on the cheerleading squad's junior varsity team. As the Court put it, "B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team."

B.L. responded to her disappointment with two Snapchat posts. The first image B. L. posted showed B. L. and a friend with middle fingers raised in the "fuck you" gesture, bearing the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank, with the caption: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" This caption included an upside-down smiley-face emoji.

As Justice Breyer's opinion for the Court explained, B. L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. The posts spread amongst students at the school, and were seen by parents and school officials, including coaches. The school decided that because the posts used profanity in connection with a school extracurricular activity, B.L should be disciplined, in the form of a suspension of B.L. from the junior varsity cheerleading squad for the upcoming year.

The Court in *Mahoney* rejected any absolute rule that would effectively prevent school officials from regulating off-campus speech. Rather, the court held, regulatory interests of schools remain significant in some off-campus circumstances. "These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules

[10] *Mahanoy Area School District v. B. L. by & through Levy*, No. 20-255, 2021 WL 2557069, at *2 (U.S. June 23, 2021).

concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers."

Cutting in the other direction, the Court identified a number of factors that would often *diminish* the legitimacy of efforts by schools to punish off-campus speech.

First, the Court opined, when dealing with off-campus speech, schools will rarely *stand in loco parentis*. The entire point of the *in loco parentis* doctrine is to treat school administrators as standing in the place of students' parents where the children's actual parents "cannot protect, guide, and discipline them." The doctrine appears to lose its potency in the context of off-campus speech: "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."

Second, the Court observed, from the student speaker's perspective, "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day." The temporal breadth of that reality, the Court reasoned, should cause pause. Courts "must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." Moreover, the Court admonished, "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention."

Third, the Court explained, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." The Court explained that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.' (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)"

In a summation that may in some respects have raised more question than it answered, the Court explained that it was articulating a list of factors to be considered, but eschewing any bright-line formulaic tests:

> Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First

> Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.

Having thus set the matrix for analysis, the Court proceeded to hold that the school violated the First Amendment in disciplining B.L. To begin, B.L. was engaged in critique: "Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part." Had B.L. uttered this speech in an "adult world," the Court noted, it would have been protected: "To the contrary, B. L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection." The Court held that considering the "where and when," the First Amendment balance favored B.L., who spoke outside of school hours and outside of school.

Looking at B.L.'s use of vulgarity, the Court's analysis was nuanced. The Court first considered the school's "interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community." This interest, the Court held, was "weakened considerably by the fact that B. L. spoke outside the school on her own time." And B.L.'s use of vulgarity, including her various iterations and invocations of the "f-bomb," registered her anger and frustration, not any sexual innuendo. This aspect of the Court's opinion is entirely convincing, and if anything, understating. Any parent or teacher with any realistic understanding of the everyday speech of high school students would know that lacing speech with words like "fucking" is not exactly a rare occurrence.

The Court rejected any claim by the school that it was seeking to interdict substantial disruption, finding that nothing in the record supported the existence of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action.

Finally, the Court rebuffed the attempt to justify discipline of B.L. in order to protect "team morale." The Court found that on the record there was not enough to suggest any serious decline in team morale to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion.

Americans for Prosperity v. Bonta

In *Americans for Prosperity Foundation v. Bonta*,[11] the Supreme Court, in an opinion by Chief Justice Roberts, held unconstitutional a requirement imposed under California law that charitable organizations must disclose to the California Attorney General's Office the identities of their major donors. The California Attorney General required charities to disclose the names and addresses of donors who had contributed more than $5,000 in a particular tax year. A First Amendment challenge was brought by various charities that solicit contributions in California. The organizations challenging the law spanned the political and cultural spectrum, including groups as various as the American Civil Liberties Union, the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relation, the Zionist Organization of America, Feeding America, and a PBS station.

The Court readily admitted that California had "an important interest in preventing wrongdoing by charitable organizations." It goes without saying, the Court observed, "that there is a 'substantial governmental interest in protecting the public from fraud.'" The problem, however, was the lack of alignment between California's interest in fraud prevention and the breadth of its disclosure requirements. There was a dramatic mismatch between the governmental interest and the governmental disclosure regime. 60,000 California charities were required to renew their registrations each year. But the donor disclosure requirement, through a filing known as "Schedule B," appeared to rarely, if ever, lead to any fraud investigation. To the contrary, the Supreme Court observed "that there was not 'a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts.'" As the Court summarized: "The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints."

Brnovich v. Democratic National Committee

In *Brnovich v. Democratic National Committee*,[12] the Supreme Court applied § 2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted. The case involved a challenge to various provisions of Arizona's voting laws. All Arizona voters may vote by mail or in person for nearly a month

[11] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).
[12] *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2330 (2021).

before Election Day. However, Arizona imposed two restrictions on what was otherwise a very flexible regime. First, in some Arizona counties, voters who choose to cast a ballot in person on Election Day must vote in their own precincts or else their ballots will not be counted. This could result in a ballot not being counted if the voter showed up at the wrong precinct. Second, Arizona law provided that mail-in ballots could not be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver. The Supreme Court held that neither Arizona's out-of-precinct rule nor its ballot-collection law violated § 2 of the Voting Rights Act. Arizona's out-of-precinct rule, the Court held, "enforces the requirement that voters who choose to vote in person on Election Day must do so in their assigned precincts." Having to identify one's own polling place and then travel there to vote, the Court reasoned, does not exceed the "usual burdens of voting." Rather, the Court held, such tasks are "quintessential examples of the usual burdens of voting." In determining whether these provisions were passed with racist intent, as opposed to political motives, the Supreme Court accepted that the "spark for the debate over mail-in voting may well have been provided by one Senator's enflamed partisanship, but partisan motives are not the same as racial motives." The Court sharply rejected the so-called "cat's paw" theory of liability. A "cat's paw" is a "dupe" who is "used by another to accomplish his purposes." A plaintiff in a "cat's paw" case "typically seeks to hold the plaintiff's employer liable for "the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision." The Supreme Court roundly rejected application of the "cat's paw" theory to legislative bodies. The theory, the Court held, "rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents."[13] But under American traditions of government, the Court reasoned, legislators have a duty to exercise their judgment and to represent their constituents. The Court tersely concluded: "It is insulting to suggest that they are mere dupes or tools."

Cedar Point Nursery v. Hassid

In *Cedar Point Nursery v. Hassid*,[14] the Supreme Court addressed a California regulation granting labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. The regulation mandated that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm

[13] *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2350 (2021).
[14] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The Supreme Court held that this California access regulation constituted a *per se* physical taking. The Court held that California's access regulation appropriated a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the Court reasoned, the regulation appropriated for the enjoyment of third parties (here union organizers) the owners' right to exclude.[15] Government-authorized physical invasions, the Court reiterated, are takings requiring just compensation. Because the regulation appropriated a right to physically invade the growers' property—to literally "take access"—it constituted a *per se* physical taking.

The Court distinguished its prior decision in *PruneYard Shopping Center v. Robins*.[16] In *PruneYard* the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. The shopping center argued that the decision had taken without just compensation its right to exclude. The Supreme Courte held that no compensable taking had occurred. In *Cedar Point* the Supreme Court distinguished *PruneYard* by drawing a distinction between regulations that require equal access to property *already open* to the public—such as shopping centers—from regulations that require access to property that the property owners generally treat closed to the public. As the Court reasoned: "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."

[15] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).
[16] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).