

# Jenner & Block's Annual Supreme Court Term in Review CLE

June 29, 2023



JENNER&BLOCK

# Our Panel



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# Jenner's Supreme Court Practice

- Routinely appear in federal and state appellate and trial courts and provide counseling on commercial and regulatory issues
- 15 oral arguments in the past six US Supreme Court Terms

This SCOTUS Term:

- Argued two merits cases
- Co-counsel in one merits case
- Filed at least 15 amicus briefs
- We were involved in over 30% of SCOTUS cases this term



# Representative Awards and Recognitions

- Featured on *The National Law Journal's* “**Appellate Hot List**” for the last 14 consecutive years
- Named a “**Practice Group of the Year**” several times by *Law360*
- Our Appellate and Supreme Court Practice and individual lawyers have also been consistently recognized in *Chambers USA* as being among the nation’s **leading appellate law practices**
- Jenner is also recognized by *Chambers USA* as having one of the best appellate teams for cases involving **Native American law**



Appellate and Supreme Court



ACLU of Oklahoma  
Honors McGirt Team  
with Angie Debo Civil  
Libertarian Award

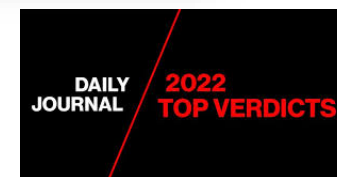


ISHAN BHABHA  
2019

Partner Michelle Kallen  
Named Virginia Lawyers  
Weekly's 2022 Leader of  
the Year



LENNY POWELL  
2023





# Agenda

● The Past Term – Roundtable

● Ethics and Press

● Justice Jackson's First Term

● Post-*Dobbs*

● Cases

Affirmative Action and DEI

Election Law

IP Cases

First Amendment

Student Loans and Ad Law

Indian Law

Next Term

● Q&A

# The Past Term **Roundtable**

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# Legitimacy and the Court

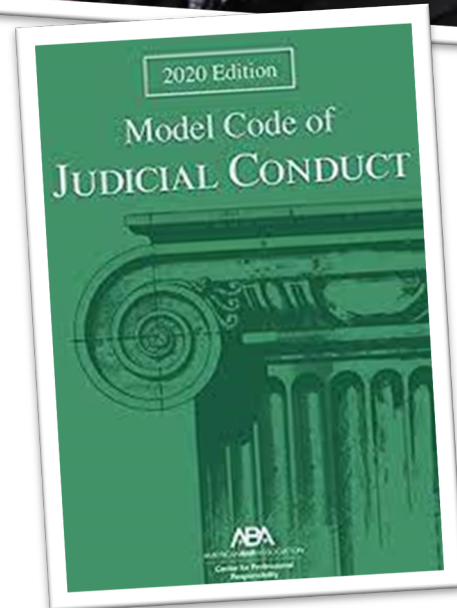
- “Overall, the way the Court retains its legitimacy and fosters public confidence is by acting like a court, is by doing the kinds of things that do not seem to people political or partisan, by not behaving as though we are just people with individual political or policy or social preferences that we’re . . . making everybody live with.” – *Justice Kagan*
- The Court should not be “wandering around just inserting itself into every hot button issue in America” and it especially “shouldn’t be doing that in a way that reflects . . . one set of political views over another.” – *Justice Kagan*
- “Simply because people disagree with an opinion is not a basis for questioning the legitimacy of the Court.” – *Chief Justice Roberts*
- “Saying or implying that the Court is becoming an illegitimate institution or questioning our integrity crosses an important line.” – *Justice Alito*

# Ethics and Press

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# Ethics and the Court



# Press Coverage of the Court

- “Historically, the Supreme Court press corps has eschewed adversarial journalism, opting instead to cover the institution with equal parts fawning reverence and bottomless credulousness. But [now], . . . at least some sectors of the media are subjecting them to the sort of rigor previously reserved for the classes of politicians who don’t wear robes to work.” – *Jay Willis, Slate*
- “Having failed to intimidate the Court, [opponents of the Court’s judicial philosophy] set about to discredit it. The effort unfolded as a steady stream of seemingly coordinated media reports, all written to leave lay readers with the misimpression that the Supreme Court is corruptly doing the bidding of wealthy and influential benefactors. None of the stories reveals any evidence of corruption. But each omits or obscures facts that would dispel the contrary impression.” – *Benjamin Flowers, Ohio SG*

# Justice Jackson's First Term

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Justice Jackson





# Justice Jackson

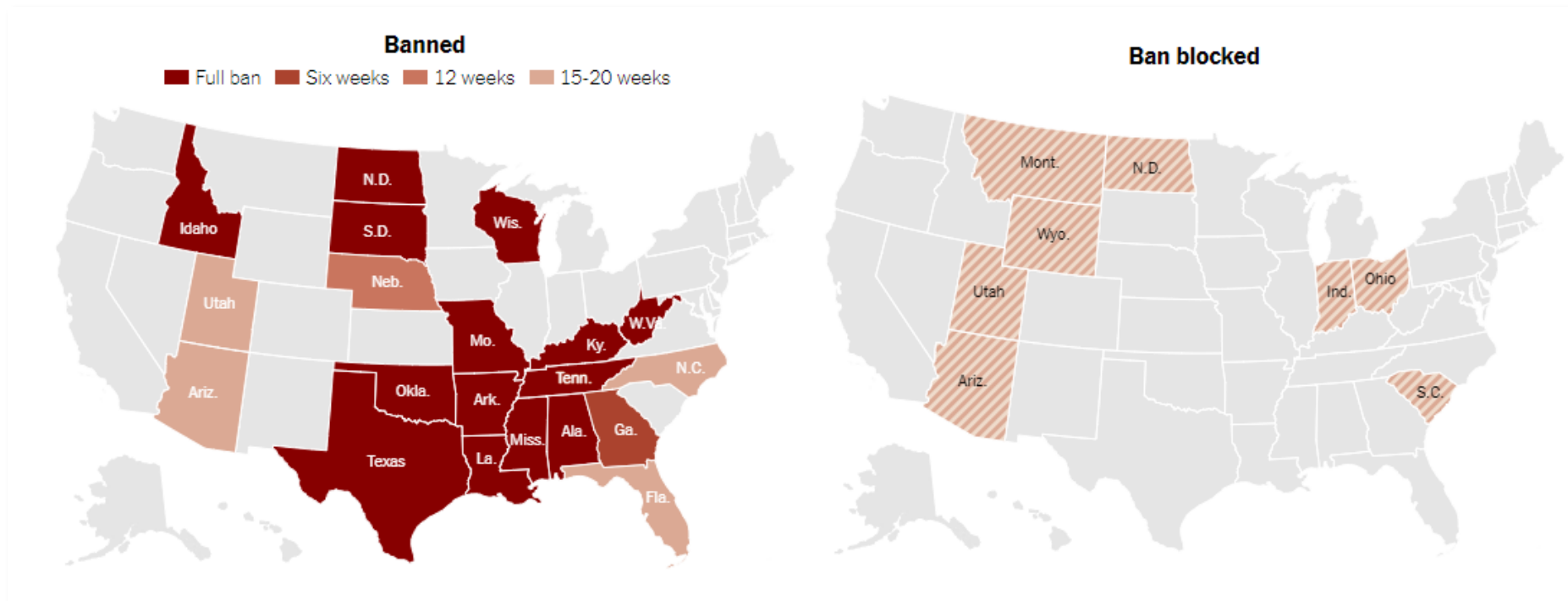
- **Oral argument style:**
  - Tough, active questioner
  - Examples of invoking originalism in her questioning
- **Voting trends:**
  - Has authored 6 majority opinions
  - Numerous dissents, including from orders
- **Key opinions:** Talevski, Glacier Northwest, Hansen, Jones v. Hendrix
  - Her distinctive voice is emerging



# Post-*Dobbs*

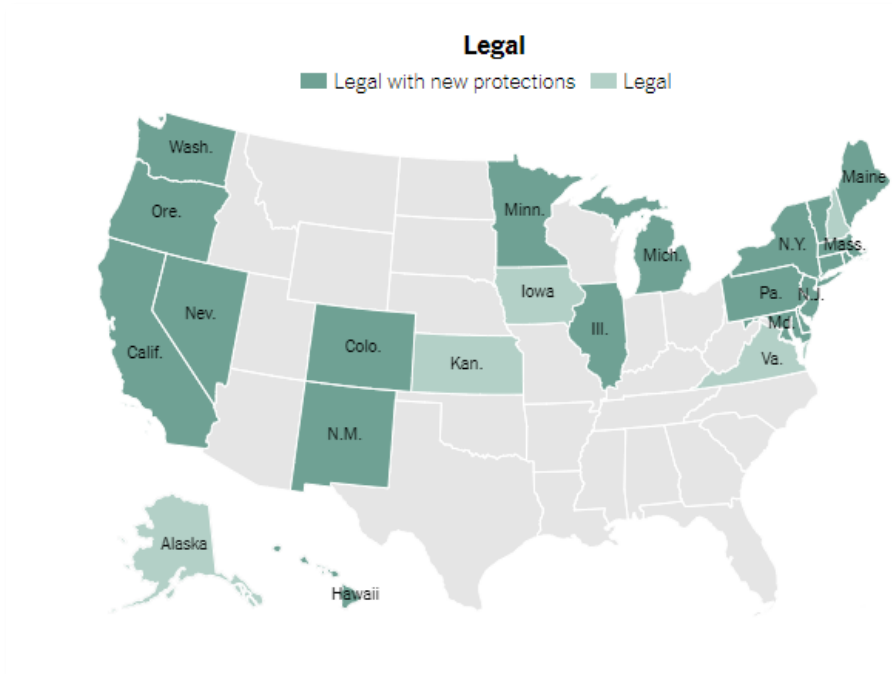
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# Current (But Shifting) State of Abortion Access



- **13** states ban abortion completely (in Wisconsin, the state's 1800's era ban is currently being litigated).
- **1** state bans abortion at about 6 weeks.
- **5** states ban abortion after 12-20 weeks.
- Courts have preliminarily blocked bans in **8** states.

# Pro-Choice State Responses



- Constitutional Amendments
- Legal challenges
- Safe Harbor Laws
- Data Shield Laws
- Increased Access
- Limiting Anti-Abortion Activity



# Current Battlegrounds: Medication Abortion

## *Alliance for Hippocratic Medicine v. FDA (Texas)*

- Anti-abortion doctors challenged FDA's 2000 approval of mifepristone and 2016 access-expanding guidance under the [Administrative Procedures Act](#).
- Texas federal judge preliminarily enjoins FDA's approval in full under the APA and the Comstock Act.
- Fifth Circuit stays injunction regarding 2000 approval; denies regarding post-2016 decisions.
- Supreme Court stays district court's preliminary injunction pending appeal.

POLITICS

## **Democrats Argue Biden Should Just Ignore Abortion Medication Ruling**

WIN: 5th Circuit Halts Dangerous Mail-Order Abortion Pills, Restores Original FDA Safety Standards

April 13, 2023

# Current Battlegrounds: Travel Bans

- Attempts to limit the ability to travel across state lines to get an abortion.
  - Potential state attempts to enforce their laws against those who traveled to get an abortion, or who helped do so.
  - Idaho minor “abortion trafficking” ban.
    - Gov. Inslee (WA) letter to Gov. Little (ID):

“I question the constitutionality of this law ... **a gross abuse of their right to travel between our states.**”
    - Gov. Little Response: **Law does not “criminalize, preclude, or otherwise impair interstate travel ... [it] seeks only to prevent a minor girl from Idaho from being taken across state lines for an abortion without the knowledge and consent of her parent or guardian.”**



# Current Battlegrounds: Aiding and Abetting

- Source of aiding and abetting liability
  - State laws with explicit (civil) aiding and abetting liability: Texas
  - State laws prohibiting “procuring” an abortion: Arkansas, Kentucky, Louisiana, Oklahoma, South Dakota, Texas
- Potential limitations on states’ expansion of aiding and abetting liability in the abortion context
  - **Extraterritorial Limits**
    - *National Pork Producers Council v. Ross*, S. Ct. (2023): Weakening of Dormant Commerce Clause arguably increases states’ reach
  - **Knowledge/Intent**
  - **Standing**

Cases

***The 2022-23 Term***

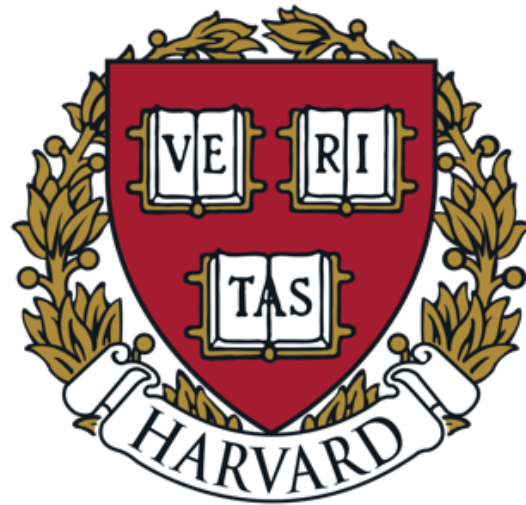


Cases

***Affirmative  
Action and DEI***

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*Students for Fair Admissions (SFFA)* asks the Supreme Court to end race-conscious admissions



## Supreme Court, in 6-3 Roberts Opinion, Eviscerates Use of Race in Admissions

- Chief Justice Roberts wrote the opinion for the Court's 6-3 conservative majority
- While the opinion does not explicitly outlaw Grutter, it practically makes the use of race in admissions unlawful.
- Holds Harvard's and UNC's admissions programs violate the Equal Protection Clause (notes that Court continues to interpret Title VI as coextensive; same analysis applies to public and private institutions)
- University's interest in student body diversity is too amorphous and unmeasurable to serve as a compelling interest under strict scrutiny.
- Further, the universities failed to establish a meaningful connection between the means used and goals sought, i.e., the universities did not satisfy narrow tailoring.
- Adds two additional requirements to satisfy strict scrutiny: (1) cannot stereotype applicants on the basis of race or disadvantage others and (2) must have a specific endpoint.
- Opinion only concerns the admissions selection process. Concludes by stating that universities can consider an applicant's discussion of race's impact on one's life, but notes that universities cannot do indirectly (through essays or the like) what they cannot do directly.

# Three Concurrences

## **Thomas Concurrence:**

- Lengthy historical analysis of view of “color-blind” Constitution
- Includes language that could extend opinion beyond admissions, refers broadly to “equity” programs and criticizes race-based housing and programming at colleges and universities
- States that under the majority opinion, he highly doubts any college or university will be able to “discriminate based on race in admissions.”

## **Gorsuch Concurrence (Joined by Thomas):**

- Interprets Title VI separately from Equal Protection Clause
- Would apply a higher standard for Title VI, no strict scrutiny, “intentionally treating any individual worse even in part” because of race violates Title VI

## **Kavanaugh Concurrence:**

- *Grutter* only allowed affirmative action for one more generation; we have reached that endpoint

## Two Dissents

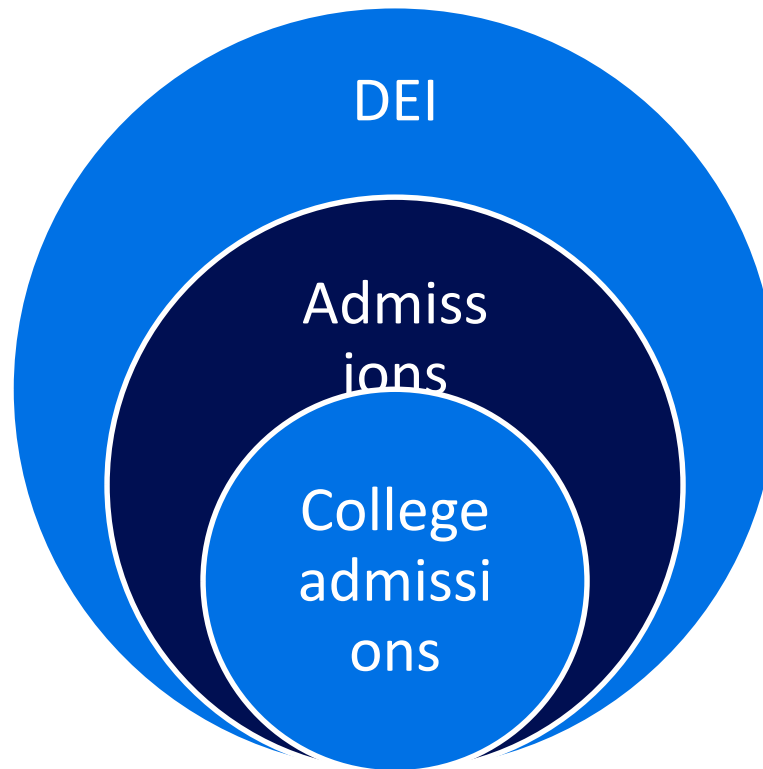
- **Sotomayor Dissent (Joined by Kagan and Jackson)**

- Defends *Grutter*: Diversity is a compelling interest; the universities satisfied narrow tailoring (no reason to depart from *stare decisis* here; Court ignores reliance interests)
- “The Court’s opinion circumscribes universities’ ability to consider race in any form by **meticulously gutting respondents’ asserted diversity interests.**”
  - The majority opinion “announces a [measurable precision] requirement **designed to ensure all race-conscious plans fail.**”
- Cites to all the places in the majority opinion and concurrences that refer favorably to race-neutral alternatives.

- **Jackson Dissent (joined by Sotomayor and Kagan):**

- Writes separately to respond to SFFA’s contentions that considering race in admissions is unfair

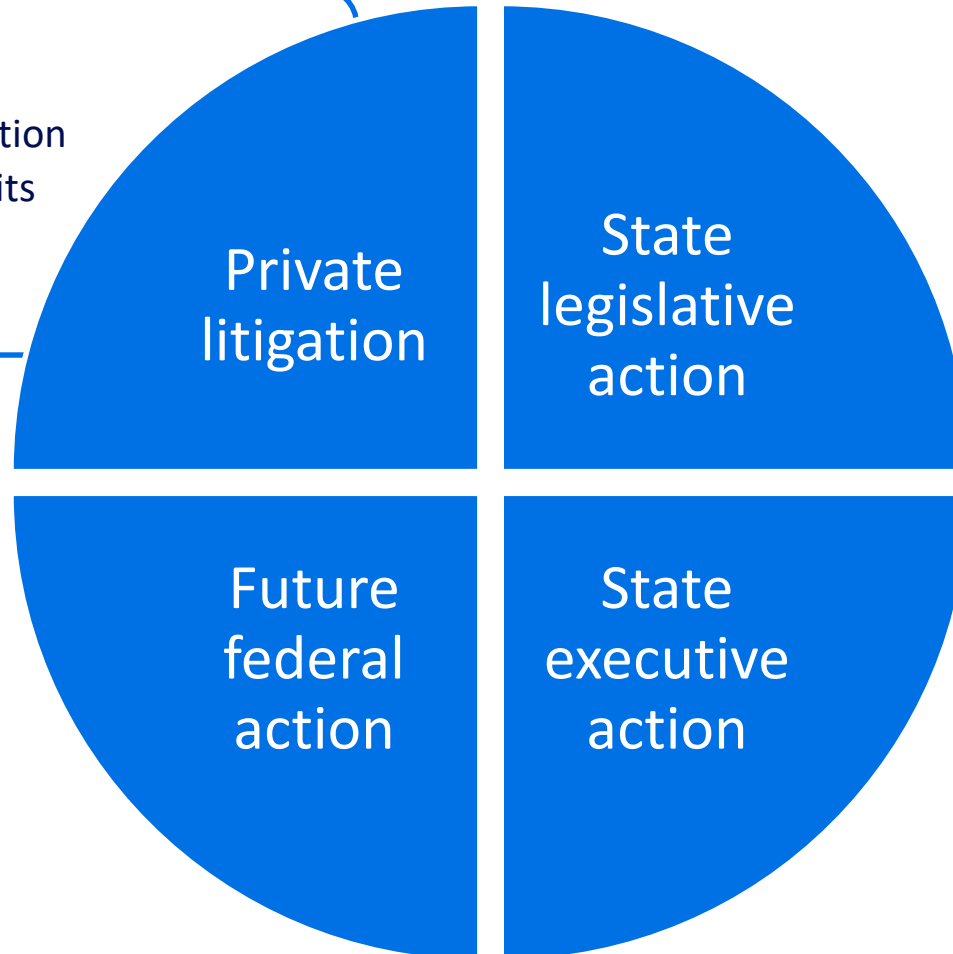
What impact will *SFFA* have outside of college admissions?



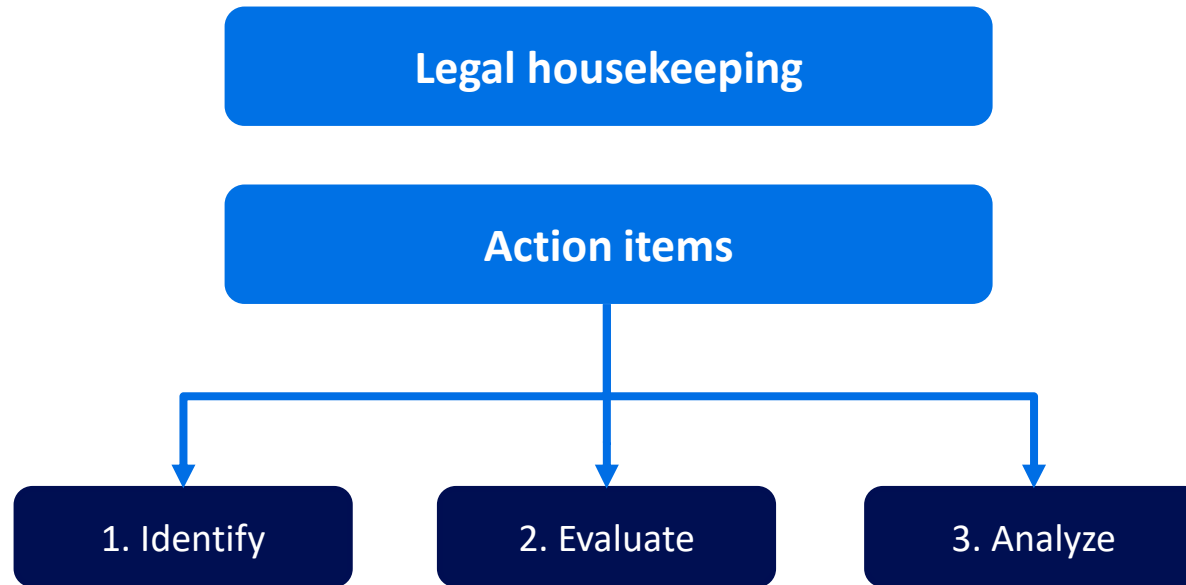


## Challenges to corporate DEI initiatives can also take many forms

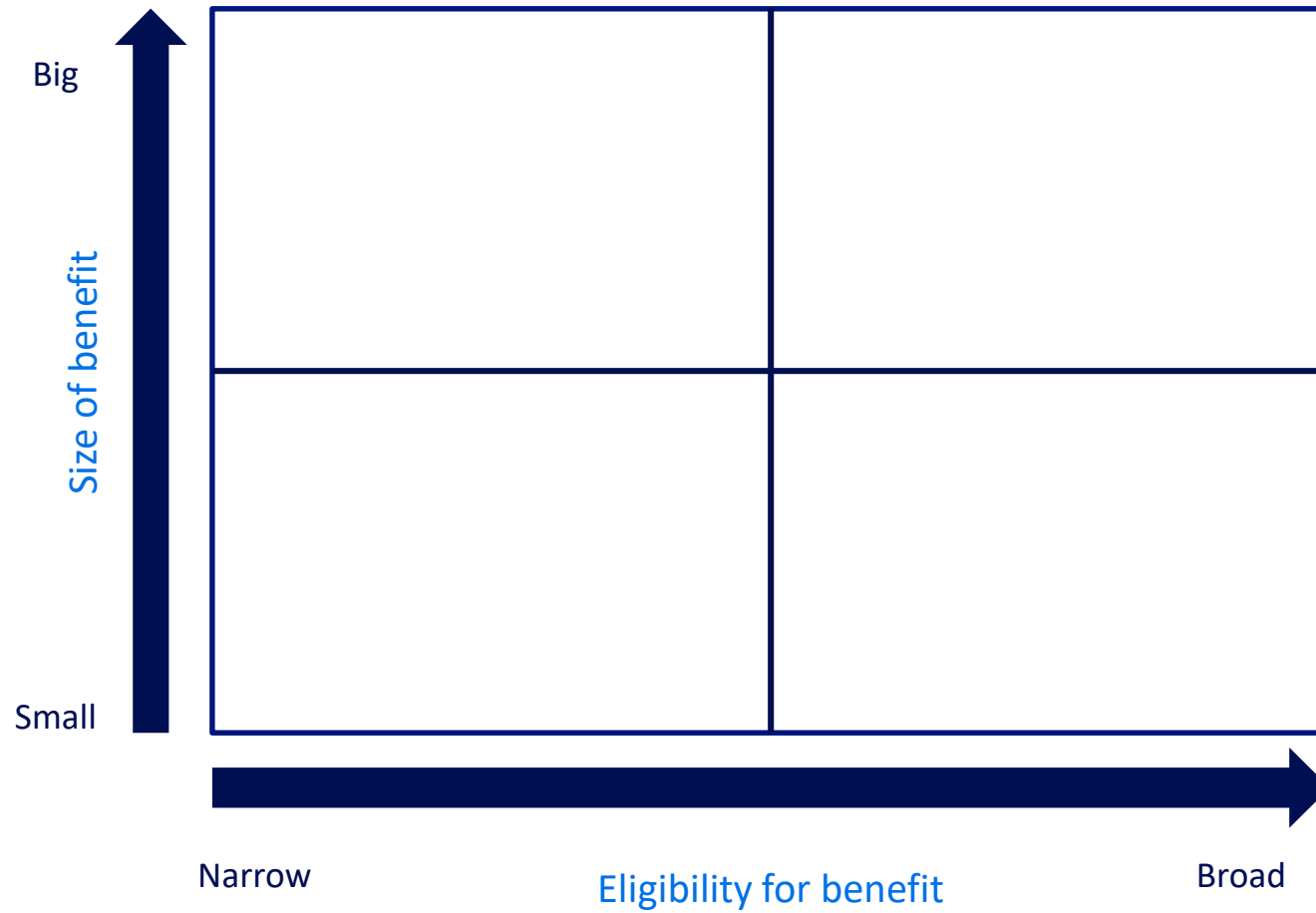
- DEI in business operations
- Reverse discrimination
- Shareholder lawsuits
- Board diversity requirements



## Next Steps



# Risk Analysis



Cases

# *Election Law*

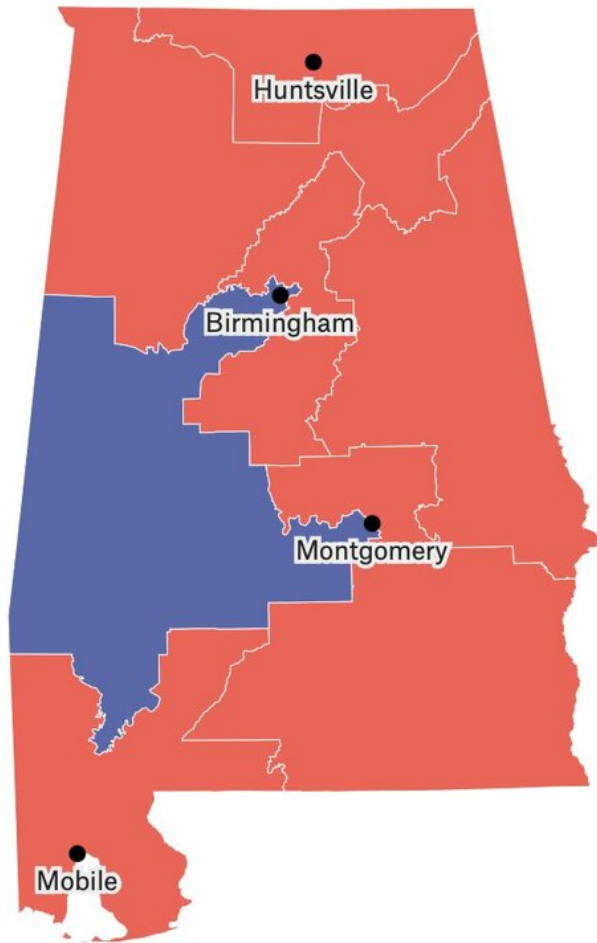
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## *Election Law*

- *Allen v. Milligan* – Section 2 of the Voting Rights Act
- *Moore v. Harper* – The Independent State Legislature Theory
- *Ardoin v. Robinson* – Section 2 of the Voting Rights Act
- *Alexander v. South Carolina State Conference of the NAACP* – Racial gerrymandering



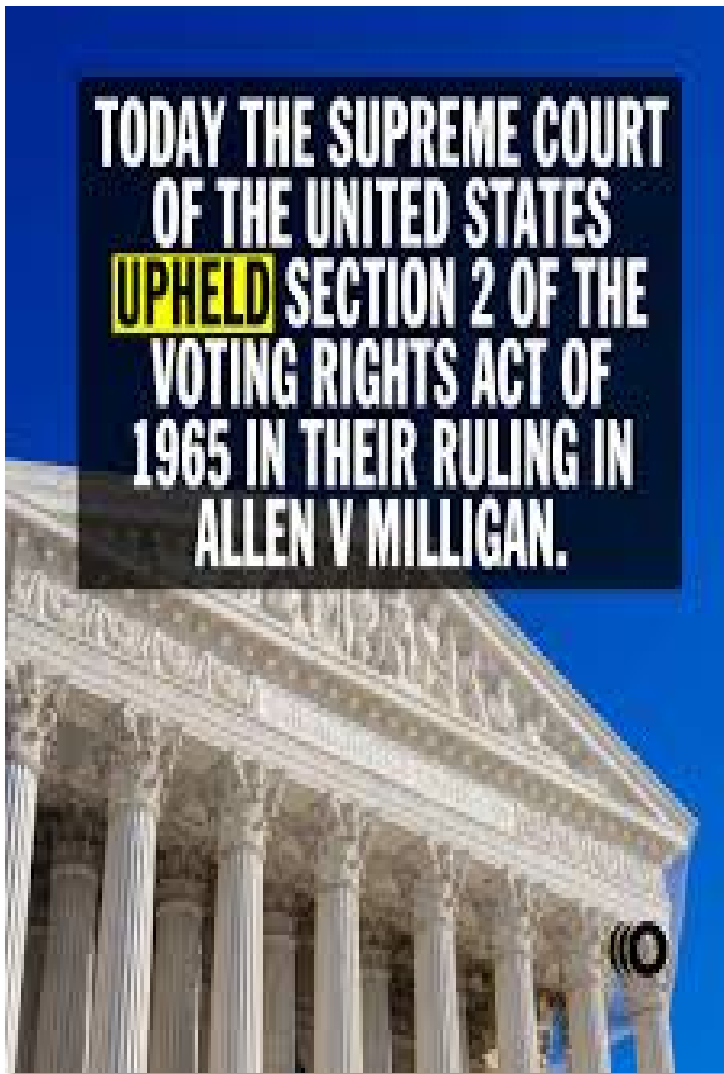
# *Allen v. Milligan*



- Plaintiffs win a unanimous ruling from a three-judge federal court that Alabama's congressional redistricting plan violates the Voting Rights Act.
- Alabama seeks an emergency stay.
- In a 5-4 decision, the Court grants the stay.
- Justice Kavanaugh claims the Court is not making any new law and says Justice Kagan's "catchy but worn-out rhetoric about the 'shadow docket'" is "off target."
- Chief Justice Roberts says he would not grant the stay, but would grant certiorari to clarify Voting Rights Act jurisprudence.
- Justice Kagan strongly criticizes the use of the shadow docket to make new law.



# *Allen v. Milligan*



- Chief Justice Roberts strongly reaffirms Voting Rights Act in an opinion joined by Justices Sotomayor, Kagan, Jackson, and mostly Kavanaugh.
- Justice Kavanaugh concurs, but questions whether “the authority to conduct race-based redistricting can[] extend indefinitely into the future.”
- Justice Thomas dissents, joined in various parts by Justices Gorsuch, Barrett, and Alito.
- Justice Alito separately dissents, joined by Justice Gorsuch, and criticizes the majority for making the argument in an amicus brief part of the Court’s caselaw.
- The decision could have significant implications for the 2024 congressional elections.

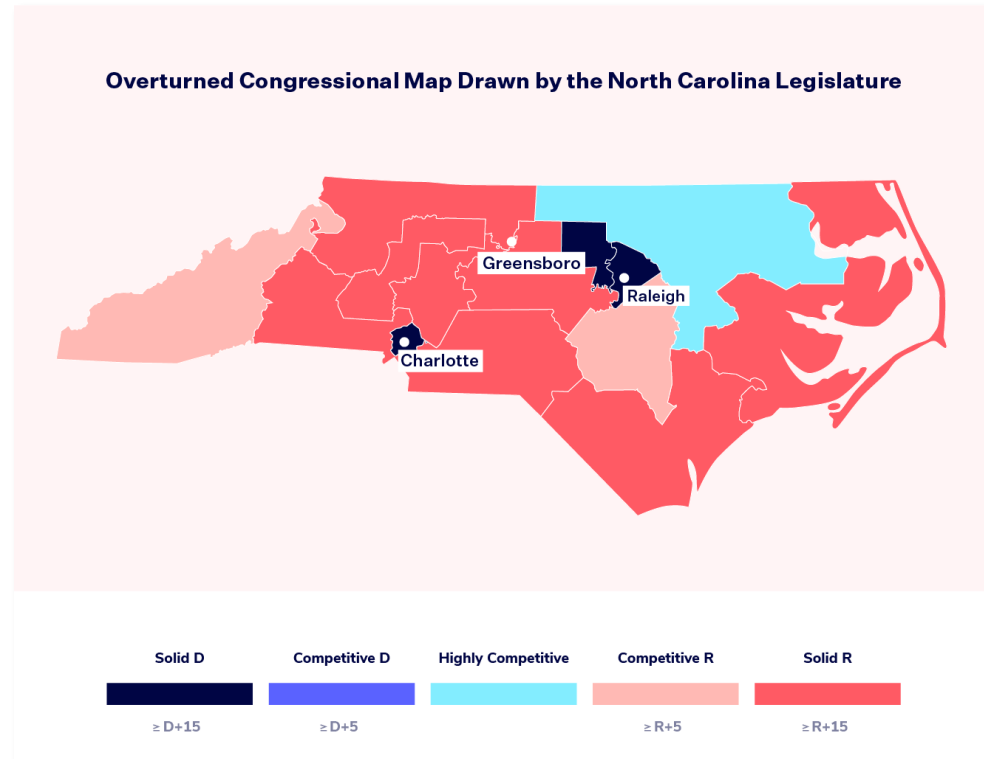
# Moore v. Harper

- Test case for the independent state legislature theory – a legal concept that only the legislature has power to regulate federal elections
- Appeal was brought by North Carolina Republicans, seeking to overturn a state supreme court decision striking down a NC congressional map as an unconstitutional partisan gerrymander
  - Petitioners argue that the state supreme court didn't even have the authority to review the congressional map because of the independent state legislature theory
- Potential implications of the Independent State Legislature Theory
  - Nullify the role of state courts and governors in election law
  - Roll back efforts to combat gerrymandering



# Moore v. Harper

- North Carolina General Assembly drew a 10-4/11-3 map in a state that is 50/50.
- North Carolina Supreme Court held that this violated the North Carolina Constitution's Free Elections, Free Speech, and Equal Protection Clauses.
- Legislative Defendants argued to the US Supreme Court that this violated the US Constitution's Elections Clause.



# *Moore v. Harper*

## Article I, Section 4, Clause 1:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State **by the Legislature thereof**; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

**By the Legislature thereof?**



Cases  
*IP Cases*

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Matthew S. Hellman for petitioner, NANCE v. WARD, 4-25-22



*Jack Daniel's Properties, Inc. v. VIP Products LLC  
Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)*

- Should there be a higher bar to prove trademark infringement where First Amendment values are at stake?
  - Movie about Ginger Rogers
  - “Oh Lord, won’t you buy me a Mercedes-Benz...”
  - Jack Daniel’s/Bad Spaniels
- Court declines to answer that question.
  - Justice Kagan writes for a unanimous Court that at least where the alleged infringer is using the mark *as* a mark, no special First Amendment analysis is required.
  - “Whatever First Amendment rights you may have in calling the brew you make in your bathtub ‘Pepsi’ are outweighed by the buyer’s interest in not being fooled into buying it.”
  - Leaves untouched lower court decisions giving weight to First Amendment considerations in other trademark contexts.



# Hetronic

- When does U.S. trademark law reach foreign conduct that harms US mark holders and consumers?
  - International tradeshow, websites, products coming to the US
  - Bulova watches in Mexico
  - Extraterritoriality vs. domestic injury



# *Andy Warhol Foundation, Inc. v. Goldsmith*

- What is a “transformative” use of a copyrighted work?
  - Fair use seeks to strike balance between fostering new expression and protecting rights holders
  - Sequels, parodies, critiques...
  - Andy Warhol....
- Court by 7-2 vote holds that Warhol print is not transformative
  - Not about whether Warhol’s version embodies new expression
  - Rather, used for the same purpose– licensed to magazine as original
  - Dissent “waves away the statute’s concern for derivative works”
- Justice Kagan, joined by the Chief, issues strongly-worded dissent
  - Warhol “started with an old photo, but he created a new new thing.”
  - “The majority thus treats creativity as a trifling part of the fair-use inquiry.”
  - “If Warhol does not get credit for transformative copying, who will?”



Cases

***First  
Amendment***

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# First Amendment

- **Masterpiece Cakeshop** Part II

- Another challenge to Colorado’s anti-discrimination in public accommodations law: whether compelling petitioner to design wedding websites for same-sex marriages violates the First Amendment.
- Will this open the door to discrimination in public accommodations, on First Amendment groups?

- **Counterman v. Colorado**

- Scope of a “true threat” that is not protected by the First Amendment.

- **United States v. Hansen**

- 7-2 opinion (Barrett): 8 U.S.C. 1324(a)(1)(A)(iv) does not impermissibly sweep in protected speech.



Cases

# *Student Loans and Ad Law*

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# Student Debt Cases

*(Biden v. Nebraska; Dep't of Education v. Brown)*

- Student Debt Forgiveness
  - Invokes emergency authority due to the pandemic
  - Eliminates estimated \$430 billion of federal student-loan debt
    - Eliminates all loan balances for 20 million borrowers and erases up to \$20,000 for over 20 million more
- Statute confers broad emergency authority:
  - **Notwithstanding any other provision of law . . . the Secretary . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs. . . as the Secretary deems necessary in connection with a war or other military operation or national emergency . . . to ensure that recipients of student financial assistance . . . under title IV of the Act who are affected individuals are not placed in a worse position** financially in relation to that financial assistance because of their status as affected individuals

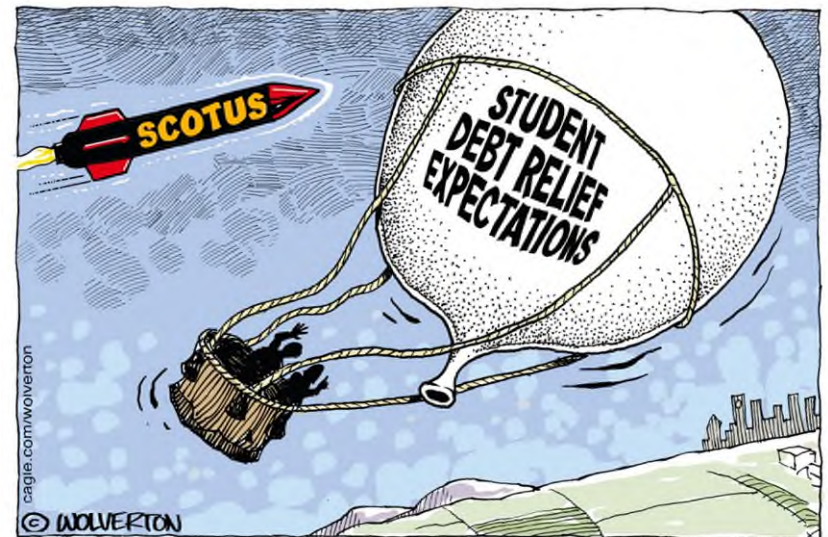


# Student Debt Cases – The Court is Troubled

“[Do you think if] you simply polled every member of Congress . . . they would regard what the government proposes to do with student loans as a major question or something other than a major question?” – *Justice Alito*

“I think most casual observers would say, if you're going to give up that much amount of money, if you're going to affect the obligations of that many Americans on a subject that's of great controversy, they would think that's something for Congress to act on. And if they haven't acted on it, then maybe that's a good lesson to say for the President or -- or the administrative bureaucracy that maybe that's not something they should undertake on their own.” – *Chief Justice Roberts*

“[T]hat leaves us with . . . an old statute with kind of general language, Congress specifically considering the present issue repeatedly but not . . . passing legislation that would authorize the specific action and then . . . the executive, nonetheless, doing a massive new program. And that seems problematic.” – *Justice Kavanaugh*



# *United States v. Texas*

- Challenge by Texas and Louisiana to 2021 DHS Guidelines that prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently.
- Court dismisses for lack of standing. States and citizens “lack standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.”
  - No history or tradition
  - Article II authority
  - Lack of manageable standards to balance resources constraints and policy concerns

[Nationwide relief] “can stymie the orderly review of important questions, lead to forum shopping, render meaningless rules about joinder and class actions, and facilitate efforts to evade the APA’s normal rulemaking processes. Vacatur can also sweep up nonparties who may not wish to receive the benefit of the court’s decision. . . . More importantly still, universal relief, whether by way of injunction or vacatur, strains our separation of powers. It exaggerates the role of the Judiciary in our constitutional order, allowing individual judges to act more like a legislature by decreeing the rights and duties of people nationwide.” – *Justice Gorsuch*

Cases

# *Indian Law*

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# *Haaland v. Brackeen*

- Challenge to the 1978 Indian Child Welfare Act brought by Texas and individuals.
- Principal Theories
  - Article I
  - Equal Protection
  - Anti-Commandeering
- Court (7-2) rejects Article I and Anti-Commandeering on the merits
- Rejects Equal Protection on standing grounds



Cases

*Next Term*

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# Questions & Answers





# Our Panel



# Jessica Ring Amunson

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Jessica Ring Amunson is co-chair of the firm's Appellate and Supreme Court Practice and chair of the firm's Election Law and Redistricting Practice. In 2018, she was named an "Appellate MVP" by *Law360*, which recognizes the five attorneys in the country "who had extraordinary wins and contributed most to their practice area in the past year." An experienced litigator, Jessie has argued before the US Supreme Court and multiple federal and state courts of appeals and has authored hundreds of briefs. She has successfully represented clients in matters involving federal constitutional claims, statutory interpretation questions, administrative law issues, and large commercial disputes. Jessie also regularly counsels clients on appellate and Supreme Court strategy.

As chair of the firm's Election Law and Redistricting Practice, Jessie represents clients, including elected officials, in matters involving redistricting, voting rights, and campaign finance in the US Supreme Court, before the Federal Elections Commission, and in courts around the country. She has litigated election law and redistricting matters in a number of states, including litigation involving disputed elections. She regularly represents clients on the merits and as amici in direct appeals to the US Supreme Court in redistricting and voting rights cases. Jessie has been repeatedly recognized for her extensive knowledge of election law and regularly speaks on panels regarding issues in redistricting and voting rights. She serves on the Advisory Committee to the Voting Rights Institute and is a member of the Litigation Strategy Council for the Campaign Legal Center.



# Ishan K. Bhabha

**Partner | Washington, DC**

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Ishan was named in 2021 by *Bloomberg Law* as one of the 40 best lawyers nationwide under 40, and by the *National Law Journal* as a Rising Star. He is Co-Chair of the firm's Education Practice and a member of the Appellate and Supreme Court Practice. Since joining the firm in 2012, his practice has focused on complex issues of regulatory, constitutional and commercial law. His recent TED Talk, on how private organizations can foster productive and responsible debate while protecting free speech, has been viewed more than a million times.

Ishan's practice has spanned a wide variety of substantive areas of law with a particular focus on education, technology, hospitality, media and entertainment. Ishan has extensive experience in helping organizations navigate complex regulatory structures, both through internal counseling and in representation before courts and administrative agencies. He has served as an outside general counsel for Shift Technologies, Inc. (NASDAQ: SFT) and has substantial experience counseling senior executives and boards of directors on key issues of legal, regulatory, and ethical risk.

Ishan has tried cases both in federal court and arbitration and has represented clients in all stages of litigation from the filing of an initial complaint through the appeal of a verdict. In addition, Ishan has significant experience in the United States Supreme Court including presenting oral argument on behalf of the petitioner in *Biestek v. Berryhill* and serving as merits and amicus counsel in multiple other cases.



# Ian Heath Gershengorn

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Ian is Chair of the firm's Appellate and Supreme Court Practice and is one of the nation's premier Supreme Court and appellate advocates. He has argued 17 cases before the Supreme Court. Before re-joining the firm in 2017, he served in the Office of the Solicitor General at the US Department of Justice, first as Principal Deputy Solicitor General and then as Acting Solicitor General of the United States, a position he held from June 2016 until the end of the Obama administration in January 2017. Ian's practice focuses on advising clients on a range of complex litigation and strategy problems, with particular emphasis on commercial disputes and challenges involving government, regulatory, and other public policy issues.

Since returning to the firm in the Fall of 2017, Ian has appeared regularly in the state and federal appellate courts, arguing on behalf of clients such as McKesson Corporation, FanDuel, the Recording Industry Association of America, FirstTrust Bank, General Dynamics, and Charter Communications.

Ian currently co-teaches a course at Harvard Law School on The Roberts Court.



# Matthew Hellman

**Partner | Washington, DC**

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Matthew S. Hellman is co-chair of the firm's Appellate and Supreme Court Practice. He has been lead counsel in dozens of appellate matters and has presented arguments in the US Supreme Court and in federal and state appellate courts around the country. He has successfully defended on appeal more than \$1 billion in commercial claims, and he has prevailed in the Supreme Court in important bankruptcy, copyright, First Amendment, and administrative law cases. Clients such as Marriott, GE, Nomura, and General Dynamics have sought his counsel on a wide variety of banking, hospitality, government contracts, copyright, and business torts matters.

Mr. Hellman maintains a substantial pro bono practice, including matters with significant commercial implications, such as his win in the US Supreme Court in *Law v. Siegel*, which was called the most important bankruptcy case of that term. He has argued or supervised more than a dozen pro bono cases in the courts of appeals, including two capital cases. In 2007, Jenner & Block recognized Mr. Hellman with the Albert E. Jenner, Jr. Pro Bono Award, which annually recognizes lawyers in the firm with a strong commitment to pro bono or public service work.

In 2016, Mr. Hellman was named co-director of the Jenner & Block University of Chicago Law School Supreme Court and Appellate Clinic, a testament to his experience as well as his ability to teach the next generation of appellate advocates. He is also a member of the Edward Coke Appellate Inn of Court and on the Board of Directors of the Washington Lawyers' Committee for Civil Rights and Urban Affairs. He serves as co-chair of the DC Hiring and Hiring Executive Committees and is also a member of the Associate Development and Evaluation Committee and the Finance Committee.



# Annie Kastanek

**Partner | Chicago, IL**

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Andrianna (Annie) Kastanek, a former federal prosecutor and Supreme Court clerk, is a member of the Appellate and Supreme Court and the Investigations, Compliance, and Defense practices. Ms. Kastanek has supervised briefing and arguments in more than 200 cases before the US Court of Appeals for the Seventh Circuit and personally argued more than 40 federal appeals. She has first-chaired numerous complex investigations and tried 12 cases in federal court. She leverages her vast appellate, trial court, and investigative experience to successfully represent clients in high stakes matters.

Prior to joining Jenner & Block, Ms. Kastanek was an Assistant US Attorney in the US Attorney's Office for the Northern District of Illinois. She held numerous leadership positions during her decade-long tenure in that office, including serving for three years as its Chief of Appeals. As appellate chief, Ms. Kastanek supervised the office's criminal appeals in the US Court of Appeals for the Seventh Circuit and acted as a legal advisor to the US Attorney and other prosecutors, providing legal and strategic counsel in the context of the office's most complex fraud, public corruption, national security, and racketeering prosecutions. Ms. Kastanek is a recipient of the Director's Award for Superior Performance of an Appellate Team, awarded by the Department of Justice's Executive Office for US Attorneys.

Ms. Kastanek also has first-chaired investigations involving allegations of public corruption, computer and cybercrime, and fraud, and served as the US Attorney's Office's Civil Rights Coordinator, supervising the investigation and prosecution of excessive force and hate crimes matters.

Ms. Kastanek clerked for Justice Anthony M. Kennedy of the US Supreme Court and Judge Kenneth F. Ripple of the Seventh Circuit. She graduated from Northwestern Pritzker School of Law, magna cum laude, and has served as an adjunct law professor at her alma mater, teaching courses on the US Supreme Court.



# Thank You!



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