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Spring/Summer 2021
FEDERAL BAR ASSOCIATION Eastern District of Michigan Chapter
FBAnewsletter
Federal Bar Association - Eastern District of Michigan Chapter - **63** years of service to our Federal Bench and Bar

Court Re-Opening

If the last sixteen months have taught us anything, it's that there is no aspect of our lives which have been unaffected by the Covid-19 pandemic. Court operations in the Eastern District of Michigan have been no exception. In March 2020, Chief Judge Denise Page Hood ordered all courthouses in the District closed and suspended all in-person proceedings, including criminal trials and grand jury operations. All critical court functions transitioned to the Zoom platform, which tested the ability of lawyers, court staff, judges, and litigants to navigate the unfamiliar world of virtual court proceedings.

In May 2021, Chief Judge Hood re-opened the Detroit courthouse for select in-person proceedings to address the ever-growing backlog of cases, especially criminal cases which involve a defendant's right to be present. Three courtrooms in Detroit were outfitted with plexiglass and other measures to protect participants, and the Court's Reopening and Prioritization Committee identified matters—particularly criminal matters—which should proceed using the available in-person resources and infrastructure.

After nearly two months of a partial re-opening, Chief Judge Hood has announced that individual judges may open their courtrooms to in-person proceedings. Judges will now use individual discretion to schedule matters in their courtrooms, including criminal jury trials. For the time being, the Court will alternate days on which it permits jury selection for trials and grand jury operations, and will rely on CDC guidelines to permit the entry of attorneys,

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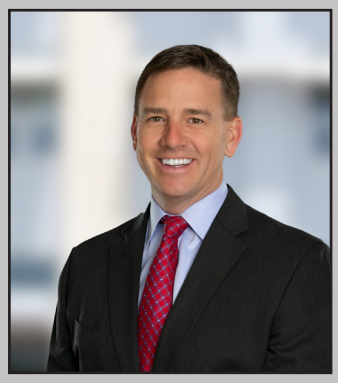

President's Column

Dan Sharkey

Happy glorious-but-way-too-short-Michigan summer! If you're like me, you're anxious to head for the lake, the first tee, or out for a run with your dog. Digesting a philosophical dissertation about the practice of law may not be at the top of your list. So I'll save the serious stuff for fall, and make three quick points:

1. The past: beaucoup thanks to our immediate past President, Fred Herrmann. Even as an Army veteran, there's no one I would rather have lead us through this rough pandemic year than a Naval Academy alumnus and a former Marine Corps officer. He did it with equanimity and even a bit of elan. Well done, Fred.

2. The present: our Chapter is in tremendous shape. We have returned to financial stability. We have never been more active, hosting dozens of well-attended remote events during the pandemic. We now have about 1,000 members and had record turn-out at our New Lawyers Seminar this year, so even our "farm team" looks good.

3. The future: our officers for 2021-22 are Jennifer Newby (President Elect), George Donnini (Vice President), Andrew Lievense (Secretary / Treasurer), and Charissa Potts (Program Chair). We have a great team; let's hope they can keep me in line. We continue to be led by our Executive Director nonpareil, Mindy Herrmann. She is the (choose your metaphor) the glue, the rock, the backbone of our Chapter.

Our first meeting, with our Executive Board and Committee Co-Chairs, is on September 8. I hope to see the rest of you at our September 22nd State of the Court luncheon which will be our first live, in-person (translation: not remote) event in 18 months.

The theme for this year: "It Must Be Different With Us." What does that mean? I'll explain on September 22. Until then, have a great summer.

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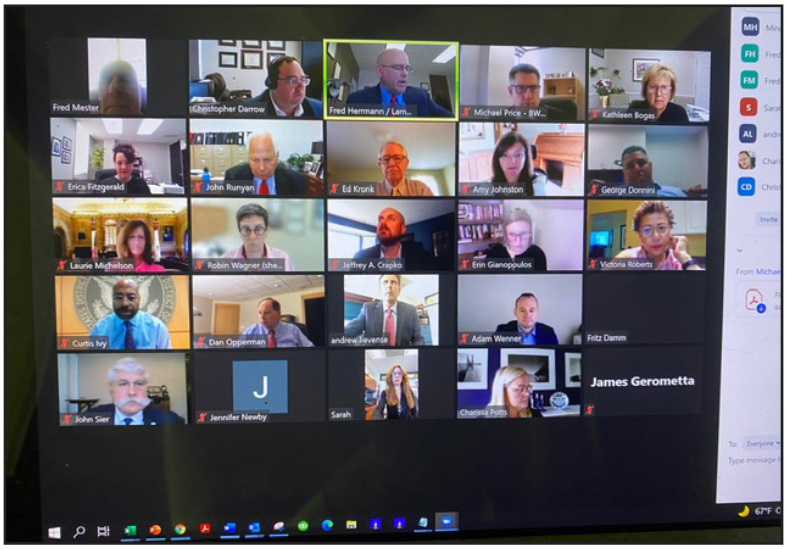
Court Re-Opening *(from page 1)*

witnesses, and court personnel into the courthouse. As she has throughout the pandemic, Chief Judge Hood will continue to monitor conditions to determine whether additional safeguards should be instated—or re-instated—to ensure the safety of those utilizing court services in the Eastern District of Michigan.

FBA Annual Meeting

On June 16, 2021, the Chapter's annual meeting was opened by outgoing president Fred Herrmann. Going by the Zoom name "Lame Duck," President Herrmann presided over the election of a new executive slate and an unopposed amendment to the Chapter bylaws. Herrmann thanked the outgoing executive committee and committee co-chairs, as well as the judges and court staff for their work over a difficult and challenging year.



Annual Dinner

At the conclusion of the Chapter's business, John Runyan presented the Julian Able Cook, Jr. and Bernard A. Friedman Civility Award to Kathleen Bogas. The Cook – Friedman Civility Award is presented annually to an attorney based on five selection criteria: (1) significant practice in civil law; (2) demonstrating the highest level of competency and professionalism; (3) demonstrating the highest levels of integrity and personal courtesy as set forth in the District's Civility Principals; (4) demonstrating a commitment to resolving problems in a rational, peaceful, and efficient manner; and (5) being guiding by a fundamental sense of dignity, decency, candor, and fair play.

Runyan, himself a past recipient of the award, noted that Bogas was not only a tremendous lawyer and mediator, but also a serial "do-gooder." She served as President of both the National Employment Lawyers Association, the Michigan Association for Justice, and was Chair of the SBM Negligence Section. Bogas received the Respected Advocate Award from the Michigan Defense Trial Counsel in 2001, the Jean Ledwith King Leadership Award from the Women Lawyers Association, and the Earl J. Cline Award for Excellence from the SBM Negligence Section, both in 2011. In 2012, she received the Champion of Justice Award from the SBM, and in 2016, she received the Distinguished Service Award from the SBM Labor and Employment Law Section. Bogas has previously been honored by induction into the American College of Trial Lawyers, the College of Labor and Employment Lawyers, and the American Board of Trial Advocates. She currently serves as co-Chair of the SBM Judicial Qualifications Committee and Chair of the Senators Stabenow and Peters Merit Selection Committee.

On a personal level, Runyan noted he is most impressed by Bogas's humility and professionalism. Regardless of job or station, Bogas treats every person she meets with the same level of respect, warmth, and genuine interest in their well-being.

Bogas delivered a speech about the importance of civility in the practice of law. That speech is printed following this article.

Now Immediate Past-President Fred Herrmann and President Dan Sharkey closed the meeting by thanking Bogas for setting an example of civility and noting its importance to the practice of law in the Eastern District.

Civility Award Remarks from Recipient Kathleen Bogas

The following remarks were given on June 16, 2021, by Kathleen Bogas when she was presented with the Cook-Friedman Civility Award:

To say I am humbled to receive this award is an understatement and that is largely in part to the two men who are honored in the naming of this award. I cannot think of a better designation for such an award. Judge Cook is one of the first federal court judges I appeared before in a major case, and I was immediately struck by his kindness and understanding nature. He always went out of his way to inquire about me and my family as time went on. Judge Friedman is the most civil person I know. I don't think he has ever said a negative thing about anyone. He also is kind, gracious, and thoughtful. And no matter how kind and decent Judge Friedman is, and Judge Cook was, they both were able to use their positions to "resolve problems brought before them in a rational, peaceful and efficient manner." I have never heard someone walk away from their courtrooms saying that either of the Judges did anything but the honorable thing, even while disagreeing with some decisions.

I see that Judge Mester is with us today as well. This award could easily be named after him. Judge Mester has always displayed the same attributes as Judges Cook and Friedman and I always enjoyed being in his courtroom.

They don't teach you in law school a lot of things, for example, how to run a law practice, where to buy malpractice insurance, or how to get along with other attorneys. While they have some teachings now on civility, I know that when I was there we learned law – torts, contracts, civil procedure and the like – but not about civility. So I learned from those around me – and I was fortunate that they were the best.

When I was at the end of my first year of law school I needed a job for the summer having always worked and, not knowing any lawyers, saw a posting at U of D for a law clerk at the firm then known as Marston Sachs. I applied, was hired, and remained at the firm for 28 years. There, I had two great teachers of civility – Ted Sachs and Charley Marston. Charley was lesser known in federal court since he handled personal injury cases, mostly in state court. But if you saw him you knew who he was. He had a shock of white hair, was gregarious, always having a smile and quick wit, and never disparaged people. He loved what he did and loved being a lawyer. Ted Sachs, many of you knew him, and few words are adequate to describe him as a pillar in the legal community and the federal bar. Even though Ted fought vigorously and passionately for his union clients, he was always civil and did not engage in personal attacks or battles with opposing counsel. And we all know how contentious union and management negotiations can be. As a testament to Ted, his best friends in the law were Bill Saxton and George Roumell, his opponents in those hard fought battles. With all of the accolades given to Ted Sachs, the one thing I will always remember is that he loved being an attorney and loved what he did.

As you can see, there is a common theme. Creating an environment where you love what you do. I love what I do and love being a lawyer. But how could I love it if there were constant, or even frequent, fights with opposing counsel. I am not talking about disagreements, we all have those, but fights and nastiness. This happens between attorneys far too often. We are all better than that and we all must strive to bring dignity, decency, candor and fair play to our work. Those who have received this honor before me, all of whom I have had the honor of knowing, including two former partners, John Runyan and Reg Turner, have shown our profession how to act in a way to raise our profession and our profiles. It is our responsibility to be attorneys such as Judge Cook, Judge Friedman, Ted Sachs, and Charley Marston and all those who have received this award before me so that we can provide to others by example how to treat others and how in return we love what we do.

I am thankful to join the ranks of those who came before me. And am grateful for this award and the many kind emails I have received in the past weeks.

Kinikia Essix, Court Administrator / Clerk of Court

As Michigan begins to reopen and resume normal operations, the Court has started to implement its own recovery plan. With certain public health restrictions lifted, the Court determined that a gradual return on-site would provide an opportunity to evaluate the effectiveness and efficiency of its protocols while continuing to monitor local pandemic data. With the recent rescission of emergency orders by the Michigan Department of Health and Human Services, the Court had to reassess the impact of those changes on its recovery plan. Target return dates are being finalized with the goal of allowing adequate time for planning and ensuring all facilities and services are ready. After a most challenging year, the Court's recovery has begun and is continuing to develop in response to local and national guidance.

Beginning on May 4, 2021, limited in-person criminal proceedings resumed in the District. Since that date, the Court has held approximately sixty-six hearings on-site. The Court is working diligently to resume criminal jury trials and is preparing to restart during the month of July. Currently, arrangements are being made to schedule trial dates for selected criminal cases.

The Court bid farewell to former Executive Magistrate Judge R. Steven Whalen, who retired on June 15, 2021. Magistrate Judge Whalen has served on the bench since 2002 and his insight and judicial temperament will be missed. Magistrate Judge David R. Grand took on the role of executive magistrate judge, effective May 15, 2021.

I am hopeful that the current positive trends will uphold, and we can stay on course to fully return in the coming months. In the interim, the Court will continue to monitor the data and will respond with appropriate measures to ensure employee and public safety. For the most current information, please review the Court's website.

If you have any suggestions or comments, please contact me at: kinikia_essix@mied.uscourts.gov.

Leonard R. Gilman Award

On June 8, 2021, the Chapter presented the Leonard R. Gilman Award to Assistant United States Attorney Regina McCullough. The award is named after Lenny Gilman, who was United States Attorney at the time of his passing in 1985. The Award is presented annually to a practitioner of criminal law in the Eastern District who embodies

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Gilman Award *(from page 3)*

Gilman's commitment to excellence, professionalism, and public service. Present this year were Lenny Gilman's brother Jerry Gilman, and his nieces, Lori and Jennifer Gilman.

Prior to the presentation of the award, Michigan Supreme Court Justice Elizabeth T. Clement spoke about the Michigan courts' responses to the COVID-19 pandemic. Notably, she commented on how the use of remote video conferencing technology increased the efficiency of court operations and increased the access of the public to court proceedings. A working group is reviewing the changes implemented during the pandemic to determine which of these changes should continue after the pandemic ends.

Regina McCullough, her daughter, Kaitlyn Brown, and mother, Ophelia McCullough.

Wayne Pratt, who was hired by Lenny Gilman at the United States Attorney's Office, introduced the Award and spoke of the commonalities he sees between Lenny, former United States Attorney Saul Green, and recipient Regina McCullough. He noted their commitment to justice, their willingness to take responsibility for their decisions, and their humility.

Gilman Award

Former United States Attorney Saul Green spoke next and introduced Regina McCullough. Green, who served as United States attorney for the Eastern District of Michigan from 1994 to 2001, first met McCullough when she was a paralegal intern at Wayne County Corporation Counsel. When he became United States attorney, he sought out McCullough to fill an open paralegal position at the United States Attorney's Office. While at that office, McCullough finished law school and was hired as a Special Assistant United States Attorney. McCullough was then hired permanently at the office, she was made the deputy chief and eventually chief of the Health Care Fraud Unit. Green believes her promotions within the office prove that everyone who encounters McCullough recognizes the qualities within her that made her this year's recipient of the Gilman Award.

McCullough thanked the Gilman Committee for selecting her for the award. She credited her parents for teaching her the Golden Rule of do onto others as you would have done to you – which has remained the guiding principle throughout her career. Following this principle, McCullough noted that while the criminal justice system is adversarial, she does not believe that opposing counsel need be adversaries. Having started her career as a paralegal, McCullough understands the importance of everyone on the legal team and tries to treat everyone she encounters with kindness. McCullough closed by asking her listeners to treat others with kindness.

The program closed with Chapter president Fred Herrmann congratulating McCullough and thanking the Gilman Committee for their work.

FBA Multi-District Litigation Seminar Write-Up

On April 21, 2021, the Chapter presented, via Zoom, a seminar on multidistrict litigation (MDL). The event was co-sponsored by the Commercial Litigation and Complex Litigation Committees. It was well attended by members of the bar as well as several members of the bench.

The panelists were Judges David Lawson and Matthew Leitman of the Eastern District of Michigan, and Judge Karen Caldwell of the Eastern District of Kentucky. Judges Lawson and Leitman are currently handling MDLs. Judge Caldwell has both handled MDLs and is the current chair of the Judicial Panel on Multidistrict Litigation (JPML).

The panelists engaged in a deep dive into MDLs—what they are, why they exist, and what the bench expects of the bar.

Judge Caldwell began the program addressing the JPML and MDL process. She explained that the panel does not sit in a set location and instead travels around the country, or at least did so pre-COVID. She also discussed how MDLs are created, and the purpose behind the MDL statute, which was to create efficiencies in handling discovery of these otherwise unwieldy complex actions scattered through multiple jurisdictions. Judge Caldwell also described the actual MDL hearings, which are short and heavy on advocacy and somewhat in the nature of "speed-dating."

Judges Lawson and Leitman discussed MDLs from the perspective of the district judges that are tasked with managing an MDL. They explained that before getting assigned an MDL, the district judges are asked if they would be willing to accept an MDL.

The judges also discussed techniques they used in managing these complicated actions. All three judges noted that early organization is key to succeeding in managing these cases. The transferee court is responsible for an MDL only through the conclusion of pretrial proceedings. The judge's goal is that when an MDL case is returned to the transferor court, it is ready for trial.

As for training, the judges explained that the Federal Judicial Center provides a training seminar for the judges assigned an MDL, but there is also a lot of on-the-job learning.

The judges also discussed the process and considerations for picking lead counsel in an MDL. Experience in handling complex litigations is a key consideration. The Eastern District judges noted that these cases tend to be dominated by out of state firms and they would like to see more involvement by attorneys within the local bar.

Finally, the judges offered their thoughts on particular best practices that they found helpful and encouraged counsel to consider when handling MDLs.

Appellate Practice Committee Hosts Sixth Circuit Judge Event

On March 18, 2021, the Chapter's Appellate Practice Committee hosted "Better Know a Sixth Circuit Judge." The Zoom event, sponsored by Bush Seyferth PLLC, was a question-and-answer session with guest Sixth Circuit Judge Eric Murphy. Appellate Practice Committee co-chairs Meghan Sweeney Bean and Derek Linkous moderated the 45-minute event.

Judge Murphy began by discussing his background, including his reasons for attending law school and his favorite classes in law school. He also provided insight into his time spent clerking for Judge Harvie Wilkinson III on the U.S. Court of Appeals for the Fourth Circuit, and U.S. Supreme Court Justice Anthony Kennedy.

Next, Judge Murphy discussed his time as an appellate advocate. First, he discussed his years spent in private

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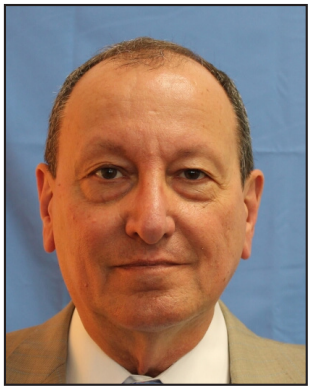
Sixth Ciruit Judge *(from page 5)*

practice at the law firm Jones Day. He then discussed his time as the State Solicitor of Ohio, and provided his perspective on how his time as an appellate advocate has influenced his approach as an appellate judge.

Finally, Judge Murphy discussed his confirmation to the Sixth Circuit on March 7, 2019, and his time as an appellate judge. He provided tips for appellate advocates appearing before the Sixth Circuit, including the importance of moots and focusing oral-argument time on being responsive to questions and not simply rehashing your brief.

Following the discussion, Judge Murphy took questions from attendees.

The Chapter greatly appreciates Judge Murphy's willingness to participate in this event. On August 5, 2021, the second Zoom event in the "Better Know a Sixth Circuit Judge" series is scheduled with Judge Jane Stranch. Please stay tuned for further details.



U.S. Magistrate Judge Steven Whalen
Photo courtesy of US District Court for EDMI.

Michigan Translators/ Interpreters Network

I recently had the opportunity to speak at a meeting of the Michigan Translators/Interpreters Network (MiTiN). While the focus of my presentation was an overview of federal court and the ways we call upon interpreters in various proceedings, we had a lively Q&A session in which I learned many things about the training and work of interpreters that I had not previously known. So I suggested that the Chapter membership, judges and attorneys alike, would be most interested in hearing from the interpreters themselves about the important work they do. I wish to thank MiTiN President Xico Gomez, Evelyn Villarruel, Donna Bos, Hiromi Fujii, and the membership of MiTiN for contributing to and preparing this article.

Hon. R. Steven Whalen
United States Magistrate Judge

Interpreters play a critical role in ensuring individuals with Limited English Proficiency (LEPs) have access to courts. Without the interpreter, the non-English speaking defendant cannot effectively be part of her own defense team, nor can a crime victim or witness with limited English proficiency recount his or her story to the jury. The parties in such cases rely on the court interpreter to convey the meaning of their statements accurately and faithfully. However, can the courts trust that the interpreter is rendering a true and unbiased interpretation of what is being said?

Let's begin with a common misconception that a court interpreter only needs to speak English and the language of the LEPs. The fact is that court interpreters should possess native to near-native fluency in the languages they interpret. Court interpreters are encouraged to attain either federal or state certification in languages where certification is available, as courts are required to use certified interpreters over other interpreters. Court interpreters must also adhere to a strict code of ethics and are held to a high standard of professionalism.

The Michigan Supreme Court, through the State Court Administrative Office (SCAO), offers a process for individuals to become Certified or Qualified Court Interpreters. Currently, individuals who pass the written proficiency exam are given "qualified" status. Individuals who pass both the English proficiency test and the foreign language oral examination are granted "certified" status.

Court interpreters must have the ability to interpret in all three modes of court interpretation: consecutive, simultaneous and sight translation, and they must be familiar with legal terminology and procedures. Both Federal and State certification exams are difficult to pass. The passing rate for state certification is 22%. It is even lower for the federal exam.

Recognizing the difficulty of passing the certification exams should give the courts and attorneys confidence in using certified interpreters. In Michigan, in addition to attaining "qualified" or "certified" status through a series of exams, court interpreters are required to earn 10 units of continuing education credits annually to maintain their status.

However, there are many languages for which no certification exam is available. In these cases, the court should voir dire an interpreter to ascertain their level of professional experience, education, or accreditation from a university.

A list of certified and qualified court interpreters is available on the SCAO website. The American Translators Association (ATA), the National Association of Judiciary Interpreters and Translators (NAJIT), and the Michigan Translators/Interpreters Network (MiTiN) also offer online directories, as well as profiles of their members.

In the interest of better serving the courts, and the LEPs, it is recommended that:

- The courts contract Certified or Qualified interpreters, or voir dire potential interpreters to ascertain their level of competency.
- Attorneys who speak the language of the LEP be mindful that they cannot act as both attorney and interpreter during court proceedings.
- Judges and attorneys familiarize themselves with the Interpreter's Code of Professional Conduct for Interpreters to know what they can and cannot request the interpreter to do. This can be found on the SCAO website.

- The interpreter be provided, whenever possible, with relevant documents prior to a proceeding, e.g., an indictment or other charging document, a pretrial or presentence report, police report, etc.
- Interpreters not be asked to "deliver" messages. Interpreters can only interpret.
- All parties know that the interpreter keeps a professional distance to avoid the appearance of impropriety.
- All parties refrain from asking the interpreter for their opinion. Interpreters may not give legal advice, nor should they comment on a case or the attorney's performance.
- All parties understand that the interpreter speaks in the first person and is required to uphold the confidentiality of all privileged information.
- All parties remember to speak clearly, loudly and to pause. This allows the interpreter to render a faithful and complete interpretation.
- All parties understand that the interpreter will not alter the level of sophistication of what is said or simplify what the speaker says unless the speaker does so. If the LEP does not understand, it is the speaker, not the interpreter, who may modify or restate what is said.
- Interpreters ask for clarification whenever the meaning is unclear.
- Interpreters take breaks as needed to maintain mental alertness.
- Interpreters work in pairs when interpreting over long periods of time.
- The interpreter should not be asked to explain what the attorneys or the judge says; however, the interpreter will gladly interpret the attorney's or judge's explanation.

The Michigan Translators/Interpreters Network

The Michigan Translators/Interpreters Network (MiTiN) is an organization of professional interpreters and translators founded in 1991. Functioning as the local chapter of the American Translators Association (ATA), MiTiN offers its members continuing education and training opportunities, and works to promote professional standards and practices.

Supreme Court Review

By M Bryan Schneider

The Supreme Court's October 2020 (all-virtual) Term concluded in early July, with the Court having issued a relatively light fifty-seven decisions in argued cases. Although the Term featured none of the hot-button issues that dominate the public's attention, the Court did decide numerous cases of interest to federal practitioners.

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Supreme Court Review *(from page 7)*

The bulk of the Court's docket this Term was devoted to civil, as opposed to criminal, matters. The Court issued a number of important decisions relating to jurisdiction and civil procedure, standing accounted for five separate decisions mostly tightening standing requirements. In *Transunion LLC v. Ramirez*, the Court held that class plaintiffs lacked standing to challenge the accuracy of information in their credit report files absent a showing of concrete harm by the inaccurate information through disclosure to third parties. In *Carney v. Adams*, the Court denied standing to a plaintiff challenging Delaware's judicial appointment rules because he failed to show that he was able and ready to apply for a judicial vacancy in the immediate future. The Court similarly denied standing to several individual and state plaintiffs challenging the constitutionality of the Affordable Care Act (the "Act") in *California v. Texas*. The plaintiffs argued that the Act's individual mandate is not a valid exercise of Congress's Commerce power and can no longer be sustained as an exercise of Congress's Taxing power, and that the mandate was inseverable from other portions of the Act which imposed monetary costs. The Court ultimately held that the plaintiffs could not show an injury traceable to the allegedly unconstitutional provision since that provision was no longer being enforced, and thus that the plaintiffs did not have standing to challenge the other provisions of the Act. Contrary to these decisions, the Court did find standing in *Uzuegbunam v. Preczewski*, concluding that a claim for nominal damages is sufficient to establish the redressability element of standing, and in *Collins v. Yellen*, concluding that shareholders in Fannie Mae and Freddie Mac had standing to challenge a stock purchase agreement of preferred stock to the Treasury Department that included the adoption of a variable dividend formula. The Court reasoned that such a pocketbook injury is the prototypical injury for which standing is allowed.

The Court returned this Term to the issue of personal jurisdiction, concluding in *Ford Motor Co. v. Montana Eighth Judicial District Court* that Montana and Minnesota courts could exercise personal jurisdiction over Ford for accidents involving Ford vehicles in those states. Although the cars had originally been purchased in other states, the Court explained, personal jurisdiction may be established when a company cultivates a market for a product in the forum state and the product malfunctions there, even if the particular item was purchased in another state. In *BP P.L.C. v. Mayor and City Council of Baltimore*, the Court held that where a defendant removes a case to federal court on multiple grounds and the district court remands to state court, an appellate court may review all of the grounds for removal so long as one of the asserted grounds is subject to review. In *City of San Antonio v. Hotels.Com*, the Court held that a district court does not have the authority to reduce or alter a court of appeal's award of costs under Federal Rule of Appellate Procedure 39. And in *CIC Services v. Internal Revenue Service*, the Court held that the Anti-Injunction Act, which requires a taxpayer to pay a tax prior to filing a challenge to the tax's validity, did not bar a suit challenging IRS reporting requirements even though civil tax penalties can be imposed as a consequence of non-compliance with the reporting requirements.

In substantive civil matters, the Court decided a number of cases raising issues of constitutional and civil rights law. Notably, returning to an area in which the Court has been active in recent terms, the Court addressed three separate challenges under the Appointments Clause. In *Collins v. Yellen*, the Court held that for-cause removal provision regulating the Director of the Federal Housing Finance Agency is an unconstitutional restriction on the President's removal power. In *United States v. Arthrex, Inc.*, the Court held that Administration Patent Judges are principal officers and thus their appointment by the Secretary of Commerce rather than the President is unconstitutional. And in *Carr v. Saul*, the Court held that the plaintiffs' Appointments Clause challenge to the appointment of Social Security Administration Administrative Law Judges was not subject to an exhaustion requirement.

In *Mahanoy Area School District v. B.L.*, the Court held that a school district violated the First Amendment rights of a student by punishing her for profane social media posts that occurred outside of school. While recognizing that a school may have an interest in regulating some off-campus student speech, the Court concluded that those interests were not sufficiently weighty in this case. In another free speech case, *Americans for Prosperity Foundation v. Bonta*, the Court struck down a California law requiring charitable organizations to disclose the identities of their major donors. In the much anticipated free exercise case *Fulton v. City of Philadelphia*, the Court declined to overrule *Employment Division v. Smith* as many had anticipated. However, the Court found that the City of Philadelphia denied Catholic Social Services' free exercise rights by terminating its contract to certify foster families based on CSS's refusal to certify same sex couples. Because the City's regulation was subject to exemptions, the Court held, it was not a neutral law of general applicability under Smith. In *Tanzin v. Tanvir*, the Court held that plaintiffs may obtain money damages against federal officials under the Religious Freedom Restoration Act. In *Brnovich v. Democratic National Committee*, the Court held that Arizona laws requiring election-day voters to vote in their assigned precinct and limiting who may collect early mail-in ballots do not violate § 2 of the Voting Rights Act. In a significant Takings Clause case, *Cedar Point Nursery v. Hassid*, the Court held that a California regulation granting union organizers access to an agricultural employer's property constituted a *per se* taking under the Fifth Amendment. In another takings case (albeit not under the Fifth Amendment), the Court held that the Natural Gas Act provision allowing the federal government to delegate its eminent domain power to private parties applies equally to land owned by state governments.

In a significant antitrust case decided this Term, *National Collegiate Athletic Association v. Alston*, the Court held that the NCAA's rules restricting education-related benefits to student athletes violate the Sherman Act. In the sole bankruptcy case of the Term, *City of Chicago v. Fulton*, the Court held that a creditor's retention of estate property after the filing of a bankruptcy petition does not violate the Bankruptcy Code's automatic stay provision. In *Rutledge v. Pharmaceutical Care Management Association*, the Court held that ERISA does not preempt a state law regulating reimbursement rates for prescription drugs. *Google LLC v. Oracle America, Inc.*, a significant copyright case, held that Google's copying of certain Java language allowing programmers to use the language in new programs was a fair use of Oracle's copyrighted material. In the sole substantive patent case decided this Term, *Minerva Surgical v. Hologic, Inc.*, the Court retained the doctrine of assignor estoppel, but clarified that it only prevents an assignor from challenging a patent's validity where the challenge would be inconsistent with any express or implied promises made in the assignment.

Below are key holdings from other civil cases decided this Term:

- The Federal Trade Commission Act does not authorize the FTC to award monetary relief (*AMG Capital Management v. Federal Trade Commission*).
- A contribution action under CERCLA based on a prior settlement of environmental liabilities is permissible only where the prior settlement resolved a CERCLA-specific liability (*Guam v. United States*).
- In a securities class action premised on the presumption that investors rely on the market price of a company's security, the defendant bears the burden of showing that its alleged misrepresentations did not impact the price of the security (*Goldman Sachs Group v. Arkansas Teacher Retirement System*).
- The deliberative process privilege protects internal draft opinions from disclosure under the Freedom of Information Act so long as they are pre-decisional, even if they reflect the agency's last views about an issue (*U.S. Fish & Wildlife Service v. Sierra Club*).

The Court was much less active on the criminal side of its docket this Term, but nonetheless issued several important decisions. In *United States v. Cooley*, the Court held that tribal police officers possess the authority to detain and search, for violations of state or federal law, non-Indians traveling on public roads running through a reservation. In *Lange v. California*, the Court held that pursuit of a misdemeanor suspect does not categorically justify a warrantless entry into a home to arrest the suspect, although flight remains a relevant factor in assessing the reasonableness of such an entry. In *Caniglia v. Strom*, a second Fourth Amendment case (brought as a civil suit under § 1983), the Court declined to extend the community caretaking doctrine to allow the search of a man's home for firearms after he was confronted on his porch and voluntarily agreed to go to the hospital for a psychiatric evaluation. Last Term, in *Ramos v. Louisiana*, the Court held for the first time that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious crime. This Term, in *Edwards v. Vannoy*, the Court held that the Ramos decision does not apply retroactively to cases already final when Ramos was decided. Under the Court's prior decision in *Miller v. Alabama*, a life-without-parole sentence for a juvenile offender is permissible under the Eighth Amendment only if the sentencing judge has discretion to impose a lesser punishment. In *Jones v. Mississippi*, the Court held that *Miller* does not require a sentencing judge to make any explicit factual findings to justify a life-without-parole sentence.

Turning to statutory criminal matters, in *Van Buren v. United States*, the Court held that a person "exceeds authorized access" under the Computer Fraud and Abuse Act only when he accesses particular areas of the computer to which he does not have access, and not when he obtains information to which he has access for an unauthorized purpose. In *Borden v. United States*, the Court held that a criminal offense that requires only recklessness does not constitute a crime of violence under the Armed Career Criminal Act provision establishing as a predicate felony any crime involving the use of physical force against the person of another. In *Greer v. United States*, the Court held that a court's failure to instruct a jury that the defendant must know he was a felon in order to convict the defendant of being a felon in possession of a firearm is not structural error, and is subject to plain error review if not objected to at trial. Finally, in *Terry v. United States*, the Court held that the sentence reduction made available to crack cocaine offenders by the First Step Act applies only if the defendant was convicted of a crack cocaine offense that triggered a mandatory minimum sentence.

Finally, as has been true in recent terms, the Court considered several immigration cases during the October 2020 Term. In *Niz-Chavez v. Garland*, the Court held that in order to trigger the stop-time rule (which stops the clock running on a period of continuous presence in the United States), a notice to appear for a removal proceeding must be a single document containing all of the information required by the statute; serial mailings which taken together provide all of the information are not sufficient. In *Garland v. Ming Dai*, the Court rejected a Ninth Circuit rule which required courts reviewing an Immigration Judge's decision to treat an alien's testimony as true or credible unless the Immigration Judge made an explicit credibility finding rejecting the alien's testimony. Under the Immigration and Nationality Act, a nonpermanent resident seeking to obtain a cancellation of removal bears the burden of showing that he has not been convicted of a disqualifying criminal offense. In *Pereida v. Wilkinson*, the Court held that that burden is not met where the statute of conviction contains multiple offenses, some of which are disqualifying and some of which are not, and the record is ambiguous as to which crime was the basis of the resident's conviction.

(continued on page 10)

Supreme Court Review

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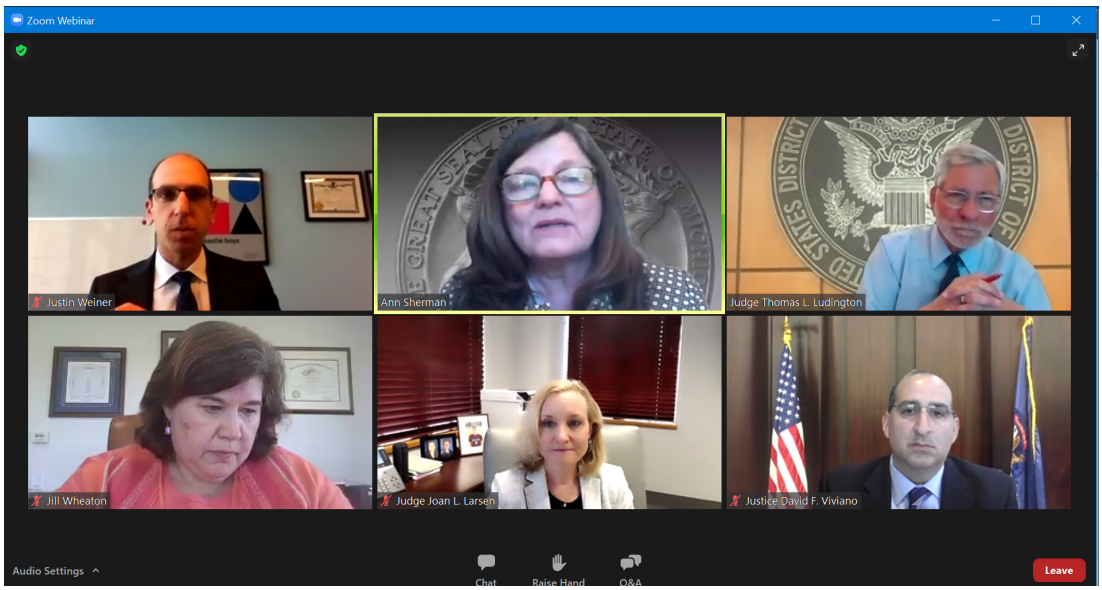
Finally, the Court addressed two issues relating to unlawful reentry. In *Johnson v. Guzman Chavez*, the Court held that aliens subject to detention for reentering the country after removal may not apply for release on bond pursuant to the statutory provision governing aliens subject to initial removal proceedings. And in *United States v. Palomar-Santiago*, the Court held that an alien charged with unlawful reentry who seeks to collaterally challenge the prior order of removal must show that he exhausted any available administrative remedies, that lacked an opportunity for judicial review, and that the entry of the removal order was fundamentally unfair.

"Am I Certifiable" Panel Discussion Event



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Calendar of Events

July 21	**Public Servant to Private Practitioner: A Roadmap for Transitioning Out** Zoom "webinar" style; only the event speakers will be on camera 12:00-1:00pm Members: $0/NonMembers: $11 (Register at fbamich.org)
August 5	**Better Know A Sixth Circuit Judge Program with Judge Jane Stranch** 12:00-1:00pm Zoom Q&A (Register at fbamich.org)
August 11	**FBA Bankruptcy Committee Meeting** 12:00 pm (Register at fbamich.org)

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