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Third Circuit Review Precedential Opinion Summary

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PRECEDENTIAL OPINION SUMMARY

The Precedential Opinion Summary collects precedential opinions issued by the U.S. Court of Appeals for the Third Circuit between January 1, 2019 and December 1, 2019. This compilation is designed to serve as a research tool rather than provide comprehensive analysis on any particular opinion. The summary is organized into two parts: civil and criminal matters, and within each part by issues of first impression, cases considered en banc, and an appendix of precedential opinions arranged by subject matter.

Civil Matters

Issues of First Impression

Administrative Law—Gun Control Act of 1968—In *Simpson v. Attorney General of United States*,[1] the Third Circuit considered what standard to apply in determining whether a violation of the Gun Control Act (GCA) was willful.[2] Judge Vanaskie, joined by Judge Chagares and Judge Jordan, held "that a violation of the GCA is willful where the licensee: (1) knew of his legal obligations under the GCA, and (2) either purposefully disregarded or was plainly indifferent to GCA requirements."[3] Adopting this standard, the Third Circuit followed the unanimous view of all the Courts of Appeals that had addressed the issue.[4] Applying the standard to the facts of the case, the court affirmed the district court's ruling "[b]ecause it [was] clear that Simpson knew or was plainly indifferent to his obligations by committing hundreds of GCA violations."[5] Even further, the court noted the licensee's prior conformity with GCA standards, indicating "knowledge of [the licensee's] obligations."[6]

Administrative Law—Immigration Law—In *Mejia-Castanon v. Attorney General of United States*,[7] the court considered whether to give deference to the Board of Immigration Appeals' (BIA) decision to not apply the stop-time rule to the good moral character requirement.[8] In order to be considered for cancellation of removal as an undocumented alien, the individual must "have maintained a continuous physical presence in the

1. 913 F.3d 110 (3d Cir. 2019) (Vanaskie, J.).
2. *Id.* at 112.
3. *Id.* at 114.
4. *Id.* at 112.
5. *Id.*
6. *Id.* at 116.
7. 931 F.3d 224 (3d Cir. 2019) (Scirica, J.).
8. *Id.* at 226.

United States for at least ten years and have been a person of good moral character for such a period."[9] Nevertheless, under Congress's implementation of the "stop-time rule," the calculation of the ten years of physical presence requirement occurs at the time the Department of Homeland Security serves an individual with a notice to appear.[10] The issue at hand analyzed an undocumented immigrant's removal and subsequent appeal for cancellation of removal.[11] The BIA deemed the petitioner ineligible for removal based on not passing the character requirements, specifically, the petitioner's participation in "alien smuggling."[12] But, as the petitioner argued, the conduct in question occurred after they were served with a notice to appear, thus, the stop-time rule would apply.[13] Judge Scirica considered the petitioner's position and determined that the provision was ambiguous, as it was possible the petitioner's interpretation was correct or that the provision applied only to the physical presence requirement.[14] The court eventually granted the BIA's interpretation of the rule *Chevron* deference and held the stop-time rule does not apply to the good moral character requirement.[15] Judge Siler, sitting in designation, dissented, finding that the provision is not ambiguous and that the plain language requires the stop-rule to apply to the character requirement.[16]

ADMINISTRATIVE LAW—IMMIGRATION—In *Nkomo v. Attorney General of United States*,[17] the court first decided "whether a notice to appear that fails to specify the time and place of an initial removal hearing deprives an immigration judge of jurisdiction over the removal proceedings."[18] Judge Hardiman, writing for the court, stated three reasons for deciding to join the other circuit courts in rejecting Nkomo's argument: (1) Congress did not place a jurisdictional limitation in the particular section at issue that exists in other sections of the removal proceedings statutes; (2) Supreme Court precedent relied on by Nkomo is a narrow holding that does not apply in this context; and (3) the regulation at issue was classified as a "charging document," suggesting that the filing requirement services a different purpose than the notice to appear.[19] Thus, the court held that the failure to specify time and place of an initial removal hearing did not deprive the immigration judge of jurisdiction.[20] The court then affirmed with the Board of Immigration Appeals' (BIA) denial of petitioner's with-

9. *Id.*
10. *Id.*
11. *Id* at 230.
12. *Id.*
13. *Id.*
14. *Id.* at 230, 232.
15. *See id.* at 226–27, 235–36.
16. *Id.* at 237 (Siler, J., dissenting).
17. 930 F.3d 129 (3d Cir. 2019) (Hardiman, J.)
18. *Id.* at 131.
19. *Id.* at 133–34.
20. *Id.* at 134.

holding for removal, stating that the BIA did not err in concluding the alien's conviction for wire fraud constituted a conviction for a "particularly serious crime."[21] Finally, the court declined to review the petitioner's Convention Against Torture claim because it believed it lacked the jurisdiction to do so.[22]

ANTITRUST—FEDERAL TRADE COMMISSION ACT—In *FTC v. Shire ViroPharma, Inc.*,[23] the Third Circuit refused the FTC's request to broadly construe the meaning of Section 13(b) of the FTC Act.[24] The FTC argued that showing a past violation of the statute and a reasonable likelihood of future violation should satisfy the phrase "is violating, or is about to violate."[25] Chief Judge Smith, writing for the court, affirmed the district court's dismissal for failure to state a claim because the FTC could not overcome the unambiguous language of Section 13(b) to try to include past violations that may recur.[26] The Third Circuit distinguished this issue from similar interpretations of securities laws because the statutes pertain to different subject matter and "the ordinary meaning of [the] statute . . . provide[d] sufficient guidance to [its] meaning."[27] The court believed broadly construing the language would cut against the language's explicitness, and no cases were cited to support such an interpretation.[28]

ANTITRUST—ATTORNEYS' FEES CLAIM—In *FTC v. Penn State Hershey Medical Center*,[29] the court considered whether the Commonwealth of Pennsylvania could recover attorneys' fees following its successful motion to enjoin a merger under Section 16 of the Clayton Act and Section 13(b) of the FTC Act.[30] The district court denied an award of attorney's fees to the commonwealth, ruling that the commonwealth had not "substantially prevailed" for purposes of Section 16 of the Clayton Act.[31] The Third Circuit affirmed the denial, but on different grounds, holding instead that the injunction the commonwealth prevailed on was actually ordered under Section 13(b) of the FTC Act.[32] Thus, the attorney fee provisions of the Clayton Act were irrelevant to the inquiry before the court.[33] Nev-

21. *Id.* at 134–35.

22. *Id.* at 135–36.

23. 917 F.3d 147 (3d Cir. 2019) (Smith, C.J.).

24. *Id.* at 161.

25. *Id.* at 150.

26. *Id.* at 161.

27. *Id.* at 158 (internal quotation marks omitted) (quoting Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 823 (3d Cir. 1999)) (focusing on plain language of Section 13(b)). The court believed the FTC could still address the "parade of horribles" it suggested would occur without a broad interpretation through administrative proceedings. *Id.* at 159.

28. *Id.* at 158–59.

29. 914 F.3d 193 (3d Cir. 2019) (Nygaard, J.).

30. *Id.* at 194–95.

31. *Id.* at 195.

32. *Id.* at 196, 199–200.

33. *Id.* at 196.

ertheless, Judge Nygaard, writing for the court, ordered the injunction under the FTC Act, which does not contain attorney fee provisions, and prevented the commonwealth from recovering the fees.[34]

BANKRUPTCY—TITLE XI—In *In re Heckler & Stelzle-Hackler*,[35] the Third Circuit discussed whether a real estate title transfer, conducted in accordance with New Jersey's tax foreclosure procedures, may be voided as "preferential" under Section 547(b) of the United States Bankruptcy Code.[36] Judge Roth, joined by Judge McKee and Judge Porter, held that the real estate title transfer was properly voided under Section 547(b) requirements.[37] In making this determination, the court relied on the plain language of the statute and confirmed that it did conflict with any New Jersey state law.[38] The court also noted that the Tax Injunction Act was not violated when the transfer at issue occurred.[39] Finally, the court declined to reverse the decision purely based on policy concerns raised by the appellant.[40] In sum, because the transfer at issue met all of the plain language requirements of Section 547(b), it was voided properly.[41]

CIVIL PROCEDURE—CLASS ACTION FAIRNESS ACT—In *Coba v. Ford Motor Co.*,[42] Judge Krause, writing for Judges Jordan and Roth, decided a procedural issue of first impression.[43] The court had to determine whether, under the Class Action Fairness Act, a federal court that had jurisdiction at the time a claim was filed or removed loses subject-matter jurisdiction when it denies class certification.[44] In joining the Second, Fifth, Sixth, Eighth, and Ninth Circuits, the court determined denial of class certification did not make jurisdiction improper.[45] On the merits of their claim, petitioner challenged "the District Court's grant of summary judgment on his claims for breach of express warranty, breach of the implied covenant of good faith and fair dealing, and violation of [New Jersey Consumer Fraud Act]."[46] On the breach of warranty claim, the court affirmed the district court's finding that the warranty covered only "materials or workmanship" and not "design-defects," and that the fuel tank problem in this case was a design defect.[47] "Because Coba did not have any right to repair or replacement of his fuel tanks . . . he also could not prevail on his claim

34. *Id.* at 197.
35. 938 F.3d 473 (3d Cir. 2019) (Roth, J.).
36. *Id.* at 475.
37. *Id.*
38. *Id.* at 584.
39. *Id.* at 480–81.
40. *Id.* at 481–82.
41. *Id.*
42. 932 F.3d 114 (3d Cir. 2019) (Krause, J.).
43. *Id.* at 118–19.
44. *Id.* at 119.
45. *Id.* at 119 n.2.
46. *Id.* at 120.
47. *Id.*

for breach of the implied covenant of good faith and fair dealing."[48] On the petitioner's NJCFA claim, the Third Circuit determined that the evidence did not support a finding that Ford "knew and did not disclose that the fuel tank suffered from a design defect" or "that even if Ford did not know the cause . . . it failed to disclose the risk."[49]

CIVIL PROCEDURE—FEDERAL RULE OF CIVIL PROCEDURE 65(C)—In *National Collegiate Athletic Association v. Governor of New Jersey*,[50] the Third Circuit addressed when an enjoined party may recover on a bond and to what extent the district court has discretion to deny damages.[51] Judge Rendell, joined by Judge McKee, held that the term "wrongfully enjoined" should be explicitly interpreted to mean that a "party had a right all along to do what it was enjoined from doing."[52] The New Jersey Thoroughbred Horsemen's Association (NJTHA) was enjoined from sports gambling due to the Professional and Amateur Sports Protection Act (PAPSA), which the Supreme Court later held to be unconstitutional.[53] Therefore, the NJTHA "had a right to conduct sports gambling all along," and was wrongfully enjoined.[54] The Third Circuit vacated the district court's denial of NJTHA's recovery on the posted bond and damages, and remanded for the district court to determine how much is to be collected.[55] In dissent, Judge Porter argued a party is not wrongfully enjoined if the temporary restraining order adversely affecting the party is based on different grounds than a federal act proven unconstitutional, such as in this case.[56]

CIVIL PROCEDURE—TOLLING STATUTE OF LIMITATIONS—In *Blake v. JP Morgan Chase Bank NA*,[57] the Third Circuit answered whether it may apply *American Pipe* tolling to class actions that are filed while another timely filed class action, that raises the same issue against defendant, is ongoing.[58] The court explained that *American Pipe* tolling[59] is limited to individual claims and not class actions.[60] Because the petitioners sued while

48. *Id.* at 124.
49. *Id.*
50. 939 F.3d 597 (3d Cir. 2019) (Rendell, J.).
51. *Id.* at 603.
52. *Id.*
53. *Id.* at 603–04.
54. *Id.* at 606.
55. *Id.* at 609.
56. *Id.* at 609 (Porter, J., dissenting).
57. 927 F.3d 701 (3d Cir. 2019) (Bibas, J.)
58. *Id.* at 703.
59. The Third Circuit defined *American Pipe* tolling as when a class action delays "the claims of . . . putative class members." *Id.* at 708. By tolling the claims, plaintiffs need not question whether they can successfully file a claim before the statute of limitations period ends. *Id.* Instead, the claim is preserved through the putative class action. *Id.* at 708–09.
60. *Id.* at 709. In making this assertion, the Third Circuit relied on recent Supreme Court precedent discussing tolling class actions and stated "[c]ourts may not toll new class actions just because there was a prior timely class action." *Id.* (citing China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1811 (2018)).

another timely filed class action was ongoing, they believed it differentiated their claim's timing from a class action filed after a court fully adjudicates a previous class action.[61] This, in effect, would help petitioners avoid and distinguish from Supreme Court precedent disallowing class actions after a previous one had been adjudicated.[62] The court held that this distinguishing fact did not upset the tolling limitations on class actions, and it did not interpret Supreme Court precedent to allow "overlapping class actions."[63] Therefore, the Third Circuit found the petitioners filed an untimely class action and affirmed the district court's decision dismissing the claim.[64]

CONSTITUTIONAL LAW—ARTICLE III STANDING—In *Prometheus Radio Project v. FCC*,[65] the Third Circuit answered the question of when in the litigation process parties may submit materials to establish standing.[66] Judge Ambro, joined by Judge Fuentes, held that parties may establish standing by submitting materials "at any time in the litigation."[67] The parties had participated in litigation for so long that, according to the court, it "was readily apparent" petitioners had proper standing.[68] The court held that the petitioners properly submitted declarations and reply briefs, thus, establishing standing. The Third Circuit joined the position explicitly held by the Ninth Circuit and implicitly followed by the Tenth and Seventh Circuits.[69] On the merits of the issue, the court held that the FCC's Reconsideration and Incubator Orders did not sufficiently consider how its ownership rule changes would affect women and minorities.[70] Judge Scirica, concurring in part and dissenting in part, argued the FCC should implement their orders and independently evaluate the new rules' effects.[71] Judge Scircia posited that the orders may not necessarily harm diversity ownership, and the court should leave the FCC to "enjoy a measure of deference when it balances [its] policy objectives."[72] Judge Scirica also noted the FCC's previous acknowledgement that the new ownership rules proved not to adversely affect minority or women ownership.[73]

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61. *Id.*

62. *Id.*

63. *Id.* at 710.

64. *Id.* at 710.

65. 939 F.3d 567 (3d Cir. 2019) (Ambro, J.).

66. *Id.* at 578.

67. *Id.* at 579.

68. *Id.*

69. *Id.* These circuits have all stated that parties can acquire proper Article III standing at varying points during litigation. *See id.* Specifically, when challenging agency actions, parties can "supplement the administrative record," and in turn, establish standing. *Id.*

70. *Id.* at 577–78.

71. *Id.* at 589–90 (Scirica, J., concurring in part and dissenting in part).

72. *Id.* at 593 (Scirica, J., concurring in part and dissenting in part).

73. *Id.* at 594 (Scririca, J., concurring in part and dissenting in part).

CONSTITUTIONAL LAW—ARTICLE III STANDING—In *Kamal v. J. Crew Group, Inc.*,[74] the Third Circuit addressed whether procedural violations of the Fair and Accurate Credit Transactions Act of 2003 (FACTA) alleging a "material risk of harm" could establish standing.[75] Judge Scirica, joined by Judge Chagares and Judge Rendell, held that technical violations of FACTA constitute concrete injury when the violation "actually harms or presents a material risk of harm to the underlying concrete interest."[76] The court found this matter different than previous standing reviews because the material risk of harm had not yet materialized for the plaintiff.[77] In order to materially risk harm to an underlying interest, there must be a close relationship to a harm traditionally regarded as providing a common law cause of action.[78] The court used examples of other "[h]arms actionable under traditional privacy torts" to conclude the situation at hand did not qualify as one of material risk.[79] The court relied on this historical comparison in determining the plaintiff's alleged harm had no tort law analog, thus, denying the claim.[80] In making this decision, the Third Circuit joined the Second, Eighth, and Ninth Circuits' interpretation of material risk of harm to establish Article III standing.[81]

CONSTITUTIONAL LAW—FIRST AMENDMENT—In *Adams v. Governor of Delaware*,[82] the Third Circuit decided whether Article IV, Section 3 of the Delaware Constitution, which requires judicial positions to be appointed based on political party affiliation, violated the U.S. Constitution's First Amendment Freedom of Association protection.[83] After granting a petition for rehearing,[84] the court held that judges do not fall within the policymakers exception, which permits political-based criteria for appointment decisions.[85] Because a judge's decision-making is independent and not tied to the allegiance of an appointing government officer, they do not fall within the exception.[86] The court applied a strict scrutiny analysis and held that Delaware failed to show this is the most narrowly tailored

74. 918 F.3d 102 (3d Cir. 2019) (Scirica, J.).
75. *Id.* at 113.
76. *Id.* at 112.
77. *See id.* (internal quotation marks omitted).
78. *Id.* at 114.
79. *Id.* at 114–15.
80. *Id.*
81. *Id.* at 112–13.
82. 922 F.3d 166 (3d Cir. 2019) (Fuentes, J.).
83. *Id.* at 169.
84. *See* Adams v. Governor of Del., 920 F.3d 878, 878 (3d Cir. 2019) (vacating and granting rehearing). In the original Third Circuit opinion, Judge Fuentes held that the petitioner challenging the Delaware constitution had Article III standing, but declined to evaluate whether Delaware's interest in political balance rendered the statute constitutional. *See* Adams v. Governor of Del., 914 F.3d 827, 835, 843 (3d Cir. 2019), *vacated*, 920 F.3d 878, *affirming in part, reversing in part*, 922 F.3d 166 (3d Cir. 2019).
85. *Adams*, 922 F.3d at 178.
86. *Id.* at 178–81.

way to fulfill its state interest of having a politically balanced judiciary.[87] Therefore, the Third Circuit affirmed the district court's summary judgment decision for the petitioner and held that article IV, section 3 of the Delaware Constitution was unconstitutional.[88] Judge McKee, joined by Judge Fuentes and Judge Restrepo, concurred in the judgment.[89] Judge McKee noted that despite Delaware's non-partisan reputation within the judicial system, reputation alone is not a sufficient justification for the strict restrictions the selection process has on an individual's right to freely associate.[90]

IMMIGRATION LAW—EQUAL PROTECTION—In *Tineo v. Attorney General of United States*,[91] the Third Circuit considered whether 8 U.S.C. § 1432(a)(2), which treats men and women differently for purposes of transmitting citizenship to their out-of-wedlock children, requires courts to apply its rationale without limits.[92] "[U]nder the now repealed 8 U.S.C. § 1432(a)(2)," a naturalized mother could transmit citizenship to her out-of-wedlock child regardless of whether the father was alive, but a naturalized father in the same position would need to legitimize his child to transmit his citizenship.[93] In *Tineo*, the petitioner was born outside of the U.S. to unwed, non-U.S. citizen parents; his father moved to the U.S. and became a naturalized citizen, while his mother soon passed away.[94] At the time, the only way for the petitioner to become a legitimate child of his father was if his birth parents married.[95] Recognizing this rule would always preclude the petitioner from deriving citizenship from his father, the Third Circuit held Section 1432(a)(2), as presently applied, did not satisfy the Equal Protection Clause of the Constitution.[96] Applying intermediate scrutiny, the court determined the government failed to establish an important government interest in denying defendant citizenship through his father, thus, granting the defendant's petition to review his order of removal.[97] Chief Judge Smith dissented in part, positing that a "substantial relationship" existed between the law and Congress's objective of establishing "a true filial tie."[98]

IMMIGRATION LAW—FIFTH AMENDMENT—In *Carbrera v. Attorney General of United States*,[99] the Third Circuit considered the constitutionality of "dis-

87. *Id.* at 181–83.
88. *Id.* at 184–85.
89. *Id.* at 185 (McKee, J., concurring).
90. *Id.* at 186–87. (McKee, J., concurring).
91. 937 F.3d 200 (3d Cir. 2019) (Greenaway Jr., J.).
92. *Id.* at 204–05.
93. *Id.* at 204.
94. *Id.* at 205.
95. *Id.* at 204.
96. *Id.* at 209–10.
97. *Id.* at 219.
98. *Id.* at 221 (Smith, C.J., concurring in part and dissenting in part).
99. 921 F.3d 401 (3d Cir. 2019) (Rendell, J.).

parate treatment on the basis of adoptive status in the citizenship context."[100] Judge Rendell, writing for the court, agreed with the Second and Ninth Circuits that rational basis review is the appropriate standard of review for distinctions on the basis of adoptive status, thus, disparate treatment was constitutional.[101] The court concluded that promoting a relationship between the child and citizen parent, preventing fraud, and protecting the rights of alien parents served as valid justifications for treatment.[102] The court explained that all three reasons exceeded the "extremely low" threshold for upholding distinctions under rational basis review.[103] Thus, the Third Circuit denied the plaintiff's petition for review of the immigration court's decision.[104]

IMMIGRATION LAW—FOURTH AMENDMENT—The Third Circuit in *Yoc-Us v. Attorney General of United States*[105] considered for the first time whether the exclusionary rule, or any applicable exceptions, applied to Fourth Amendment violations when the offending officer is a state officer, rather than a federal agent.[106] The petitioner argued the exclusionary rule should apply to suppress evidence of the petitioners' alienage status, which was used in the original civil removal proceedings.[107] Judge Rendell, writing for the court, concluded that the deterrent effect of applying the full exclusionary rule to immigration proceedings was low because "state and local officers are already 'punished' by the use of the exclusionary rule in criminal proceedings."[108] In a separate federal immigration proceeding, the court reasoned exclusion would have little deterrent potential and that the deterrence value was further reduced because of the "intersovereign nature of this case."[109] The court determined that the Supreme Court's exceptions to the exclusionary rule's application apply to cases that involve state officers.[110] The court concluded the petitioners had the right to present evidence of a Fourth Amendment violation, and therefore remanded the case to an immigration judge.[111]

IMMIGRATION LAW—FOURTEENTH AMENDMENT—In *E.D. v. Sharkey*,[112] the Third Circuit held that immigration detainees are entitled to the same due process protections as pretrial detainees.[113] An immigration officer forced a female detainee to engage in sexual intercourse on several occa-

100. *Id.* at 405.
101. *Id.* at 404.
102. *Id.*
103. *Id.*
104. *Id.* at 405.
105. 932 F.3d 98 (3d Cir. 2019) (Rendell, J.).
106. *Id.* at 101.
107. *Id.* at 106.
108. *Id.* (citing United States v. Janis, 428 U.S. 433, 448 (1976)).
109. *Id.* at 110.
110. *Id.* at 112.
111. *Id.* at 113.
112. 928 F.3d 299 (3d Cir. 2019) (Restrepo, J.)
113. *Id.* at 303.

sions, which resulted in the detainee filing a claim against the facility.[114] She believed the immigration facility deliberately ignored her claims and failed to adopt policies that harshly address the officer's behavior.[115] The district court believed "a factfinder could reasonably find" the county that operated the immigration facility liable for the officer's conduct.[116] The Third Circuit joined several other circuit courts in concluding that the detainee's right to protection in the immigration facility was clearly established at the time of misconduct.[117] The court remanded the matter back to the district court because it lacked jurisdiction to review the denial of summary judgment against the county government.[118] Chief Judge Smith concurred, criticizing the district court's use of "footnote order[s]" and noting this practice likely does not provide enough specificity in qualified immunity decisions.[119] Instead, Chief Judge Smith called for a more meaningful review of the district court's qualified immunity decision and requested opinions from lower courts rather than simple orders.[120]

INTELLECTUAL PROPERTY LAW—COPYRIGHTS—In *T.D. Bank N.A. v. Hill*,[121] the Third Circuit addressed whether a portion of the defendant's book that included a manuscript co-authored with the plaintiff while acting as CEO of Commerce Bank, who had since merged with plaintiff T.D. Bank (the Bank), infringed on a copyright owned by the Bank.[122] The district court concluded that the Bank owned the copyright under a letter agreement with the defendant, and their use of the manuscript constituted an irreparable violation of the Bank's "right to not use the copyright."[123] While the Third Circuit affirmed the district court's decision, it did so for different reasons.[124] Within the analysis, Judge Krause, writing on the behalf of the court, believed the district court improperly applied vesting of ownership principles instead of deciding whether the work fell within the defendant's scope of employment.[125] If the manuscript fell within the scope of employment, it would receive "for-hire" treatment, meet the first definition "work for hire" under the 1976 Copyright Act, and the defendant would lack any rights to the copyright.[126] First, the court concluded that the Bank served as the assignee for the copyright.[127] The court then used Supreme Court precedent and other Courts of Ap-

114. *Id.* at 304.
115. *Id.*
116. *Id.* at 305.
117. *Id.* at 307–08.
118. *Id.* at 310.
119. *Id.* at 310–11 (Smith, C.J., concurring).
120. *Id.* (Smith, C.J., concurring).
121. 928 F.3d 259 (3d Cir. 2019) (Krause, J.).
122. *Id.* at 265.
123. *Id.*
124. *Id.* at 271.
125. *Id.* at 271–72, 276–77.
126. *Id.* at 276.
127. *Id.* at 275.

peals' decisions in concluding the appropriate test for scope of employment is the one advanced by the Second Restatement of Agency.[128] In pertinent part, the test states that a work falls within the scope of employment only if "[1] it is of the kind he is employed to perform; [2] it occurs substantially within the authorized time and space limits; and [3] it is actuated, at least in part, by a purpose to serve the [employer]."[129] Because the lower court did not examine this issue, the Third Circuit remanded to resolve the underlying factual disputes.[130] Judge Cowen, concurring in part and dissenting in part, disagreed with the court's ownership analysis, stating (1) the Bank previously waived the issue of assignment, and (2) even assuming assignment is at issue, the letter did not "meet[ ] the legal requirements for an assignment of a copyright interest."[131]

INTELLECTUAL PROPERTY LAW—COPYRIGHTS—In *Silvertop Associates Inc. v. Kangaroo Manufacturing*,[132] the Third Circuit evaluated the validity of a banana costume copyright by determining whether the "pictorial, graphic, or sculptural features" of the costume could be separated from its utilitarian function, and whether allowing the copyright would monopolize the idea of a banana costume.[133] Judge Hardiman, along with Judge Chagares and Judge Goldberg, held that the costume's design features—its color, shape, length, and lines—could be separated in whole from the costume's functional aspect and were copyrightable.[134] Moreover, neither merger nor *scenes a faire* doctrines prevented the costume from being copyrighted.[135] The decision utilized the U.S. Supreme Court's recent decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[136] to determine the usefulness of the costume.[137]

LABOR AND EMPLOYMENT LAW—FAIR LABOR STANDARDS ACT (FLSA)—In *Secretary of United States Department of Labor v. Bristol Excavating, Inc.*,[138] the Third Circuit discussed whether an employer must add bonuses provided by third parties to an employee's regular rate of pay when calculating overtime compensation.[139] Prior to review, the district court agreed with the Department of Labor and held that Bristol Excavating, the employer, had violated the FLSA because third-party bonuses are "renumeration for employment" and must always be included in the calculation of

128. *Id.* at 276–77.

129. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Avtec Sys., Inc. v. Peiffer, 21 F.3d 568, 571 (4th Cir. 1994)).

130. *Id.* at 286.

131. *Id.* at 288 (Cowen, J., concurring in part and dissenting in part).

132. 931 F.3d 215 (3d Cir. 2019) (Hardiman, J.).

133. *Id.* at 219, 222.

134. *Id.* at 222.

135. *Id.* at 223.

136. 137 S. Ct. 1002 (2017).

137. *Kangaroo Mfg.*, 931 F.3d at 220–21.

138. 935 F.3d 122 (3d Cir. 2019) (Jordan, J.)

139. *Id.* at 127–28.

regular rate of pay.[140] Judge Jordan, writing for Chief Judge Smith and Judge Rendell, disagreed with the district court and held that third-party bonuses are not per se "renumeration for employment" under the FLSA's definition, and a third-party bonus "qualifies as remuneration for employment only when the employer and employee have effectively agreed it will."[141] Judge Jordan, looking to statutory history, common law, and "common sense," believed that "[i]mposing unexpected costs on employers does not work to the long-term benefit of employees," as employers would be required to pay overtime wages not based upon their own agreements with their employees.[142] Therefore, the inclusion of third-party bonuses in the calculation of regular rate of pay and overtime pay must be explicitly agreed upon by the individual employer and employee.[143]

LABOR AND EMPLOYMENT LAW—FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT (FAAAA)—In *Bedoya v. American Eagle Express*,[144] the Third Circuit considered whether the FAAAA preempts the New Jersey Wage and Hour Law's (NJWHL) and the New Jersey Wage Payment Law's (NJWPL) definition of "employee" for the purposes of employment claims.[145] Judge Shwartz, writing on behalf of the court, ruled that the FAAAA did not preempt the state law employee definitional test. According to the court, the state law's classification of independent contractors versus employees had no direct or significant impact on the defendant carrier's "prices, routes, or services."[146] In reaching this conclusion, the court noted that the FAAAA will preempt a state law if the state law has an indirect or direct "significant" impact on carrier prices, routes, or services.[147] However, the court noted a lack of specific guidance from the Supreme Court regarding an evaluation for significance of impact and offered several factors that courts might look to in the future in an FAAAA preemption analysis.[148]

LABOR AND EMPLOYMENT LAW—EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)—In *Bergamatto v. Board of Trustees of NYSA-ILA Pension Fund*,[149] the Third Circuit addressed whether an executive director of a

140. *Id.* at 129.

141. *Id.* at 135.

142. *Id.* at 132–34.

143. *Id.* at 135.

144. 914 F.3d 812 (3d Cir. 2019) (Shwartz, J.), *cert. denied*, 140 S. Ct. 102 (2019).

145. *Id.* at 816.

146. *Id.* at 824.

147. *Id.* at 819–20.

148. *Id.* at 820–24. These factors include (1) whether the state law applies strictly to motor carriers, (2) "whether the [state] law addresses the carrier-employee relationship as opposed to the carrier-customer relationship," (3) "whether the law binds the carrier to provide a particular price, route, or service," or (4) Congress' attempts to create blanket legislation and avoid "patchwork" state law. *Id.* at 820–23 (third internal quotation marks omitted).

149. 933 F.3d 257 (3d Cir. 2019) (Jordan, J.).

pension fund falling outside ERISA's definition of "administrator" may be liable as a "de facto administrator."[150] ERISA "allows suit against *an administrator* for not responding to requests for certain information."[151] The parties did not dispute that the executive director fell outside the statutory definition, so the court considered whether to expand the definition of administrator beyond the statute's language.[152] Although the Eleventh and First Circuits previously adopted a limited de facto administrator theory, "[m]ost courts" that had addressed the question, including the present lower court, declined to expand the definition.[153] Judge Jordan, writing for the court, held that the administrator title applies only to those who fit the statutory definition and declined to "stretch the term to authorize penalties against others whom a disappointed plan participant might like to reach."[154] Relying on precedent from the Supreme Court and prior Third Circuit decisions, Judge Jordan cautioned against "courts . . . reading remedies into ERISA's carefully-crafted enforcement scheme" and stated the statute "should be leniently and narrowly construed."[155] Therefore, the court declined to adopt the de facto administrator theory, succinctly stating that "there is no such thing as a 'de facto administrator.'"[156]

PROPERTY LAW—NATURAL GAS ACT—In *Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres*,[157] the Third Circuit considered for the first time "whether state law or federal law governs the measure of just compensation in condemnation proceedings brought by a private entity under the [Natural Gas Act]."[158] The Natural Gas Act (NGA) allows gas companies to exercise eminent domain over private property in order to use the land for gas pipelines.[159] The district court held that federal courts should use federal law to determine the amount of compensation owed when this happens.[160] Nevertheless, the language of the NGA does not indicate whether federal or state law should govern.[161] Judge Greenaway Jr., writing for the court, relied on analysis from the Fifth and Sixth Circuits that declined to create a "uniform rule of compensation" and allowed compensation amounts to be determined under state law.[162] The

150. *Id.* at 266.

151. *Id.* (alteration in original); *see also* 29 U.S.C. § 1132(c)(1) (2018) (outlining consequences for administrators' failure to comply with information requests).

152. *Bergamatto*, 933 F.3d at 266.

153. *Id.* at 266–67 (discussing other circuits' interpretations); *id.* at 262 (reviewing lower court's analysis and reluctance extending administrator definition).

154. *Id.* at 269.

155. *Id.* at 268.

156. *Id.* at 268–69.

157. 931 F.3d 237 (3d Cir. 2019) (Greenaway Jr., J.).

158. *Id.* at 246.

159. *Id.* at 241.

160. *Id.* at 242.

161. *Id.* at 246.

162. *Id.* at 246–47.

court, in reversing the district court, decided to incorporate state law because "(i) fashioning a nationally uniform rule is unnecessary, (ii) incorporating state law does not frustrate the NGA's objectives, and (iii) application of a uniform federal rule would upset commercial relationships."[163] Judge Chagares believed that the standard for compensation "is the same regardless of whether it is the Government or a Government-delegatee that exercises that power" and therefore, that pre-existing precedent solves this legal issue.[164]

PUBLIC ACCOMMODATIONS—AMERICANS WITH DISABILITIES ACT (ADA)—In *Matheis v. CSL Plasma, Inc.*,[165] the Third Circuit decided whether a plasma donation center falls within the ADA's public accommodation requirements as a service establishment and thus could be subject to a unreasonable discrimination claim for failure to accommodate.[166] The district court concluded, much like the Fifth Circuit, that plasma donation centers are not "service establishments," and the ADA does not affect CSL Plasma's blanket ban on donors requiring psychiatric service animals.[167] Judge Ambro, writing for the court, agreed with the district court's decision that plasma donation centers are "service establishments" under the ADA.[168] This aligned with the Tenth Circuit's decision in *Levorsen v. Octapharma Plasma, Inc.*,[169] stating that plasma donation centers are "place[s] of business" regardless of whether individuals engage in business for "altruistic purposes or pecuniary gain."[170] Furthermore, Judge Ambro held that on remand, "the [c]ourt may determine whether to permit CSL to move for summary judgment on other grounds, to hold trial, or to conclude on the facts presented that CSL violated the ADA."[171]

SECURITIES—SECURITIES ACT OF 1933—In *Obasi Investment LTD v. Tibet Pharmaceuticals, Inc.*,[172] the Third Circuit held that "a nonvoting board observer affiliated with an issuer's placement agent" did not perform similar functions as board directors.[173] Two board observers helped prepare Tibet Pharmaceuticals' initial public offering, but at the same time, remained separate from matter submitted for the Board of Directors' approval.[174] Once the Chinese government froze all of the company's assets, plaintiffs sued the two board observers, among others, for failing to

163. *Id.* at 251.

164. *Id.* at 255 (Chagares, J., dissenting).

165. 936 F.3d 171 (3d Cir. 2019) (Ambro, J.).

166. *Id.* at 174.

167. *Id.* at 176–78.

168. *Id.* at 182.

169. 828 F.3d 1227 (10th Cir. 2016).

170. *Matheis*, 936 F.3d at 177 (first internal quotation marks omitted) (quoting *Levorsen*, 828 F.3d at 1231).

171. *Id.* at 182.

172. 931 F.3d 179 (3d Cir. 2019) (Hardiman, J.).

173. *Id.* at 181.

174. *Id.* at 181–82.

disclose the company's questionable financial information.[175] The Third Circuit reversed the district court's determination that the board director and board observer were similar, and it granted summary judgment for the defendants.[176] Judge Hardiman, writing the court, determined that two defendants were not similar to directors because of their inability to vote on matters, their lack of loyalty being as compared to a typical director, and their immunity from being voted out of their position.[177] In dissent, Judge Cowen argued the defendant observers are "similar" to the directors and advocated for a broader definition of directors.[178] Judge Cowen highlighted the purpose of the 1933 Securities Act's purpose of provide protection to investors, thus, urging the court to treat the defendants as similar.[179]

SECURITIES—STATUTE OF LIMITATIONS FOR INJUNCTIONS—In *SEC v. Gentile*,[180] the Third Circuit addressed whether the default federal statute of limitations applied to two injunctions sought by the SEC.[181] Judge Hardiman, joined by Judge Krause and Judge Greenberg, held that the injunctions were not penalties, and therefore, were not subject to the statute of limitations imposed on penalties.[182] The law in question, 15 U.S.C. § 78(u)(d), gives the SEC authority to implement injunctions, and the court compared the law's function to traditional principles of equity.[183] These equity principles allowed the court to conclude that "Congress meant [not] to depart from the rule that injunctions are issues to prevent harm rather than punish past wrongdoing."[184] If the SEC fails to highlight a "meaningful showing of actual risk of harm," the statute of limitations do not apply, and courts should dismiss "as a matter of equitable discretion."[185] The court supported the position held by the Eleventh Circuit, stating that "injunctions cannot be penalties under § 2462 because they are equitable."[186] The court remanded and instructed the district court to decide "whether the injunctions sought are permitted under § 78u(d)."[187]

175. *Id.* at 182.
176. *Id.* at 181.
177. *Id.* at 189.
178. *Id.* at 192–93.
179. *Id.*
180. 939 F.3d 549 (3d Cir. 2019) (Hardiman, J.).
181. *Id.* at 553.
182. *Id.* at 552.
183. *See id.* at 556.
184. *Id.* at 557.
185. *Id.* at 562.
186. *Id.* at 561 (citing SEC v. Graham, 823 F.3d 1357, 1360 (11th Cir. 2016)).
187. *Id.* at 552.

En Banc

TORT LAW—FEDERAL TORT CLAIMS ACT (FTCA)—In *Pellegrino v. United States of America Transportation Secretary Administration, Division of Department of Homeland Security*,[188] the Third Circuit reversed the decision of the district court and found that Transportation Security Officers (TSO) are considered "officer[s] of the United States" for the purposes of intentional torts.[189] The court engaged in a frame-by-frame, textual analysis of 28 U.S.C. § 2690(h), which grants officers of the United States the ability to perform searches.[190] Importantly, the court noted the statute already encompasses "'officers' within the meaning of the term 'employee.'"[191] Judge Ambro rejected any examination of legislative history, stating the statute's plain text gives sufficient guidance for the court.[192] Judge Krause, dissenting with Judges Jordan, Hardiman, and Scirica, believed the statute granted TSOs immunity from suit.[193] According to Judge Krause, because the proviso relied on by the majority applies only to investigatory searches, and TSOs cannot conduct investigatory searches, the proviso did not apply.[194] Further, unlike the majority, Judge Krause relied on legislative history to confirm that a search conducted by TSOs is not covered by the proviso.[195] In sum, Judge Krause believed the majority's holding damaged the supposed coverage the FTCA creates for administrative searches, thus, "[t]ak[ing] the[w]rong [s]ide of a [c]ircuit [s]plit."[196]

Appendix of Precedential Civil Opinions

Administrative Law

Liem v. Attorney Gen. of U.S., 921 F.3d 388 (3d Cir. 2019) (Rendell, J.) (vacated and remanded) (holding Board of Immigration Appeals abused its discretion when failing to meaningfully consider newly presented evidence or provide an explanation for its conclusion in immigration proceedings).

Americans with Disabilities Act

Furgess v. Pa. Dep't of Corr., 933 F.3d 285 (3d Cir. 2019) (Roth, J.) (vacated and remanded) (declaring state prison providing showers to prisoners constitutes program, service, or activity provided by public entity and holding state prison's failure to provide reasonable shower accommoda-

188. 937 F.3d 164 (3d Cir. 2019) (en banc) (Ambro, J.).
189. *Id.* at 168.
190. *Id.* at 170–77.
191. *Id.* at 171.
192. *Id.* at 179–80.
193. *Id.* at 181 (Krause, J., dissenting).
194. *Id.* at 182–88 (Krause, J., dissenting).
195. *Id.* at 194 (Krause, J., dissenting).
196. *Id.* at 197 (Krause, J., dissenting).

tion for disabled prisoners states plausible claim for disability discrimination under both ADA and Rehabilitation Act).

Haberle v. Borough of Nazareth, 936 F.3d 138 (3d Cir. 2019) (Scirica, J.) (reversed and remanded) (finding district court erred in granting motion to dismiss because plaintiff sufficiently pleaded facts establishing police department's history of deliberate indifference to citizens' mental health crises under ADA, by alleging department drafted, but did not adopt, policies to correct existing inadequacies).

Antitrust

Spartan Concrete Prods., LLC v. Argos USVI, Corp., 929 F.3d 107 (3d Cir. 2019) (Hardiman, J.) (affirmed) (holding (1) that plaintiff did not show antitrust violation under Robinson–Patman Act due to insufficient evidence of a causal connection between price discrimination and damages suffered, and (2) that district court's denial of motions to amend were not an abuse of discretion because the lower court highlighted past instances of undue delay).

Arbitration

Jaludi v. Citigroup, 933 F.3d 246 (3d Cir. 2019) (Smith, C.J.) (affirmed in part, reversed in part, and remanded) (reversing district court's order compelling arbitration of Sarbanes–Oxley claim after finding parties' second arbitration agreement superseded its first arbitration agreement, and the second agreement excluded claims under Sarbanes–Oxley; but affirming district court's finding that Dodd–Frank Act does not limit authority to arbitrate Racketeer Influenced and Corrupt Organizations Act (RICO) claims).

Singh v. Uber Techs. Inc., 939 F.3d 210 (3d Cir. 2019) (Greenaway Jr., J.) (vacated and remanded) (vacating district court's dismissal on grounds that Federal Arbitration Act (FAA) excludes "workers engaged in foreign or interstate commerce," which the circuit court held applies to transportation workers who transported passengers); *id.* at 228–232 (Porter, J., concurring in part) (siding with the majority, but describing disagreement with decision on two fronts: (1) immediately starting discovery on remand may lead to inefficiencies the FAA seeks to avoid; and (2) the lower court on remand may unnecessarily broaden the scope of discovery at the pre-arbitration phase due to the majority's decision).

Bankruptcy

Shearer v. Titus (In re Titus), 916 F.3d 293 (Ambro, J.) (affirmed) (holding (1) the fraudulent-transfer liability attached to both an insolvent attorney and defendant's wife when wages were deposited into a bank account they owned as tenants by the entireties; (2) the trustee waived use of Non-Necessities Approach for purposes of calculating liability for the transfer; (3) the bankruptcy court did not err in declining to exclude non-

wage deposits from liability calculations; and (4) a clarified approach for future fraudulent transfer bankruptcy liability calculations should be utilized).

S.S. Body Armor I, Inc. v. Carter Ledyard & Milburn LLP, 927 F.3d 763 (3d Cir. 2019) (Greenaway Jr., J.) (affirmed) (finding district court properly denied creditor's emergency stay motion, which sought to stay distributions from a second settlement agreement pending resolution of the creditor's fee reserve appeal, because creditor had a "fatally low likelihood of succeeding in its Fee Reserve Appeal").

Civil Procedure

Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 932 F.3d 126 (3d Cir. 2019) (Ambro, J.) (affirmed and remanded), *cert. denied*, 140 S. Ct. 2762 (2020) (clarifying Supreme Court precedent in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983) concerning extensive-control inquiry, and approving attachment of Venezuelan, state-owned company's United States-based assets to satisfy judgment against Venezuela).

GN Netcom, Inc. v. Plantronics, Inc., 930 F.3d 76 (3d Cir. 2019) (Fisher, J.) (affirmed in part, reversed in part, and remanded) (holding, by using three-factor analysis for Federal Rules of Civil Procedure Rule 37 sanctions, that district court did not abuse its discretion by imposing sanction of a permissive adverse inference instruction to jury about the nature of defendant's deleted emails; but concluding district court's denial of expert testimony, that defendant may have engaged in far greater spoliation of evidence than was known, was not harmless error and necessitated a new trial); *id.* at 89–93 (Smith, C.J., concurring in part and dissenting in part) (joining the majority opinion to find district court did not abuse its discretion, and writing separately to contend majority's finding as to the expert testimony).

Golden v. New Jersey Inst. of Tech. v. Fed. Bureau of Investigation, 934 F.3d 302 (3d Cir. 2019) (Smith, C.J.) (reversed and remanded) (reversing district court's denial of attorney's fees for plaintiff under New Jersey's Open Public Records Act, and holding nexus between requester's litigation and release of records required by statute for attorney's fees existed when the defendant withheld records according to FBI orders).

Guerra v. Consol. Rail Corp., 936 F.3d 124 (3d Cir. 2019) (Porter, J.) (affirmed) (finding Federal Railroad Safety Act's 180-day limitations period for filing a claim is non-jurisdictional, and the district court erred for dismissing on the basis of subject-matter jurisdiction; however, plaintiff did not present enough evidence to invoke the mailbox rule regarding their complaint's mailing to Occupational Safety Health Administration, therefore the claim was untimely and barred).

Hildebrand v. Allegheny County, 923 F.3d 128 (3d Cir. 2019) (Fisher, J.) (vacated and remanded) (finding district court abused its discretion when

dismissing suit for failure to prosecute by not considering the *Poulis* factors, misstating the law, relying on findings not supported by the record, and not considering policy of deciding the case on its merits).

Houser v. Folino, 927 F.3d 693 (3d Cir. 2019) (Chagares, J.) (affirmed) (finding district court did not abuse its discretion in declining to appoint new counsel for a state inmate litigant in a 42 U.S.C. § 1983 claim where the petitioner is capable of representing himself pro se and there is a shortage of pro bono counsel available).

In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662 (3d Cir. 2019) (Smith, C.J.) (vacated and remanded) (holding district court failed to apply presumption of public access and incorrectly placed burden on parties seeking sealed documents to show interest in disclosure of protective order); *id.* at 680–84 (Restrepo, J., concurring in part and dissenting in part) (writing separately to argue majority should have addressed First Amendment issues raised by the plans).

League of Women Voters of Pa. v. Commonwealth of Pennsylvania, 921 F.3d 378 (3d Cir. 2019) (Scirica, J.) (affirmed in part, reversed in part, and remanded) (affirming award of costs and fees under 28 U.S.C. §1447(c) in gerrymandering case, but reversing on basis that state representatives are exempt from personal liability under Section 1447(c) when acting in their official capacity).

Malhan v. Sec'y U.S. Dep't of State, 938 F.3d 453 (3d Cir. 2019) (Hardiman, J.) (affirmed in part, reversed in part, and remanded) (determining that for certain claims, district court did not have subject-matter jurisdiction under *Rooker-Feldman* doctrine because interlocutory orders are not final judgments, and *Younger* abstention was not warranted because district court had federal question jurisdiction).

Robinson v. First State Cmty. Action Agency, 920 F.3d 182 (3d Cir. 2019) (Fuentes, J.) (affirmed), *cert. denied*, 140 S. Ct. 464 (2019) (holding (1) when a party assents to jury instructions, they have waived their right to argue the adequacy of the instructions on appeal; (2) the inclusion of a statutory damage cap in jury instructions was harmless error; and (3) denial of a new trial, on the basis of the disclosure of a damages cap, was not an abuse of discretion because it was immediately struck from the record).

T Mobile Ne. LLC v. City of Wilmington, 913 F.3d 311 (3d Cir. 2019) (Jordan, J.) (reversed in part, vacated in part, and remanded) (holding oral decision was not a final action ripe for judicial review because written documents are required; that thirty-day time limit in Telecommunication Act's review provision was not jurisdictional; and that under Federal Rule of Civil Procedure 15(d), an untimely supplemental complaint can, by relating back, cure an initial complaint that was unripe).

Weber v. McGrogan, 939 F.3d 232 (3d Cir. 2019) (Matey, J.) (dismissed) (dismissing appeal for lack of jurisdiction because prior district court order that dismissed complaint without prejudice was not a final appealable order and the prior order was not a "docket entry" that would begin the

150-day period for appeal under the Federal Rule of Civil Procedure Rule 58(c)(2)(B)).

Class Action

In re Asbestos Prod. Liab. Litig. (No. VI), 921 F.3d 98 (3d Cir. 2019) (Smith, C.J.) (reversed) (granting motion to dismiss on res judicata grounds and also concluding that a party can implicitly waive and forfeit their personal jurisdiction defense by performing actions that are consistent with expressed waiver, thus, creating a circuit split with the Sixth Circuit); *id.* at 110–16 (Fisher, J. dissenting) (disagreeing and arguing the multidistrict litigation court should be afforded significant deference and did not make a clearly erroneous finding as to the defendants' preservation of personal jurisdiction).

In re NFL Players' Concussion Injury Litig., 923 F.3d 96 (3d Cir. 2019) (Smith, C.J.) (affirmed in part, reversed in part, vacated in part, and remanded) (determining district court could not void all cash advance agreements in their entirety that touched only on lender's right to receive disbursed funds acquired by players, but affirming that any true assignments are void).

In re: Google Inc. Cookie Placement Consumer Privacy Litig., 934 F.3d 316 (3d Cir. 2019) (Ambro, J.) (vacated and remanded) (finding internet service provider created concrete injury by tracking a person's internet activity without authorization, that a cy pres settlement was not inherently unfair to the members of the class, and the district court did not persuasively assess the fairness, reasonability, and adequacy of the settlement, specifically, "the broad class-wide release of claims for money damages, and selection of the specific cy pres recipients").

Commercial Law

Fed Cetera, LLC v. Nat'l Credit Servs., Inc., 938 F.3d 466 (3d Cir. 2019) (Fuentes, J.) (reversed, vacated, and remanded) (deciding term "consummate" in context of debt collection contract did not require complete performance of contract based on context of contractual language and behavior of parties, and that plaintiff may be eligible for finder's fee associated with contract).

In re Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515 (3d Cir. 2019) (Krause, J.) (reverse and remand) (finding distributor's antitrust claims relating to paying artificially inflated prices "arise out of or relate to" distribution agreement because inflated prices were in agreements, thus, they must be arbitrated in accordance with agreement's arbitration provision).

Jester v. Hutt, 937 F.3d 233 (3d Cir. 2019) (Hardiman, J.) (affirmed in part, vacated in part, and remanded) (concluding settlement agreement between breeding facility and horse owner case was not nullified on a fraudulent basis and affirming denial of owner's motion for new trial, but

vacating and remanding on the basis that district court erred by reducing the punitive damages awarded).

Oberdorf v. Amazon.com Inc., 930 F.3d 136 (3d Cir. 2019) (Roth, J.) (affirmed in part, vacated in part, and remanded), *reh'g en banc granted, opinion vacated by* 936 F.3d 182 (3d Cir. 2019) (holding (1) Amazon is a "seller" under the Second Restatement of Torts based on its role in the supply chain and its role in the distribution of the item and thus subject to Pennsylvania strict products liability law; and (2) plaintiff's claims against Amazon are not barred by the safe harbor provision of Communications Decency Act (CDA), except for ones that rely upon a "failure to warn" theory of liability); *id.* at 154–65 (Scirica, J., concurring in part and dissenting in part) (dissenting from majority's holding that plaintiff's claims were not barred by the CDA).

Sköld v. Galderma Labs. L.P., 917 F.3d 186 (3d Cir. 2019) (Jordan, J.) (affirmed in part and reversed in part) (overturning petitioner's unjust enrichment award because previous agreement between the parties unambiguously transferred ownership of trademark rights to a proprietary drug-delivery formulation to defendant, and petitioner was not in fact the owner of the rights).

Wolfington v. Reconstructive Orthopaedic Assocs. II PC, 935 F.3d 187 (3d Cir. 2019) (Fuentes, J.) (affirmed in part and reversed in part) (finding debtor failed to allege a Truth in Lending Act (TILA) violation because the unenforced payment plan was not documented in formal writing as required by TILA, and reversing imposition of Federal Rule of Civil Procedure 11 sanctions against debtor's counsel).

Constitutional Law

Bank of Hope v. Miye Chon, 938 F.3d 389 (3d Cir. 2019) (Bibas, J.) (vacated and remanded) (finding ban on corporate officer from contacting shareholders, in dispute over whether officer embezzled funds, constituted a collateral order sufficient to grant jurisdiction, and that district court violated corporate officer's First Amendment by being overly restrictive under the Supreme Court's *Central Hudson* test for commercial speech).

Beers v. Attorney Gen. of U.S., 927 F.3d 150 (3d Cir. 2019) (Roth, J.) (affirmed), *cert. granted, judgment vacated by Beers v. Barr*, 140 S. Ct. 2758 (2020) (finding 18 U.S.C. § 922(g)(4), statute limiting mentally ill individuals from processing fire arms, did not burden plaintiff's Second Amendment protections because plaintiff was member of "historically-barred" class of persons as they had previously been adjudicated as mentally ill and committed to mental institution, thus, outside scope of the Second Amendment).

Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019) (Ambro, J.) (affirmed), *cert. granted*, 140 S. Ct. 1104 (2020) (holding city's policy to refuse referrals of foster children to agencies that, because of their relig-

ious views, refused to facilitate placements with same-sex couples was constitutional under First Amendment because policy does not mask ill will toward a specific religious group, force particular viewpoint, or retaliate against protected activity).

Freedom From Religion Found., Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019) (Hardiman, J.) (reversed) (finding official county seal that depicts religious symbol, along with several secular symbols of historical, patriotic, cultural, and economic significance to the community did not violate First Amendment Establishment Clause and that the *Lemon*-endorsement framework did not apply because of Supreme Court's recent decision in *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019)).

Knick v. Township of Scott, 932 F.3d 152 (3d Cir. 2019) (Smith, C.J.) (affirmed in part, vacated in part, and remanded) (applying Supreme Court's intervening interpretation of Fifth Amendment Takings Clause in the context of a local government taking property to establish that plaintiff does not need to exhaust state law remedies prior to bringing an action in federal court).

Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys., 938 F.3d 424 (3d Cir. 2019) (Hardiman, J.) (reversed and remanded) (holding rejection of an advertisement based on religious and atheistic messages by transit system discriminated based on viewpoint, violating the First Amendment, and there was no reasonable content-based restriction of neutral viewpoint speech); *id.* at 442–53 (Cowen, J. dissenting) (arguing transit system's advertisement policy excludes religion itself and should be analyzed under subject-matter prohibition where the reasonableness standard is met, not viewpoint discrimination).

Corporate Law

Mauthe v. Optum Inc., 925 F.3d 129 (3d Cir. 2019) (Greenberg, J.) (affirmed), *cert. denied*, 140 S. Ct. 563 (2019) (finding companies maintaining healthcare provider database, who faxed information update requests to appellant, did not violate Telephone Consumer Protection Act because the communications were not solicitations).

Education Law

G.S. v. Rose Tree Media Sch. Dist., 914 F.3d 206 (3d Cir. 2018) (per curiam) (affirmed) (holding student living in their maternal grandparents' home with their parents qualified for youth homelessness as covered by the Mckinney–Veto Homeless Assistance Act, which obligated school district to enroll the student under the Act).

Energy Law

In re PennEast Pipeline Co., 938 F.3d 96 (3d Cir. 2019) (Jordan, J.) (vacated and remanded) (holding Natural Gas Act does not constitute dele-

gation to private parties of federal government's exemption from Eleventh Amendment sovereign immunity, and finding that New Jersey retained its Eleventh Amendment sovereign immunity).

Fair Debt Collection Practices Act (FDCPA)

Barbato v. Greystone All., LLC, 916 F.3d 260 (3d Cir. 2019) (Krause, J.) (affirmed), *cert. denied*, 140 S. Ct. 245 (2019) (holding appellant satisfied "principal purpose" test to qualify as a "debt collector" under FDCPA, regardless of fact that it employed a third party to perform actual collection practices).

DiNaples v. MRS BPO, LLC, 934 F.3d 275 (3d Cir. 2019) (Chagares, J.) (affirmed) (holding "concrete injury" required for federal standing satisfied when debt collector sent letter displaying QR code that revealed account number with the debt collection agency when scanned and that QR code's visibility renders information "'susceptible to privacy intrusions,' even if it does not facially display any 'core information relating to the debt collection'" in violation of FDCPA, and finding defendant was not entitled to the bona fide error defense for misinterpretation of the law).

Fair Housing Act

Curto v. A Country Place Condo. Ass'n, Inc., 921 F.3d 405 (3d Cir. 2019) (Ambro, J.) (reversed and remanded) (finding sex-segregated pool schedule, which allocated males favorable swim times, to be discriminatory on its face under the Fair Housing Act, despite roughly equal aggregate swim time for each sex); *id.* at 411–13 (Fuentes, J., concurring) (writing separately to voice skepticism that a sex-segregated schedule would be upheld if it more equitably divided the favorable weeknight hours between the sexes).

False Claims Act—Qui Tam Action

Chang v. Children's Advocacy Ctr. of Del., 938 F.3d 384 (3d Cir. 2019) (Porter, J.) (affirmed) (affirming dismissal of appellant's *qui tam* action, holding relator is not entitled to an automatic in-person hearing prior to dismissal when relator fails to request a hearing).

United States ex rel. Doe v. Heart Sol., PC, 923 F.3d 308 (3d Cir. 2019) (Roth, J.) (affirmed in part, reversed in part, and remanded) (holding lower court failed to correctly separate all criminal and civil elements of civil Medicare fraud case when there was prior criminal proceeding).

United States ex rel. Charte v. Am. Tutor, Inc., 934 F.3d 346 (3d Cir. 2019) (Fuentes, J.) (vacated and remanded) (acknowledging concurrent jurisdiction providing for *qui tam* claim's non-exclusive availability in state court forum but holding New Jersey's entire controversy doctrine as inapplicable to preclude *qui tam* action in federal court when filed during pendency of state tort law action between same parties); *id.* at 354–56 (Hardiman, J. dissenting) (stating majority is allowing plaintiff "a second

bite at the apple" and arguing preclusion of plaintiff's claims would not be unfair and that revival of the claims, after seven years, is unfair to defendants).

Immigration Law

Basardo-Vale v. Attorney Gen. of U.S., 934 F.3d 255 (3d Cir. 2019) (Shwartz, J.) (petition denied) (overruling *Alaka v. Attorney Gen. of U.S.*, 456 F.3d 88 (2006), and holding that a "particularly serious crime" in the asylum and withholding of removal statutes, 8 U.S.C. §§ 1158(b)(2), 1231(b)(3), includes, but is not limited to aggravated felonies, as aggravated felonies are a subset of particularly serious crimes, such that petitioners conviction for second-degree unlawful imprisonment constituted a particularly serious crime); *id.* at 268–74 (McKee, J., dissenting) (joining Judge Ambro's dissent and disagreeing with majority's interpretation of the statutory phrase "by regulation"); *id.* at 274–75 (Ambro, J., dissenting) (writing separately from Judge McKee to discuss error in majority's interpretation of the withholding of removal statute).

Fang v. Dir. U.S. Immigration & Customs Enf't, 935 F.3d 172 (3d Cir. 2019) (McKee, J.) (reversed and remanded) (reversing district court's dismissal and holding order by Immigration and Customs Enforcement (ICE) terminating visas of non-immigrant students who enrolled in fake university created by Department of Homeland Security, as a method for ICE to catch brokers in fraudulent student visa transactions, was final and subject to judicial review under Administrative Procedure Act).

Hillocks v. Attorney Gen. of U.S., 934 F.3d 332 (3d Cir. 2019) (Fuentes, J.) (vacated and remanded) (vacating district court's order to remove alien, and holding conviction for Pennsylvania state crime of using a communication facility—a phone—to facilitate felony of selling heroin did not constitute aggravated felony or conviction relating to controlled substance under federal immigration laws, thus, could not serve as a basis for alien's removal).

Ku v. Attorney Gen. of U.S., 912 F.3d 133 (3d Cir. 2019) (Vanaskie, J.) (petition for review denied in part and dismissed in part) (finding (1) that clear and convincing evidence of loss to victims of over $10,000 was sufficiently tethered to wire fraud conviction such that conviction qualified as aggravated felony; (2) that Board of Immigration Appeals did not err in determining wire fraud constitutes crime of moral turpitude; and (3) circuit court did not have jurisdiction to review Board of Immigration Appeals' discretionary denial of waiver of admissibility under Immigration and Nationality Act).

Louis v. Attorney Gen. of U.S., 914 F.3d 189 (3d Cir. 2019) (Bibas, J.) (affirmed) (affirming Board of Immigration Appeals' decision not to reopen a removal order because (1) a non-lawyer's bad legal advice, advising petitioner that they could miss their asylum hearing, was not an excep-

tional circumstance, and (2) *in absentia* removal orders do not categorically violate due process).

Luziga v. Attorney Gen. of U.S., 937 F.3d 244 (3d Cir. 2019) (Fisher, J.) (vacated and remanded) (finding Immigration Judge and Board of Immigration Appeals failed to apply the current legal standard for particularly serious crime determinations under 8 U.S.C. § 1231(b)(3)(B); vacating the Immigration Judge's order of removal where a noncitizen committed an offense that was not particularly serious crime per se; finding the Immigration Judge erred by holding the noncitizen's failure to produce corroborating evidence against him, without first giving him notice and opportunity to provide evidence or explain its absence).

Madar v. U.S. Citizenship & Immigr. Servs., 918 F.3d 120 (3d Cir. 2019) (Porter, J.) (affirmed) (declining to extend constructive presence doctrine to transmission of citizenship under Immigration and Nationality Act when no government error prevented plaintiff's foreign-born father from retaining citizenship).

Sambare v. Attorney Gen. of U.S., 925 F.3d 124 (3d Cir. 2019) (Restrepo, J.) (petition denied) (denying lawful permanent resident's requested review of Board of Immigration Appeals' decision because appellant conviction of driving while under influence of marijuana can be a removable offense and court lacked proper jurisdiction for review).

Tilija v. Attorney Gen. of U.S., 930 F.3d 165 (3d Cir. 2019) (Greenaway Jr., J.) (remanded) (holding Board of Immigration Appeals abused its discretion in failing to accept asylum seeker's new evidence as true on motion to remand and finding that, with new evidence, plaintiff alleged prima facie case and reasonable likelihood for relief).

Radiowala v. Attorney Gen. of U.S., 930 F.3d 577 (3d Cir. 2019) (Greenaway Jr., J.) (petition dismissed in part and denied in part) (dismissing plaintiff's petition for cancellation of removal as an unreviewable decision, and denying plaintiff's claim for petition for review as it did not allege sufficient facts to support requisite hardship, by not indicating they were part of legally cognizable social group or to find they would be tortured upon returning to proposed country of removal).

Insurance Law

Pennsylvania v. President U.S., 930 F.3d 543 (3d Cir. 2019) (Shwartz, J.) (affirmed), *rev'd and remanded sub nom. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (affirming district court's grant of nationwide preliminary injunction banning employers from opting out of no-cost birth control insurance coverage upon determination that plaintiffs are likely to succeed on merits and "that the balance of the equities and the public interest both favor issuing an injunction").

Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co., 939 F.3d 243 (3d Cir. 2019) (Porter, J.) (affirmed in part, vacated in part, and remanded) (holding when manufacturer settles lawsuit alleging a defective product, lan-

guage of specific insurance policy at issue governs terms of recovery, and remanding for further consideration).

United States ex rel. Bookwalter v. UPMC, 938 F.3d 397 (3d Cir. 2019), *reh'g granted, judgment vacated*, 944 F.3d 965 (3d Cir. 2019), *and on reh'g*, 946 F.3d 162 (3d Cir. 2019) (Bibas, J.) (reversed and remanded) (determining contracts and size of pay were sufficient facts to allege that surgeons are compensated by referrals, and defendants bear the burden of pleading Stark Act exceptions under the False Claims Act, similar to litigation affirmative defenses); *id.* at 418–24 (Ambro, J., concurring) (agreeing enough was pled to survive motion to dismiss, however, writing separately to note correlation does not demonstrate surgeon compensation was impacted by referrals and actual causation is required to establish this under Stark Act).

Labor and Employment Law

ADP, LLC v. Rafferty, 923 F.3d 113 (3d Cir. 2019) (Krause, J.) (vacated and remanded) (applying New Jersey law and holding overbroad non-solicitation provision between employer and former employees must be blue penciled by court to reduce undue hardship on employees, given employer's legitimate business interest in restrictive covenant).

Caesars Entm't Corp. v. Int'l Union of Operating Eng'rs Local 68 Pension Fund, 932 F.3d 91 (3d Cir. 2019) (Hardiman, J.) (affirmed) (holding casino that stopped paying pension fund on one of four buildings in a collective bargaining agreement was not "bargaining out" under Multiemployer Pension Plan Amendments Act because casino continued to contribute at remaining buildings and Act's language only included "work . . . of the type for which contributions were *previously* required," not contributions that are "*still* required" (first internal quotation marks omitted) (second alteration in original)).

Komis v. Sec'y of the U.S. Dep't of Labor, 918 F.3d 289 (3d Cir. 2019) (Scirica, J.) (affirmed) (declining to address whether same standard applies in federal and state retaliatory hostile work environment claims under Title VII because plaintiff could not prevail under any applicable standard).

Stone v. Troy Constr., LLC, 935 F.3d 141 (3d Cir. 2019) (Jordan, J.) (vacated and remanded) (vacating district court's grant of summary judgement for defendant and holding that egregiousness is not required to trigger the statute of limitations in a willful violation of the Fair Labor Standards Act).

Sweda v. Univ. of Pa., 923 F.3d 320 (3d Cir. 2019) (Fisher, J.) (affirmed in part and reversed in part) (overturning complete motion to dismiss by finding pension plan participants plausibly alleged two claims for breach of fiduciary duty for failing to conform to the high standards of 29 U.S.C. § 1104(a)(1) of the Employee Retirement Income Security Act); *id.* at 340–48 (Roth, J., concurring in part and dissenting in part) (noting con-

cern that this and other class action claims have "targeted" fiduciaries holding large retirement sums, and dissenting from the majority's dismissal of the lower court's amended complaint, specifically, the claim for alleged breach of fiduciary duty).

Tundo v. County of Passaic, 923 F.3d 283 (3d Cir. 2019) (Bibas, J.) (affirmed) (holding that removing former government employees, that had been hired on a trial basis and laid off for poor performance, from rehire list does not violate constitutional protected property interest under § 1983).

Verma v. 3001 Castor, Inc., 937 F.3d 221 (3d Cir. 2019) (Ambro, J.) (affirmed) (confirming class of dancers were employees rather than independent contractors of adult gentleman's club and rejecting club's argument that FLSA precluded dancers' claims for unjust enrichment).

Section 1983—Eighth Amendment

Shifflett v. Korsziak, 934 F.3d 356 (3d Cir. 2019) (Ambro, J.) (affirmed in part, reversed in part, and remanded) (reversing district court's dismissal and adding to previous holding in *Robinson v. Superintendent Rockview SCI*, 831 F.3d 148 (3d Cir. 2016), by holding plaintiff exhaustive administrative remedies when prison failed to respond to grievance in timely fashion).

Mammana v. Fed. Bureau of Prisons, 934 F.3d 368 (3d Cir. 2019) (Fuentes, J.) (reversed and remanded) (reversing district court's dismissal and holding former inmate's confinement adequately alleged deprivation and mutually enforcing conditions under Eight Amendment).

Section 1983—First Amendment

Baloga v. Pittston Area Sch. Dist., 927 F.3d 742 (3d Cir. 2019) (Krause, J.) (affirmed in part, reversed in part, and remanded) (holding district court erred in granting summary judgment on school employee's § 1983 action alleging violation of their First Amendment rights and retaliation based on union association, because union membership necessarily involved public concern, and defendants failed to show that their interest in maintaining efficient workplace and avoiding disruption outweighed employee's associational interest).

Fields v. Speaker of Pa. House of Representatives, 936 F.3d 142 (3d Cir. 2019) (Ambro, J.) (affirmed in part and reversed in part) (holding house's legislative prayer favoring theistic prayer did not violate Establishment Clause and is government speech immune to "attack on free-speech, free-exercise, or equal-protection grounds"); *id.* at 163–71 (Restrepo, J., concurring in part and dissenting in part) (departing from majority on the constitutionality of selecting chaplains to conduct prayers and arguing majority's opinion regarding the guest-chaplain policy cannot be reconciled with Supreme Court's decision in *Town of Greece v. Galloway*, 572 U.S. 565 (2014)).

Forrest v. Parry, 930 F.3d 93 (3d Cir. 2019) (Greenaway Jr., J.) (reversed in part, vacated in part, and remanded) (holding that (1) district court erroneously granted summary judgment for defendant because all three theories under plaintiff's Section 1983 claim for false arrest should survive when evidence is considered in its entirety, fact issues regarding city's failure to train police officers remained, and district court impermissibly granted summary judgment sua sponte without giving adequate notice to plaintiff; (2) evidence that post-dated arrest was relevant to plaintiff's claims; and (3) district court gave erroneous jury instructions that constituted plain error).

Pomicter v. Luzerne Cty. Convention Ctr. Auth., 939 F.3d 534 (3d Cir. 2019) (Scirica, J.) (affirmed in part, reversed in part, and remanded) (holding Section 1983 claim brought by animal rights group against a convention center for center's policy of isolating protest activity to certain areas by entrance is constitutional, however, policies banning profane language and voice amplification are unconstitutional restrictions on free speech rights).

Randall v. City of Phila. Law Dep't, 919 F.3d 196 (3d Cir. 2019) (Bibas, J.) (affirmed) (holding continuing-violation doctrine did not extend statute of limitations on malicious prosecution claim because defendants ceased the alleged violation in August and plaintiff's continued detention by non-defendants does not trigger doctrine).

Turco v. City of Englewood, 935 F.3d 155 (3d Cir. 2019) (McKee, J.) (reversed and remanded) (reversing district court's grant of summary judgement for the plaintiff and holding city ordinance that established an eight-foot buffer zone around health clinics was content neutral).

Section 1983—Fourth Amendment

Estate of Roman v. City of Newark, 914 F.3d 789 (3d Cir. 2019) (Ambro, J.) (affirmed in part, reversed in part, and remanded), *cert. denied*, 140 S. Ct. 97 (2019) (affirming dismissal by district court of plaintiff's false imprisonment and malicious prosecution claims, but holding district court's dismissal of plaintiff's municipal liability claims were improper because plaintiff sufficiently alleged (1) a custom of warrantless searches and (2) that the city failed to train and supervise its police officers); *id.* at 806–07 (Jordan, J., concurring) (writing separately to note the consent decree and amended complaint were sufficient for plaintiff to overcome the motion to dismiss); *id.* at 807–12 (Hardiman, J., concurring in part and dissenting in part) (noting disagreement about which facts were properly before the court).

Section 1983—Qualified Immunity

Bryan v. United States, 913 F.3d 356 (3d Cir. 2019) (Roth, J.) (affirmed) (holding (1) officers did not violate clearly established constitutional right for purposes of qualified immunity because legal principle is

not clearly established the day the court announced decision (or even one or two days later); and (2) search fell within scope of Federal Tort Claims Act's discretionary function exception because the officers "did not violate clearly established constitutional rights").

Securities

Fan v. StoneMor Partners LP, 927 F.3d 710 (3d Cir. 2019) (Restrepo, J.) (affirmed) (holding defendant's sufficient disclosure of information to investors of inherent business risks in a particular transaction can render plaintiffs' alleged misrepresentations immaterial in a securities fraud case and that plaintiffs must establish defendant made false statements with scienter).

N. Sound Capital LLC v. Merck & Co., 938 F.3d 482 (3d Cir. 2019) (Krause, J.) (reversed and remanded) (holding Securities Litigation Uniform Standards Act's (SLUSA) mass-action provision does not preclude individuals who opt-out from asserting individual actions); *id.* at 495–502 (Shwartz, J., dissenting) (arguing plaintiffs, as class members, benefitted from pretrial proceedings in the class action cases and "functionally proceeded as a single action with the class actions" and thus fell within the SLUSA's preclusion provision).

Social Security Law

Hess v. Comm'r of Soc. Sec., 931 F.3d 198 (3d Cir. 2019) (Jordan, J.) (vacated and remanded) (siding with the government and holding an Administrative Law Judge's determination, or valid explanation, for why a social security claimant should not receive benefits does not require the Administrative Law Judge to recite certain language in the explanation).

Sovereign Immunity

Patterson v. Pa. Liquor Control Bd., 915 F.3d 945 (3d Cir. 2019) (Restrepo, J.) (affirmed) (upholding decision by district court to grant respondent's motion to dismiss on Eleventh Amendment sovereign immunity grounds and finding Pennsylvania Liquor Control Board an arm of the Commonwealth of Pennsylvania).

Tax Law

SIH Partners LLLP v. Comm'r, 923 F.3d 296 (3d Cir. 2019) (Greenberg, J.) (affirmed) (agreeing with United States Tax Court in upholding summary judgement against appellant on validity of taxation regulations for Controlled Foreign Corporations and proper applied tax rate).

Trade Secrets

Heraeus Med. GmbH v. Esschem, 927 F.3d 727 (3d Cir. 2019) (Krause, J.) (affirmed in part, vacated in part, and remanded) (holding owner of trade

secret was time-barred from bringing suit on misappropriations discovered more than three years before suit was filed, but finding owner could sue for misappropriations that occurred *within* three-year period before filing, because Pennsylvania applied rule of separate accrual to continuing trade secret misappropriations, as stated in Pennsylvania Uniform Trade Secrets Act).

Transportation

Adams Outdoor Advert. Ltd. P'ship v. Pa. Dep't of Transp., 930 F.3d 199 (3d Cir. 2019) (Ambro, J.) (affirmed in part and reversed in part) (finding Department of Transportation (DOT) rule excluding billboards 500 feet from interchanges was not impermissibly vague, DOT failed to meet burden of showing Interchange Prohibition exemptions meet First Amendment scrutiny, and affirming "entry of an injunction prohibiting [DOT] from enforcing the Pennsylvania Outdoor Advertising Control Act's permit requirement until PennDOT establishes time limits on its permit decisions").

Owner Operator Indep. Drivers Ass'n, Inc. v. Pa. Tpk. Comm'n, 934 F.3d 283 (3d Cir. 2019) (Shwartz, J.) (affirmed), *cert. denied*, 140 S. Ct. 959 (2020) (affirming district court's holding that tolls collected and used by the Pennsylvania Turnpike for non-Turnpike purposes do not violate the dormant Commerce Clause).

CRIMINAL MATTERS

Issues of First Impression

HABEAS PETITIONS—"IN CUSTODY" REQUIREMENT—In *Piasecki v. Court of Common Pleas, Bucks County*,[197] the Third Circuit determined whether a petitioner subject only to sex offender registration requirements was "in custody pursuant to the judgment of a State Court."[198] Judge McKee, writing for the court, determined that the petitioner was "in custody" under *Ross* analysis and the registration requirements were part of the judgment sentence.[199] The court recognized that federal courts look to state court judgment to see if sex offender registration is punitive to determine if the registration is part of the state court's judgment.[200] Pennsylvania state courts have ruled that sex registration requirements are punitive punishment and the court records noted the sex offender registration as part of the sentence.[201] Thus, the Third Circuit vacated the district court's deci-

197. 917 F.3d 161 (3d Cir. 2019) (McKee, J.), *cert. denied*, 2019 WL 5686456 (Nov. 24, 2019).

198. *Id.* at 162 (internal quotation marks omitted).

199. *Id.* at 167–75.

200. *Id.* at 173.

201. *Id.* at 173–75.

sion that the sex offender registration requirements could not support habeas corpus jurisdiction.[202]

HABEAS PETITIONS—GUILTY PLEAS—In *Velazquez v. Superintendent Fayette SCI*,[203] the Third Circuit addressed whether petitioner was entitled to habeas relief when their counsel failed to object to the defensive guilty but mentally ill (GBMI) plea procedure in 18 Pa. Cons. Stat. § 314(b).[204] Petitioner tried to enter a GBMI plea given their history of mental illness, but the trial judge did not accept the plea or examine whether petitioner was mentally ill at the time of the offense.[205] Instead, the trial judge recorded petitioner had entered a normal guilty plea and trial counsel did not object to the procedure.[206] On appeal, the Third Circuit held trial counsel's failure to object constituted ineffective assistance of counsel in violation of the Sixth Amendment, and caused petitioner to suffer prejudice because there was a reasonable probability they would have taken advantage of the plea process if it were not for the trial counsel's failure to object.[207] The Third Circuit noted petitioner did not need to demonstrate that their GBMI plea would likely be accepted, a favorable finding of severe mental illness would result, or that the outcome of the two findings would lead to a lesser sentence.[208] Additionally, the court found the district court did not lack habeas jurisdiction where the petitioner merely asserted that the wrong guilty plea was entered.[209] The Third Circuit vacated the petitioner's conviction and remanded with instructions to grant the petition for the writ of habeas corpus with respect to the GBMI claim.[210]

SIXTH AMENDMENT—INEFFECTIVE ASSISTANCE OF COUNSEL—In *Workman v. Superintendent Albion SCI*,[211] the Third Circuit addressed the defendant's ineffective assistance of trial counsel claim.[212] After trial, a jury convicted the defendant of first-degree murder on a theory of transferred intent, a theory their trial counsel did not meaningfully challenge at trial.[213] Defendant's post-conviction counsel produced a procedurally faulty writ of habeaus corpus for ineffective assistance of trial counsel, which was consequently denied.[214] On appeal, the defendant sought an excusal from the Third Circuit on the procedurally faulty ineffective assistance of counsel claim.[215] The court excused the defendant's procedur-

202. *Id.* at 177.
203. 937 F.3d 151 (3d Cir. 2019) (Greenaway Jr., J.).
204. *Id.* at 153.
205. *Id.*
206. *Id.*
207. *Id.* at 157.
208. *Id.* at 163.
209. *Id.* at 153–54.
210. *Id.* at 164–65.
211. 915 F.3d 928 (3d Cir. 2019) (Fuentes, J.).
212. *Id.*
213. *Id.* at 933.
214. *Id.*
215. *Id.*

ally faulty petition because their post-conviction counsel was ineffective and because the underlying claim concerning trial counsel had "some merit."[216] Additionally, the court found that trial counsel's assistance was "manifestly ineffective," and thus vacated the district court's order with remand instructions to grant a conditional writ of habeas corpus.[217] Notably, the Third Circuit joined the Seventh and Ninth Circuits in holding the prejudice element, which is required for an excusal of a procedurally faulty writ of habeas corpus, is satisfied when post-conviction counsel performs in an unreasonably deficient manner and if the trial counsel's ineffective assistance is substantial.[218]

SIXTH AMENDMENT—RIGHT TO A SPEEDY TRIAL—In *United States v. Bailey-Snyder*,[219] the Third Circuit addressed whether placing an inmate in "administrative segregation" constitutes an arrest, thus triggering the protections of the Sixth Amendment and the Speedy Trial Act.[220] Judge Hardiman, joined by Judge Scirica and Judge Rendell, "decline[d] to extend the constitutional speedy trial right 'to the period prior to arrest.'"[221] In joining the Fourth, Fifth, Eighth, Ninth and Tenth Circuits, the court held that administrative segregation is not an arrest and thus, did not trigger the right to a speedy trial under the Sixth Amendment.[222] Likewise, the Third Circuit joined the Fifth, Seventh and Eighth Circuits in holding administrative segregation also does not violate the Speedy Trial Act.[223]

SPEEDY TRIAL ACT—EVENTS "STOPPING" SPEEDY TRIAL CLOCK—In *United States v. Williams*,[224] the Third Circuit addressed, for the first time, whether unreasonable delays in transporting a defendant for a psychological examination limited the amount of excludable time provided for psychological examinations under the Speedy Trial Act.[225] Judge Restrepo held that delays longer than ten days in transporting defendants to competency evaluations are non-excludable when determining the time period within which the government must begin a trial.[226] The Third Circuit joined the First, Fifth, and Sixth Circuits in its determination.[227] Consequently, the court remanded the case to the district court to dismiss the indictment against the defendant with prejudice.[228]

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216. *Id.*
217. *Id.*
218. *Id.* at 939.
219. 923 F.3d 289 (3d Cir. 2019) (Hardiman, J.).
220. *Id.* at 293.
221. *Id.* (quoting United States v. Marion, 404 U.S. 307, 321 (1971)).
222. *Id.* at 294.
223. *Id.*
224. 917 F.3d 195 (3d Cir. 2019) (Restrepo, J.).
225. *Id.* at 201.
226. *Id.* at 203.
227. *Id.* at 202.
228. *Id.* at 205.

SUFFICIENCY OF THE EVIDENCE—In *United States v. Rowe*,[229] the Third Circuit determined the appropriate method to quantify the amount of drugs relevant to a distribution charge or a possession with intent to distribute charge under 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).[230] Judge Fisher, joined by Chief Judge Smith and Judge McKee, held that separate acts of distribution of controlled substances are distinct offenses under Section 841(a), as opposed to a continuing offense.[231] Further, the court held that possession with intent to distribute is a continuing offense that begins when the defendant has the power and intention to exercise control and dominion over the specified quantity of drugs, and ends when that possession is interrupted by complete dispossession or a reduction of an amount less than the specified quantity.[232] The court concluded that the evidence presented by the government, based on the premise that weights from separate offenses could be combined, was insufficient to allow a rational juror to determine guilt under Section 841 for distribution and possession with intent to distribute of 1,000 grams of heroin.[233] In addition to remanding the verdict based on the weight of the drugs, the court vacated the sentencing decision based on the district court's error of determining drug weight.[234]

SUPERVISED RELEASE—FUGITIVE TOLLING—In *United States v. Island*,[235] the Third Circuit decided whether a defendant can count time absent from the court's supervision towards service of supervised release period.[236] Judge Scirica, writing for the majority, agreed with the majority of Courts of Appeals in determining that supervised release is tolled when the party fails to report and comply with supervised release, in other words, becomes "fugitive."[237] The statute is silent as to the repercussions of a defendant's failure to comply with supervised release, so the Third Circuit agreed with its sister circuits because the resulting decision aligns with the purpose of supervised release.[238] In a dissenting opinion, Judge Rendell argued that Section 3583(i) requires a warrant to extend the supervised release term, but the majority denied this argument because fugitive tolling is not based in Section 3583(i) jurisdictional grant.[239] Thus, the Third Circuit affirmed the district court's revocation of supervised released in a subsequent sentence.[240]

229. 919 F.3d 752 (3d Cir. 2019) (Fisher, J.).
230. *Id.* at 759.
231. *Id.*
232. *Id.* at 760.
233. *Id.* at 761.
234. *Id.* at 763.
235. 916 F.3d 249 (3d Cir. 2019) (Scirica, J.), *cert. denied*, 140 S. Ct. 405 (2019).
236. *Id.* at 250–51.
237. *Id.* at 253.
238. *Id.* at 253–54 (Rendell, J., dissenting).
239. *Id.* at 256–59 (Rendell, J., dissenting).
240. *Id.* at 256.

Appendix of Precedential Criminal Opinions

Appellate Procedure

United States v. James, 928 F.3d 247 (3d Cir. 2019) (Jordan, J.) (affirmed) (holding district court properly denied defendant's motion to withdraw guilty plea because defendant had not offered any evidentiary support for entrapment defense, and record did not support assertions that they were under duress, or that plea was not knowing, voluntary, and well-informed, or that their counsel was ineffective).

United States v. Mulgrew, 913 F.3d 392 (3d Cir. 2019) (Nygaard, J.) (denying petition for rehearing en banc, granting petition for rehearing by panel in part) (granting petition solely as to appellant's claim for entitlement to consideration of sufficiency of evidence of perjury and agreeing to amend opinion in consolidated case, *see* United States v. Hird, 913 F.3d 332 (3d Cir. 2019)).

United States v. Nicholas, 914 F.3d 212 (3d Cir. 2019) (Smith, C.J.) (denying petition for rehearing en banc, granting petition for rehearing by the panel in part), *cert. denied*, 139 S. Ct. 1325 (2019) (reconsidering solely evidentiary claim concerning admissibility of 2008 EAA Board Minutes and agreeing to amend opinion in the consolidated case, *see* United States v. Fattah, 914 F.3d 112 (3d Cir. 2019)).

United States v. Tynes, 913 F.3d 393 (3d Cir. 2019) (Nygaard, J.) (denying petition for rehearing en banc, granting petition for rehearing by panel in part) (granting petition solely as to claim that there was insufficient evidence to support conviction and agreeing to amend opinion in consolidated case, *see* United States v. Hird, 913 F.3d 332 (3d Cir. 2019)).

Armed Career Criminal Act

United States v. Daniels, 915 F.3d 148 (3d Cir. 2019) (Cowen, J.) (affirmed), *cert. denied*, 140 S. Ct. 1264 (2020) (holding prior attempt-based state drug convictions were "serious drug offenses" under Armed Career Criminal Act).

Criminal Motions—Motions to Sever

United States v. Blunt, 930 F.3d 119 (3d Cir. 2019) (Restrepo, J.) (reversed in part, vacated in part, and remanded) (granting motion to sever for co-defendant spouses being tried jointly to prevent co-defendant from presenting prejudicial and incriminating testimony against their spouse and to prevent forcing a spouse to choose between spousal privilege and fundamental right to testify on one's own behalf).

Criminal Motions—Motions to Suppress

United States v. Hird, 913 F.3d 332 (3d Cir. 2019) (Nygaard, J.) (affirmed in part, vacated in part, and remanded), *cert. denied sub nom. Alfano v. United States*, 140 S. Ct. 657 (2019) and *Lowry v. United States*, 140 S. Ct.

656 (2019) (affirming district court's denial of motion to dismiss because indictment sufficiently alleged violations of mail fraud and wire fraud; affirming perjury convictions of three appellants; but remanding for resentencing for one defendant because district court erred by using guideline on obstruction instead of making false statements to FBI).

United States v. Green, 927 F.3d 723 (3d Cir. 2019) (Hardiman, J.) (affirmed) (finding (1) district court's denial of defendant's motion to suppress an inculpatory statement was not in violation of Fifth Amendment and was lawfully obtained, because defendant's response was unforeseeable and police officer's statement lacked coercive influence, and (2) and denial of a motion to suppress gun and bullets found during a routine patdown search was proper).

United States v. Porter, 933 F.3d 226 (3d Cir. 2019) (Hardiman, J.) (affirmed) (holding defendant cannot challenge district court's denial of a motion to suppress evidence after entering a guilty plea, because defendant's Fourth Amendment claims are irrelevant to the judgment of conviction).

United States v. Trant, 924 F.3d 83 (3d Cir. 2019) (Smith, C.J.) (affirmed) (holding district court's decision was correct in (1) allowing government to reopen case-in-chief as defendant was not affected and had agreed to motion; (2) restricting defendant from asking witness about unlawful possession of a firearm; and (3) allowing officer testimony to establish that defendant's firearm was involved in interstate commerce).

Fourth Amendment

United States v. Goldstein, 914 F.3d 200 (3d Cir. 2019) (Roth, J.) (affirmed) (holding good faith exception applies when government obtained cell site location information data pursuant to court order under Stored Communication Act prior to *Carpenter v. United States*, 138 S. Ct. 2206 (2018)).

Habeas Petitions

Cordaro v. United States, 933 F.3d 232 (3d Cir. 2019) (Chagares, J.) (affirmed) (acknowledging habeas corpus availability when intervening statutory interpretation renders alternative remedies inadequate, provided that actual innocence claim shows "it is more likely than not that no reasonable juror properly instructed on the intervening interpretation would" vote to convict, but affirming denial of habeas corpus petition for failure to show actual innocence).

Howell v. Superintendent Rockview SCI, 939 F.3d 260 (3d Cir. 2019) (Fisher, J.) (affirmed) (affirming on de novo review that the jury selection procedure did not violate the Sixth Amendment's fair cross-section requirement by systematically excluding black jurors, even though the Superior Court of Pennsylvania misapplied the Supreme Court's precedent); *id.* at 270–73 (Porter, J., concurring) (noting jury selection process was

more robust than constitutional requirements, so there cannot be a systematic exclusion); *id* at 273–83 (Restrepo, J., concurring in part and dissenting in part) (joining majority's holding that the Superior Court of Pennsylvania misapplied the Supreme Court's precedent, but dissenting from the remainder of the opinion on the grounds that petitioner established a prima facie violation of the Sixth Amendment right and the commonwealth did not rebut this evidence).

In re Matthews, 934 F.3d 296 (3d Cir. 2019) (Greenaway Jr., J.) (petitions authorized) (authorizing petitioners' habeas petitions to challenge their sentences for convictions under 18 U.S.C. § 924(c), which prohibited use or carry of firearm during and in relation to a crime of violence or drug trafficking crime, following Supreme Court elimination of § 924(c)(3)(B) as unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319 (2019)).

Romansky v. Superintendent Greene SCI, 933 F.3d 293 (3d Cir. 2019) (Ambro, J.) (affirmed) (approving dismissal of habeas petition because defendant's due process claims were time-barred under one-year limitation period for persons in custody pursuant to state court judgment and subsequent resentencing judgment did not reset limitation period from initial trial).

United States v. Santarelli, 929 F.3d 95 (3d Cir. 2019) (Restrepo, J.) (reversed and remanded) (holding district court erred in denying defendant's motion to amend their habeas petition because allegations in motion to amend related back to date of initial habeas and motion was not second or successive habeas petition).

Jury Issues

United States v. Baker, 928 F.3d 291 (3d Cir. 2019) (Jordan, J.) (affirmed) (holding, in a case regarding a police officer's theft of public funds, that lower court correctly (1) refused to instruct the jury on entrapment, because officer failed to show inducement on behalf of government, and (2) excluded officer's wife's testimony relating to clinical diagnosis and medical bills, because less prejudicial evidence was available).

United States v. Greenspan, 923 F.3d 138 (3d Cir. 2019) (Bibas, J.) (affirmed) (declining to reverse lower court despite defendant successfully raising several errors in jury instruction, (1) that the defendant bore the burden of persuasion in their advice-of-counsel defense, (2) limiting defendant's testimony regarding their attorney's advice, (3) limiting scope of defense to five or eight alleged by defendant, as errors were harmless in light of overwhelming evidence of guilt).

United States v. Wright, 913 F.3d 364 (3d Cir. 2019) (Shwartz, J.) (reversed and remanded), *cert. denied*, 140 S. Ct. 627 (2019) (holding district court lacked inherent authority to forbid retrial and dismiss indictment); *id.* at 376–87 (Nygaard, J. dissenting) (countering that district court does possess inherent power to dismiss an indictment after serial hung juries);

id. at 387–92 (McKee, J., concurring) (finding that congressional action is needed to support).

Sentencing

United States v. A.M., 927 F.3d 718 (3d Cir. 2019) (Bibas, J.) (affirmed) (holding (1) defendant's use of device-making equipment, which copies means of identification, warranted enhancement for bank fraud sentence, (2) enhanced sentence was not precluded by defendant's aggravated identity theft conviction, and (3) departure from the statutory minimum was not necessary because government never moved for a departure).

United States v. Ayala, 917 F.3d 752 (3d Cir. 2019) (Chagares, J.) (affirmed), *cert. denied*, 140 S. Ct. 164 (2019) (declining to create bright-line rule regarding appropriateness of criminal defendants appearing shackled during non-jury sentencing hearings because district courts need room to make "individualized security determinations").

United States v. Chapman, 915 F.3d 139 (3d Cir. 2019) (Restrepo, J.) (vacated and remanded) (vacating defendant's sentence because their right to allocution was substantially affected by district court's decision to proceed with their sentencing hearing, despite fact that neither defendant nor their family were notified hearing had been scheduled, which precluded defendant from introducing mitigating letters of support).

United States v. Damon, 933 F.3d 269 (3d Cir. 2019) (Matey, J.) (affirmed), *cert. denied*, 140 S. Ct. 1212 (2020) (affirming grant of government's motion to enforce plea agreement and affirming dismissal of defendant's motion to terminate supervised release under plea agreement provision waiving right to challenge sentence because "sentence" includes supervised release and motion to terminate supervised release constitutes "challenge" to that sentence as matter of contract interpretation).

United States v. Payano, 930 F.3d 186 (3d Cir. 2019) (Krause, J.) (vacated and remanded) (holding district court's mistaken understanding of applicable sentencing range substantially affected defendant's rights and resentencing is needed to correct error that "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings").

United States v. Reese, 917 F.3d 177 (3d Cir. 2019) (Ambro, J.) (vacated) (holding district court violated Speedy Trial Act when its continuance orders failed to state factual basis for excluding time and did not invoke Act's language, therefore not excluding resulting time delay from Act's seventy-day limit—even if defendant did not initially object to continuance).

Sixth Amendment—Ineffective Assistance of Counsel

Simon v. Gov't of Virgin Islands, 929 F.3d 118 (3d Cir. 2019) (Rendell, J.) (affirmed in part, reversed in part, and remanded) (finding superior court abused its discretion in failing to conduct evidentiary hearing to address *Brady* violation claim by failing to disclose prior agreement with key

witness; and appellate division erred when it dismissed defendant's ineffective assistance of counsel claim without first conducting an evidentiary hearing).

Supervised Release

United States v. Nunez, 928 F.3d 240 (3d Cir. 2019) (Shwartz, J.) (dismissed in part and affirmed in part), *cert. denied*, 140 S. Ct. 526 (2019) (concluding circuit court did not have jurisdiction over district court's denial of defendant's motion to dismiss because it was not a final judgment, but that it did have jurisdiction to review denial of defendant's motion for pre-trial release order, pursuant to Bail Reform Act, and district court correctly declined to mandate release from detention by ICE during pending removal proceedings).

Sufficiency of the Evidence

United States v. Fattah, 914 F.3d 112 (3d Cir. 2019) (Smith, C.J.), (affirmed in part, vacated, reversed, and remanded in part), *cert. denied*, 139 S. Ct. 1325 (2019) (vacating five counts for bribery and honest-services fraud in light of the Supreme Court's interpretation of the term "official act" in *McDonnell v. United States*, 136 S. Ct. 2355 (2016); reversing judgment of acquittal and remanding for sentencing on charges of bank fraud and making false statements to a financial institution because the evidence established that Credit Union Mortgage Association was a "mortgage lending business").

United States v. Garner, 915 F.3d 167 (3d Cir. 2019) (Ambro, J.) (affirmed) (declining to draw inferences in defendant's favor, that the informant witness was not credible and alternative interpretation of evidence, while performing sufficiency of evidence review and upholding jury's convictions on conspiracy, attempted bank robbery, and firearm charges).