RECENT DEVELOPMENTS IN APPELLATE ADVOCACY

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I. INTRODUCTION

The past year witnessed a time of transition in appellate law. Most significantly, Justice Neil Gorsuch joined the United States Supreme Court for his first full term and left his mark on several opinions by joining the traditional conservative voting bloc (which had been left in a 4-4 standoff with the other members of the Court during the 2016–17 term). Partially as a result of Justice Gorsuch's addition, the 2017–18 Term included several significant decisions affecting the areas of business law and civil rights and liberties, decided by narrow majorities of the Court. At the same time, the Court continued to serve in its traditional role of providing the final word on interpretations of federal jurisdiction and procedure, providing

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guidance for the federal district and appellate courts on several issues where it had previously been lacking.

Technology is the other dominant theme. The Supreme Court confronted the huge amount of information gathered from cell phones by wireless carriers and had to determine how much protection to afford that data under the Fourth Amendment. But even the language of court opinions reflected changing trends. To address the rising role of non-verbal communications (most particularly, the ubiquity of emojis in text messages), appellate courts have had to adapt.

II. BUSINESS LAW

The Supreme Court tackled several important business law issues in the 2017–18 term, from class actions, to antitrust, securities law, and others. Some of the Court's opinions demonstrated a return to the *status quo* with the appointment of Justice Gorsuch. In other cases, the Court issued opinions that were delayed due to prospect of multiple four-four standoffs in 2017 as a result of the lack of a majority.

In *Epic Systems Corporation v. Lewis*,[1] Justice Gorsuch authored the first major opinion of his tenure on the Court, holding that arbitration clauses barring collective action by employees are enforceable and do not violate the National Labor Relations Act (NLRA).[2] In delivering the opinion of a five-four majority, Justice Gorsuch demonstrated the same textualist approach that was often employed by his predecessor, Justice Antonin Scalia.[3] The *Epic Systems* case actually consolidated three separate appeals presenting similar circumstances.[4] In each case, employers entered into written employment agreements with their employees providing that any disputes between the parties would be arbitrated in an individualized arbitration setting.[5] Despite these agreements, the employee in each action sought to litigate their disputes in court on a classwide basis.[6]

The Court rejected the employees' first contention that the savings clause under the Federal Arbitration Act (FAA), in conjunction with the collective action rights under the NLRA, rendered the arbitration agreements

1. 138 S. Ct. 1612 (2018).
2. *Id*. at 1619.
3. *Id*. (observing that Congress through the Federal Arbitration Act "has instructed federal courts to enforce arbitration agreements according to their terms," and noting that the NLRA "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and entre the courtroom or arbitral forum").
4. *Id*. at 1619.
5. *Id*. at 1620.
6. *Id*. (describing the factual background and procedural history of the appeal in *Ernst & Young LLP v. Morris*, No. 16-300, out of the Ninth Circuit Court of Appeals).

unenforceable.[7] The FAA provides that a court may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." Reasoning that because the saving clause applies only to defenses that apply to *all* contracts and not just to arbitration agreements, Justice Gorsuch concluded that "the saving clause . . . can't save [the employees'] cause."[8] The Court also rejected the employees' argument that the NLRA renders class action waivers in employment agreements unlawful, "overriding" application of the FAA.[9] The NLRA, the Court observed, permits employees to form unions and bargain collectively, but fails to "express approval or disapproval of arbitration," "does not mention class or collective action procedures," and "does not even hint at a wish to displace" the FAA as advocated by the employees.[10] The Court found no irreconcilable statutory conflicts that required resolution.[11]

The Court also rejected the employees' *Chevron* deference argument[12] through which the employees asked the Court to afford deference to a 2012 opinion by the National Labor Relations Board's general counsel that the NLRA displaces the FAA with respect to class and collective action waivers.[13] Justice Ginsburg's dissenting opinion referred to the majority's decision as "egregiously wrong"[14] and opined that the "inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[15] But the majority labeled this a "false alarm,"[16] and Justice Gorsuch stated that workers' rights to collectively bargain "stand every bit as strong today as they did yesterday," even for workers who contracted with their employers to individually arbitrate employment disputes.[17]

In *South Dakota v. Wayfair, Inc.*,[18] Justice Kennedy, writing for the majority, tested the Supreme Court's traditionally steadfast devotion to the

7. *Id.* at 1622.
8. *Id.* at 1622. The majority reached this conclusion, even assuming that the employees underlying assumptions about other, unresolved legal issues were correct—such as whether the savings clause applies to federal statutory defenses as opposed to just state common law defenses, and whether the NLRA actual *does* render class action waivers in employment agreements unlawful. *Id.*
9. *Id.* at 1624.
10. *Id.*
11. *Id.* at 1628.
12. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
13. *Epic Sys. Corp.*, 138 S. Ct. at 1629. "Where, as here, the canons [of statutory construction] supply an answer, "'*Chevron* leaves the stage.'" *Id.* at 1630 (citation omitted).
14. *Id.* at 1633 (Ginsburg, J. dissenting). Justice Ginsburg was joined in her dissent by Justices Breyer, Sotomayor, and Kagan.
15. *Id.* at 1646.
16. *Id.* at 1630.
17. *Id.* at 1632.
18. 138 S. Ct. 2080 (2018).

doctrine of *stare decisis* and overturned decades-old precedents—*National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*[19] and *Quill Corp. v. North Dakota*[20]—prohibiting states from collecting state taxes from their residents arising from transactions with out-of-state mail-order and online retailers who had no physical presence in those states. The Court considered whether South Dakota may require remote sellers to collect and remit sales tax without some additional connection to the state. In direct contravention of its own prior decisions, the Court held that South Dakota's imposition on sellers was valid, fair, and constitutional. One important theme loomed largely over the decision: "the internet's prevalence and power have changed the dynamics of the national economy."[21]

In 2016, in response to *Bellas* and *Quill*, South Dakota enacted a law (Senate Bill 106) that required remote vendors that deliver more than $100,000 of goods or services annually into South Dakota or engage in 200 or more transactions in the state to collect and remit sales tax to the state "as if the seller had a physical presence in the state."[22] South Dakota had no state income tax and relied substantially on its sales and use taxes to fund state government services.[23] Without a retailer's physical presence, South Dakota sought to rely on its residents to pay use tax on their purchases from out-of-state retailers.[24] Not only did this prove impractical and ineffective, South Dakota discovered that *Bellas* and *Quill*'s "physical presence" requirement cost the state tens of millions in tax revenue, significantly hindering its ability to support state and local public institutions.[25] The state declared an emergency and cited an urgent need for the Supreme Court to reconsider its precedents.

South Dakota commenced a lawsuit against online retail giants Wayfair, Inc., Overstock, Inc. and Newegg, Inc., seeking a declaration that these sellers with no employees or real estate within the state had to comply with S.B. 106. Each company easily met the minimum sales or transactions requirement of the Act, but none collected sales tax. A federal court declined to entertain jurisdiction, considering it a state tax matter, and remanded the case back to state court.[26] The companies moved for summary judgment, arguing that the Act was unconstitutional. A South Dakota trial court granted summary judgment in favor of the retailers.[27] The state

19. 386 U.S. 753 (1967).
20. 504 U.S. 298 (1992).
21. *National Bellas Hess*, 138 S. Ct. at 2097.
22. *Id.* at 2089.
23. *Id.* at 2088.
24. *Id.*
25. *Id.*
26. South Dakota v. Wayfair, Inc., 229 F. Supp. 3d 1026 (D.S.D. 2017).
27. State v. Wayfair, Inc., 2017 WL 4358293 (S.D. Cir. Mar. 6, 2017).

appealed, and the Supreme Court of South Dakota affirmed,[28] holding that the statute violated the Dormant Commerce Clause.[29]

The Court granted certiorari to determine and define the scope and validity of the "physical presence" rule imposed by *Bellas* and *Quill*.[30] In a landmark five-four decision, the Court ruled that a state can legally collect taxes from remote retailers deemed to have sufficient "economic nexus" with the state. This nexus requirement, Justice Kennedy wrote, mirrors the due process requirement that "there be some minimum connection between a state and a person, property or transaction it seeks to tax."[31] Modern commercial life has taught us that a company need not be physically present in a state to transact a substantial amount of business.[32] Justice Kennedy treated the decision as an emergent economic one, urging the Court to embrace the reality that dramatic technological advancements over the past two decades—which he affectionately dubbed "The Internet revolution"—have altered the way we do business as a society and must, in turn, alter the manner in which states may profit from commerce conducted on their own soil. To allow *Bellas* and *Quill*[33] to stand, Justice Kennedy conceded, would mean to hang on to an antiquated economic model and promote a complex constitutional quandary of the Court's own creation that threatens to disrupt the mechanics of modern e-commerce.[34]

The Court acknowledged and appeared to regret substantial reliance on its precedents, deeming *Quill* an "egregious and harmful" misstep. Ultimately, the Court found that the statute's standard of $100,000 in sales or 200 transactions can only be met if "the seller availed itself of the substantial privilege[35] of carrying on business in South Dakota. There was

28. South Dakota v. Wayfair, Inc., 901 N.W.2d 754, 761 (S.D. 2017) (relying on *Quill and Bellas* and leaving the Supreme Court with the "prerogative of overruling its own decisions" (citing Rodriguez de Quijas v. Shearson American Exp., Inc., 490 U.S. 477, 484 (1989)). South Dakota has no intermediate appeals court.

29. The "Dormant" Commerce Clause ultimately means that because Congress has been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity.

30. *Id.*

31. *National Bellas Hess*, 138 S. Ct. at 2093.

32. *Id.*

33. *Id.* at 2085 (noting that *Quill* essentially operates as a judicially created tax shelter for businesses that limit their physical presence in a state and "creates rather than resolves market distortions").

34. *Id.* at 2084. After reciting the history of the dormant Commerce Clause, he summarized the doctrine: "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2090–91 (citing *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (noting that state laws that discriminate against interstate commerce are automatically invalid)).

35. The Court offered Wayfair a stern lecture on the advantages society and big business derive from taxation: "What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the

no question that respondents—large national companies—exceeded that threshold due to their extensive virtual presence.

In *Ohio v. American Express Co.*,[36] the Court adjudicated another case arising from changes to market and consumer practices. Justice Thomas delivered the opinion of another five-four majority, holding that anti-steering provisions in the contracts between American Express (Amex) and the merchants who accept its credit cards do not violate antitrust law by creating an unreasonable restraint of trade.[37] Amex is one of four major players in the United States market for credit card services, along with Visa, MasterCard, and Discover.[38] These credit card companies provide services to merchants on one side of the credit card transaction, and to consumers on the other.[39] All four companies derive revenue from merchant fees, but the Court found that Amex's business model, unlike Visa and MasterCard, depends more on merchant fees than on cardholder lending.[40] As a result, Amex charges merchants higher fees than its competitors, and merchants have an incentive to steer consumers away from using Amex credit cards.[41] Amex includes anti-steering provisions in its merchant contracts, which prohibit merchants from enticing consumers to use other credit card brands in their establishments.[42] The United States and approximately seventeen States filed an antitrust lawsuit against Amex, alleging that Amex's anti-steering requirements violate the "rule of reason," creating an unreasonable restraint of trade and inappropriately increasing the cost of credit card transactions for merchants.[43] After a seven-week trial, the district court agreed and enjoined Amex's anti-steering practice.[44]

On appeal, however, the Second Circuit reversed and, ultimately, a divided Supreme Court affirmed, based on its conclusion that the market for credit card services is a "two-sided transaction platform" involving both merchant and consumer transactions.[45] The majority concluded that the

police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions and courts to ensure collection of the purchase price." *Id.* at 2096.

36. 138 S. Ct. 2274 (2018).

37. *Id.* at 2280, 2283.

38. *Id.* at 2282. Visa and MasterCard were named as defendants in the district court, but were dismissed after entering into agreements with the Government to change their practices. *Id.* at 2283 n.5.

39. *Id.* at 2282.

40. *Id.*

41. *Id.* at 2282–83.

42. *Id.* at 2283.

43. *Id.*

44. *Id.*

45. *Id.*

district court erred by focusing solely on the impact of Amex's anti-steering requirements on the merchant side of the market for credit card services and by failing to consider the impact of Amex's anti-steering provisions on the market as a whole.[46] The Court's decision to treat both sides of credit card transactions as part of a single market controlled the result because, based on this definition, the Court held that the government plaintiffs had not proven the requisite anti-competitive effects.[47] The Court found that the government failed to present any evidence that the "price of credit-card transactions" in the two-sided credit card market "was higher than the price one would expect to find in a competitive market."[48]

Although plaintiffs did establish that Amex increased its charges to *merchants* over time, and arguably that the increases were caused by the anti-steering provisions, the majority concluded that was insufficient to establish anti-competitive effects.[49] Indeed, the Court observed that Amex's anti-steering provisions may have stimulated rather than stifled competition in the credit card marketplace overall, citing an increase in credit card usage among consumers, the development of premium credit card perks by Visa and MasterCard, and the creation of sliding-scale merchant charges by these Amex competitors.[50] Finally, the Court observed that the "steering" activity Amex sought to ban is, itself, anti-competitive.[51]

The Court was still able to achieve unity in some of its business decisions. In *Cyan, Inc. v. Beaver County Employees Retirement Fund*,[52] Justice Kagan delivered the unanimous opinion of the Court in reaching two holdings.[53] First, the Court held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) did not "strip state courts of jurisdiction over class actions" filed exclusively under the Securities Act of 1933 (1933

46. *Id.* at 2287.

47. *Id.* at 2288. Justice Breyer's dissenting opinion characterized the majority's definition of the relevant market as based solely on academic theory with no mooring in settled antitrust jurisprudence: "our precedent provides no support for the majority's special approach to defining markets involving 'two-sided transaction platforms.'" *Id.* at 2300 (Breyer, J., dissenting).

48. *Id.* at 2288.

49. *Id.* In his dissent, Justice Breyer expressed his belief that the majority ignored unchallenged factual findings by the district court which, alone, satisfied the plaintiffs' burden of establishing an anticompetitive impact. *Id.* at 2301 (Breyer, J., dissenting) ("Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirming the Court of Appeals" because "the plaintiffs *made* the factual showing that the majority thinks is required.").

50. *Id.* at 2289.

51. *Id.*

52. 138 S. Ct. 1061.

53. *Id.* at 1066, 1078.

Act).[54] Second, the Court held that SLUSA does not allow removal to federal court of class actions alleging exclusively federal claims under the 1933 Act.[55]

Beaver County Employees' Retirement Fund filed a lawsuit in California Superior Court alleging that Cyan, a telecommunications company and its officers and directors (together, Cyan), violated the 1933 Act by including material misstatements within its offering documents.[56] Cyan moved to dismiss the claims arguing that the amended 1933 Act precluded state courts from exercising subject matter jurisdiction over 1933 Act claims entirely.[57] The California Superior Court rejected Cyan's argument and denied the motion to dismiss.[58] The state appellate courts then denied review of that ruling.[59] The Court granted certiorari to resolve a split among various state and federal courts as to whether state courts have subject matter jurisdiction over covered class actions that allege 1933 Act claims.[60]

Cyan's arguments were primarily based on SLUSA's "except clause" in 15 U.S.C. § 77v(a) which states that "[t]he district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."[61] Cyan pointed to a particular subsection, § 77p(f)(2), which defines a "covered class action" as a suit seeking damages on behalf of more than fifty persons, to argue that the "except clause" exempts all sizable class actions.[62] The Court rejected this argument, reasoning that the "except clause" points to § 77p as a whole and prevented Cyan from "cherry pick[ing] from the material covered by the statutory cross-reference."[63] The Court found that § 77p, which bars certain securities class actions based on state law, controls if there is a conflict between § 77v(a) and § 77p, but § 77p does not limit state court jurisdiction over class actions brought under the 1933 Act.[64] Justice Kagan emphasized that the statute designates the clause as a mere "conforming amendment."[65]

The Court also held that the removal provision in SLUSA is limited to removals of class actions asserting claims under state securities laws and

54. *Id.* at 1078.
55. *Id.*
56. *Id.* at 1068.
57. *Id.* at 1071.
58. *Id.*
59. *Id.* at 1068.
60. *Id.*
61. *Id.* at 1071 (emphasis added).
62. *Id.*
63. *Id.*
64. *Id.* at 1064.
65. *Id.* at 1063.

does not apply to permit the removal of cases asserting only federal securities claims to federal court.[66] The removal argument was not raised by the petitioners but rather by the United States as *amicus curiae*.[67] The Court analyzed § 77p(c) which allows for removal of certain class actions to federal court, providing that "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section."[68] The Court explained that § 77(b) prohibits the removal of certain class actions based on state law and therefore, the reach of § 77p(c) is limited, and that section only allows for the removal of state court actions premised on state law.[69]

In *Digital Realty Trust v. Somers*,[70] Justice Ginsberg delivered another unanimous opinion, holding that the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Act protects only individuals who report alleged securities violations directly to the Securities and Exchange Commission (SEC), and does not extend to individuals who report possible violations to company superiors or others.[71] Under the Dodd-Frank Act, a whistleblower is protected from retaliation for disclosing potential securities violations to the SEC.[72] A whistleblower is expressly defined as a person who provides "information relating to a violation of the securities laws to the commission."[73]

Paul Somers was employed by Digital Realty Trust, a real estate investment trust, as the company's Vice President.[74] Digital Realty terminated Somers shortly after he reported suspected securities-law violations by the company to senior management.[75] Somers did not report the suspected violations to the SEC before he was terminated, but sued Digital Realty, alleging a claim of whistleblower retaliation under the Dodd-Frank Act.[76] Digital Realty moved to dismiss the claim, arguing that Somers did not qualify as a whistleblower under the anti-retaliation provision because he did not report any misconduct to the SEC.[77] The District Court denied the motion to dismiss, finding the statute ambiguous.[78] To resolve the

66. *Id.* at 1078.
67. *Id.*
68. *Id.* at 1076.
69. *Id.*
70. 138 S. Ct. 767 (2018).
71. *Id.* at 782.
72. *Id.* at 774.
73. *Id.* at 768.
74. *Id.* at 776.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

ambiguity, the district court turned to an SEC rule which distinguished between whistleblowers seeking monetary awards for reporting and whistleblowers seeking protection against retaliation.[79] Under the SEC rule, the former are required to provide information to the SEC, while the latter are not.[80] The Ninth Circuit affirmed the District Court's decision, finding the statute ambiguous and concluding that "whistleblower" should be read two different ways in the statute itself, employing deference to the SEC's interpretation of the statute.[81]

The Supreme Court granted certiorari to resolve a split among the Circuits and reversed.[82] The Court found that the term "whistleblower" was not ambiguous and therefore the SEC is precluded from more expansively interpreting the term.[83] The Court emphasized that the "core objective" of Dodd-Frank's whistleblower program is to "aid the commission's enforcement efforts by motivating people who know of securities law violations to *tell the SEC*."[84] The Court also highlighted the fact that another whistleblower-protection provision in Dodd-Frank imposes no requirement that information be conveyed to a government agency and "when congress includes particular language in one section of a statute but omits it in another, [the] Court presumes that Congress intended a difference in meaning."[85] The Court observed the implications that the lower court's ruling would cause, finding that not requiring an employee to provide information relating to securities laws to the SEC would afford protection to an employee who reports information bearing no relationship whatever to the securities laws.[86] Thus, the Court held that the anti-retaliation provision in the Dodd-Frank Act's definition of "whistleblower" is clear and conclusive and protects only individuals who report alleged misconduct to the SEC.[87]

III. CIVIL RIGHTS AND LIBERTIES

The 2017–18 Supreme Court Term also included landmark decisions in the field of civil rights and liberties. The Court issued its most-discussed opinion for the Term in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[88] The background facts for the case were widely reported in

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 782.
84. *Id.* at 780.
85. *Id.* at 776.
86. *Id.* at 781.
87. *Id.*
88. 138 S. Ct. 1719 (2017).

the media. In 2012, a same-sex couple had visited Masterpiece Cakeshop in Colorado and inquired about ordering a cake for their wedding reception.[89] The shop's owner informed the couple that the shop would not create a cake for their wedding because of his religious opposition to same-sex marriages. The couple then filed a charge with the Colorado Civil Rights Commission alleging unlawful discrimination in a place of public accommodation on the basis of sexual orientation.[90] After an administrative law judge determined that the shop's owner had violated the Colorado Anti-Discrimination Act and was not entitled to First Amendment protection from its enforcement, the Civil Rights Commission affirmed. The Colorado Court of Appeals then affirmed the Commission's decision, and the shop sought the Supreme Court's review by certiorari.

After granting certiorari, the Supreme Court reversed. But rather than directly addressing the core issue in the case—whether the shop's owner's conduct was protected by the First Amendment's Free Exercise Clause—Justice Kennedy's six-justice[91] majority opinion issued a narrower holding. After reflecting on the conflict between the shop owner's position that using "his artistic skills to make an expressive statement, a wedding endorsement in his own voice" would violate his deep and sincere religious beliefs and the State's interest in enacting and enforcing its laws to protect a class of individuals from discrimination,[92] the Court severely critiqued the Civil Rights Commission's handling of the case. The Court held that "[t]he Civil Rights Commission's treatment of [the owner's] case has some elements of a clear and impermissible hostility toward the sincere religious belief that motivated his objection."[93] According to the Court, at several points during the meeting when the Civil Rights Commission convened to discuss the case, "commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community."[94] After cataloguing what the Court viewed as examples of that hostility, the majority concluded that "[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[95] Without opining on the ultimate merit of the Commission's claims against the shop and its

89. *Id.* at 1723.
90. *Id.* at 1726.
91. Justice Thomas filed an opinion concurring in part and concurring in the judgment. Justices Ginsburg and Sotomayor dissented.
92. *Id.* at 1727–28.
93. *Id.* at 1729.
94. *Id.*
95. *Id.* at 1732.

owner, the Court reversed the Colorado Court of Appeals' judgment and remanded the case for further proceedings.

In *Carpenter v. United States*,[96] the Court addressed the ever-present tension between the Fourth Amendment's protections for privacy and developing technology enabling law enforcement to investigate crimes and make arrests. After arresting four men suspected of robbing several stores in the Detroit area, police obtained information about fifteen of their suspected accomplices, as well the accomplices' cell phone numbers.[97] Based on that information, prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for several suspects, including Timothy Carpenter. Under the Stored Communication Act, the government could compel disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing investigation."[98] A federal magistrate judge issued orders compelling the production of the requested orders, and ultimately the government obtained data about Carpenter from two wireless carriers.[99] The data included time-stamped records known as cell-site location information, identifying where the cell phone was located at the moment the data were gathered (typically, when the cell phone made or received a call). In all, the government obtained 12,898 location points cataloging Carpenter's movements over a period spanning 127 days.[100]

After Carpenter was charged with six counts of robbery and additional counts of carrying a firearm during a federal crime of violence, he moved to suppress the cell-site data provided by the wireless carriers, arguing that the government's seizure of those records without a search warrant supported by probable cause violated the Fourth Amendment. The district court denied Carpenter's motion, and he was convicted at trial and sentenced to over 100 years in prison. The United States Court of Appeals for the Sixth Circuit affirmed on appeal.

After granting certiorari, the Supreme Court reversed. Writing for the five member majority, Chief Justice Roberts first held that the fact that the data had been compiled by a third party did not mean it was exempt from the Fourth Amendment's protections. Although the Court's prior Fourth Amendment jurisprudence had "drawn a line between what a person keeps to himself and what he shares with others,"[101] the majority determined that the "unique nature of cell phone location records" caused them to be dif-

96. 138 S. Ct. 2206 (2018).
97. *Id.* at 2212.
98. 18 U.S.C. § 2703(d).
99. *Carpenter*, 138 S. Ct. at 2212.
100. *Id.*
101. *Id.* at 2216.

ferent from the other types of personal information held in the possession of third parties.[102] As Justice Roberts observed, the availability of cell phone location records meant that "[w]ith just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense."[103] Because of the extraordinary amount of data revealed by the cell phone location records, as well as the unique nature of the carrier's collection of the data, the majority concluded that the government had "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements"[104] by obtaining the records without a warrant, and thus reversed the Court of Appeals' decision.

IV. FEDERAL JURISDICTION AND PROCEDURE

Even in a year dominated by changing court dynamics, cultural shifts, and new technologies, the Supreme Court retained its traditional role of resolving circuit splits on issues of federal jurisdiction and procedure. In *China Agritech, Inc. v. Resh*,[105] Justice Ginsburg delivered the opinion of the Court,[106] holding that the *American Pipe* doctrine, which tolls the statutes of limitations for members of a putative class while class action claims are pending in a federal court, does not extend to subsequent efforts by those absent class members to file new class litigation outside of the statute of limitations period, explaining: "American Pipe does not permit the maintenance of a follow-on class action past expiration of the statute of limitations."[107]

Resh was the third consecutively filed putative shareholder class action against China Agritech under the Securities Exchange Act of 1934.[108] The first two actions were both timely filed under the Exchange Act's two-year limitation provision, and class certification was denied in each action.[109] After certification was denied, the class representatives in the earlier actions settled their individual claims and their cases were dismissed.[110] Resh filed the third class action case after the two-year limitations period expired, and

102. *Id.* at 2217.
103. *Id.* at 2218.
104. *Id.* at 2219.
105. 138 S. Ct. 1800 (2018).
106. Eight Justices concurred in the opinion. Justice Sotomayor concurred only in the judgment. *Id.* at 1803.
107. *Id.* at 1804 ("Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no.").
108. *Id.* at 1804.
109. *Id.* at 1804–05.
110. *Id.* at 1805.

the district court dismissed his action as time-barred.[111] Applying *American Pipe* tolling, the Ninth Circuit reversed the district court's dismissal and reinstated Resh's putative class action.[112] In so doing, the Ninth Circuit, joining the Sixth, became just the second circuit court to hold that *American Pipe* would apply to successive class actions regardless of the ground upon which certification was denied.[113] The Third Circuit had previously concluded that the *American Pipe* tolling rule applied in successive class cases, but only if the inadequacy of the representative plaintiff was the reason for the denial of class certification in the prior case.[114] In contrast, the First, Second, Fifth and Eleventh Circuits had all held that the use of *American Pipe* tolling to "stack" class cases beyond the relevant statute of limitations was improper.[115]

The Supreme Court adopted the majority position, focusing on judicial efficiency and policy grounds. According to the Court, the "efficiency and economy of litigation" that supports the tolling of individual claims, does not support tolling untimely successive class action claims.[116] In fact, Justice Ginsburg opined, where multiple potential class representatives wish to pursue class litigation, they are encouraged to file joint or competing cases immediately, to allow the courts to determine who might best represent a class.[117] She posited that "[a] would-be class representative, who commences suit after expiration of the limitation period . . . can hardly qualify as diligent in asserting claims and pursuing relief."[118]

Justice Sotomayor's concurrence argued that the Court's decision should have been limited to cases filed under the Private Securities Litigation Reform Act of 1995 (PSLRA), a proposition that would have resolved the case before the Court, but not the circuit split percolating in the lower courts.[119] At a minimum, according to Justice Sotomayor, the Court should have considered narrower restrictions on *American Pipe* that would allow tolling in some follow-on class actions.[120] But according to Justice Ginsburg, *American Pipe* does not provide substantive rights that a narrow application might abridge.[121] It limits statutory restrictions on equitable grounds and should not be broadly construed.[122]

111. *Id.*
112. *Id.*
113. *Id.* at 1805–06.
114. *Id.* at 1806.
115. *Id.*
116. *Id.* (internal quotation marks and citation omitted).
117. *Id.* at 1810–11.
118. *Id.* at 1808.
119. *Id.* at 1811.
120. *Id.* at 1814.
121. *Id.* at 1810.
122. *Id.*

In *Hall v. Hall*,[123] the Supreme Court grappled with a complicated family dispute and a challenging procedural question centering on the appealability of parts of a consolidated case. In a unanimous opinion penned by Chief Justice Roberts, the Court held that one of multiple cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure is immediately appealable upon an order disposing of that case, regardless of whether any of the others remain pending.[124] Rule 42(a) did not alter the settled understanding of the consequences of consolidation, and that understanding makes clear that when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals.[125]

The petitioner Elsa Hall and her brother, Samuel Hall, were engaged in a bitter, long-running family squabble. Prior to her death, their mother, Ethlyn, entrusted her real estate holdings in the Virgin Islands to Samuel, an attorney.[126] Ethlyn later sued Samuel and his law firm in the District Court of the Virgin Islands over Samuel's alleged mismanagement of her affairs, transferred all of her property into a trust, and designated Elsa as her successor trustee.[127] After Ethlyn died, Elsa assumed her role as trustee and as plaintiff in the case. Samuel counterclaimed for intentional infliction of emotional distress, fraud, and other claims.[128] Since Elsa was not a party to the trust case in her individual capacity, he filed a new complaint against her in her individual capacity in the same district court.[129] The trust and individual cases were initially litigated separately, but were consolidated pursuant to Rule 42(a) on Samuel's motion.[130] The district court ultimately dismissed Samuel's counterclaims from the trust case, though they remained in the individual case.[131] The jury returned a verdict for Samuel in the individual case, but the district court granted Elsa a new trial.[132] In the trust case, a verdict against Elsa was returned, and she was to recover nothing.[133] Elsa filed a notice of appeal from the district court's judgment in the trust case, and Samuel moved to dismiss on jurisdictional grounds, arguing that the judgment was not final and appealable because his claims against Elsa remained pending in the individual case.[134] The Third

123. 138 S. Ct. 1118 (2018).
124. *Id.* at 1122 (comparing Rule 42(a) to consolidation pursuant to 28 U.S.C. §1407, and relying on prior holding in *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015)).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1123.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

Circuit Court of Appeals agreed and dismissed Elsa's appeal, finding that "[w]hen two cases have been consolidated for all purposes, a final decision on one set of claims is generally not appealable while the second set remains pending."[135]

In reaching its decision, the Court relied on the common definition of "consolidation": "to unite, as various particulars, into one mass or body; to bring together in close union; to combine."[136] "Consolidation," the Court explained, had a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813.[137] Over the course of more than a hundred years, the Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together, but not the complete merger, of constituent cases.[138] Rather, the Court noted, consolidation is primarily permitted by our practice for the courts' convenience, and to save time and expense for all parties.[139] It does not, however, merge the suits into a single cause, change the rights of the parties, or make those who are parties in one suit parties in another.[140]

In *Artis v. District of Columbia*,[141] the Supreme Court analyzed the length of time a plaintiff has to refile a pendent state law claim in state court after it has been dismissed by a federal court. The dispute stemmed from the ambiguity over the language of the federal supplemental jurisdiction statute, 28 U.S.C §1367(d), which provides that the period of limitations for refiling in state court a state claim that has been dismissed by a federal court after the independent federal claims have been resolved "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."[142] Two competing interpretations emerged after the statute's enactment in 1990. The first, the "stop-the-clock" approach suggests that the state statute of limitations period is suspended or stops running on the day the federal complaint is filed and resumes where it left off on the day

135. Hall v. Hall, 679 F. App'x 142, 145 (2017) (citing *Bergman v. City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988) and *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 476 (3d Cir. 2006)).

136. *Hall*, 138 S. Ct. at 1124 (citing Webster's New International Dictionary 570 (2d ed. 1942)). The Court offered a straightforward parallel: "The United States, for example, is composed of States 'united, as various particulars, into one mass or body,' 'brought together in close union,' or 'combined'. Yet all agree that entry into our Union 'by no means implies the loss of distinct and individual existence ... by the States." *Id.* at 1125 (citing *Texas v. White*, 7 Wall. 700, 725 (1869)).

137. *Id.* at 1125.

138. *Id.*

139. *Id.* at 1126.

140. *Id.* at 1127 (citing *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496–97 (1933)).

141. 138 S. Ct. 594 (2018).

142. 28 U.S.C. §1367(d).

the federal case is dismissed.[143] The second, the "grace period" theory, proposes that the statute of limitations continues to run during the pendency of the federal case, and the plaintiff has only whatever time is left to refile her claim, or 30 days, whichever is longer.[144]

Following termination from her employment with the District of Columbia, Stephanie Artis sued the District of Columbia, alleging that she suffered employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[145] She also asserted state law claims grounded in retaliation for reporting her supervisor's discriminatory practices.[146] That suit was later dismissed by a federal court, which declined to exercise supplemental jurisdiction over her state-law claims.[147] Fifty-nine days following the dismissal, she filed the state-law claims in a District of Columbia trial court. The court dismissed the lawsuit, holding that the tolling provision in 28 U.S.C. §1367(d) merely provides 30 days beyond the dismissal for the plaintiff to refile, a deadline Ms. Artis missed.[148] The District of Columbia Court of Appeals affirmed.[149]

Justice Ginsburg, writing a majority opinion joined by Justices Breyer, Sotomayor, Kagan, and Chief Justice Roberts, explained why the "stop the clock" theory prevailed. The Court held that the statute of limitations on a state law claim is tolled for "two adjacent time periods: while the claim is pending in federal court and for 30 days postdismissal."[150] The Court analyzed several federal statutory texts illustrating when a grace period is provided, and when it is not. Justice Ginsburg then chided the dissent "for all its mighty strivings," for failing to identify "even one federal statute that fits the bill, *i.e.*, a federal statute that says 'tolled' but means something other than 'suspended,' or 'paused,' or 'stopped.'"[151] The Court cautioned that a contrary proposition would frustrate federalism concerns. For instance, had Ms. Artis filed two separate actions—one in federal court and one in state court—and asked the state court to hold the suit filed in abeyance pending disposition of the federal suit, it would amount to nothing more than wasteful and inefficient duplication of resources done for the sake of preserving her state court claims.[152] A "stop-the-clock" rule, on the

143. 138 S. Ct. at 601.
144. *Id.* at 602.
145. *Id.* at 599.
146. *Id.*
147. Artis v. District of Columbia, 51 F. Supp. 3d 135, 142 (D.D.C. 2014).
148. 138 S. Ct. at 600.
149. Artis v. District of Columbia, 135 A.3d 334 (D.C. 2016).
150. *Artis*, 138 S. Ct. at 603.
151. *Id.* at 602.
152. *Id.* at 607 ("[I]t 'work[s] against judicial efficiency . . . to compel prudent federal litigants who present state claims to file duplicative and wasteful protective suits in state court'" (quoting *Stevens v. ARCO Mgmt. of Wash. D.C., Inc.*, 751 A.2d 995, 1002 (D.C. 2000))). Even the trial court, which inspired the notion of filing in two separate courts, acknowledged that

other hand, achieves the primary purpose of limitations statutes: to prevent surprises to defendants and bar a plaintiff who has "slept on his rights."[153]

V. EMOJIS AND OTHER FORMS OF COMMUNICATION IN APPELLATE DECISIONS

The changing landscape of culture and technology was reflected not only in the issues that the appellate courts had to address in the past year, but even in the languages used in the appellate opinions. Emojis and emoticons are used daily in text communications, email messages, and an increasing number of other forms of communications. As the use of emojis and emoticons increases generally, there will also be an increase in the number of legal issues that their use raises. That new development was evident in the past year.

Emoticons and emojis serve similar purposes, but they are defined as two separate mediums of communication.[154] Emoticons are letters, numbers, and other keyboard characters compiled together to create a pictograph.[155] Most emoticons depict facial expressions, but others can be used to depict symbols: for example, <3 depicts a heart.[156] Emojis, instead, are pictures that can be static or animated depending on the program.[157] The word "emoji" comes from Japanese; it means "picture character."[158] Emojis can represent things such as faces, food, weather, vehicles, animals, plants, and other images.[159]

There are two categories of emojis: "unicode-defined" and "proprietary."[160] Unicode-defined emojis provide a unique number for each character in order to depict an image regardless of language or platform.[161] Proprietary emojis are not defined, such as the social media "sticker" emojis created by Facebook or Instagram.[162] Depending on the type of emoji and the type of system used by both the sender and recipient, the emojis

duplicative filings in federal and state court are "generally disfavored . . . as 'wasteful' and . . . 'against [the interests of] judicial efficiency.'" *Id.* at 600.

153. *Id.* at 608.

154. *See, e.g.*, Ukwauchu v. State, No. PD-0366-17 (Tex. Crim. App. 2018) (noting that Professor Bryan Garner has defined the term "emoji" as "an emoticon or other image in [a standardized] set," and that he defined "emoticon" as "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone" (citing Garner's Modern English Usage 476 (4th ed. 2014)), https://www.bhwlawfirm.com/wp-content/uploads/2018/06/Baylor-Sexual-Assault-Opinion-Ukwuachu.pdf)).

155. Erik Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227 (2018).

156. *Id.* at 1238.

157. *Id.*

158. *Id.* at 1231.

159. *See id.*

160. *Id.* at 1234.

161. *Id.*

162. *Id.* at 1236.

may either be transmitted as intended or simply appear as a box image depicting a placeholder where the intended emoji would be.[163]

Emojis and emoticons played at least a passing role in many recent federal and state court cases.[164] Emojis and emoticons sometimes appear in opinions when they are part of the evidence at issue before a court. For example, an emoji or emoticon may accompany a message accepting an offer, expressing sympathy to someone who has suffered a tragedy, or in an email message warning co-workers not to testify against another employee.

In 2018, Seventh Circuit became the first federal circuit court to use the "smiley face emoji" and the "poop emoji" in a published court decision. The Seventh Circuit did not use either emoji as a form of communication in the opinion but rather quoted them as evidence in the case that it was deciding.

In *Emerson v. Dart*,[165] the Seventh Circuit quoted a Facebook post written by a woman who had sued the Cook County [Illinois] Department of Corrections for employment discrimination.[166] The woman posted a message to a Facebook group shared by more than 1,600 employees of the Department of Corrections.[167] Her Facebook post warned her co-workers not to assist County in its defense of her discrimination claim. She wrote:

> To my fellow officers! DON'T GET IN A FIGHT THAT IS NOT, I REPEAT THAT IS NOT YOURS. I'VE JUST RECEIVED THE NAMES OF SOME PEOPLE THAT THE COUNTY IS ATTEMPTING TO USE AS WITNESSES, (1) IS A SGT, (2) OFFICERS, (1) OPR INVESTIGATOR, on the job 18mths, this fight is from 2009 & I've been off since 2012, sooooo do the math. Yes, I will definitely put your name out there in due time ☺. This is a PSA for those of you still believing that being a liar, brown noser will get you something. MESSING WITH ME WILL GET YOU YOUR OWN CERTIFIED MAIL. SO GLAD THAT THE ARROGANCE

163. *Id.*

164. *See, e.g.*, Fairbanks v. Roller, 314 F. Supp. 3d 85 (D. D.C. 2018); E*Trade Fin. Corp. v. Eaton, 305 F. Supp. 3d 1029 (D. Ariz. 2018); United States v. Lanier, No. 2:14-CR-83 (E.D. Tenn. Oct. 15, 2018); Randall v. United Parcel Serv., Inc., No. 3:17-cv-00807-HZ. (D. Or. Oct. 12, 2018); Bellue v. E. Baton Rogue Sheriff, No. 17-00576-BAJ-RLB (M.D. La. Sept. 13, 2018); Nexus Servs., Inc. v. Moran, No. 5:16-cv-00035 (W.D. Va. Mar. 23, 2018); Murdoch v. Medjet Assistance, LLC, 294 F. Supp. 3d 1242 (N.D. Ala. 2018); In re Bard IVC Filters Prods. Liab. Litig., Nos. MDL 15-02641-PHX DGC WO, CV-16-00474-PHX-DGC (D. Ariz. Feb. 15, 2018); United States v. Edwards, No. 2:17-cr-170 (S.D. Ohio Jan. 17, 2018); United States v. Dish Network LLC, 256 F. Supp. 3d 810, 853 (C.D. Ill. 2017); K.N. v. Stowell, No. G054963 (Cal. Ct. App. Aug. 27, 2018); Guirguis v. Brown, No. B280566 (Cal. Ct. App. Feb. 14, 2018); Bollinger v. Ohio Dep't of Educ., 2018 Ohio 3714 (Ct. App. 2018); State v. Lewis, 292 Or. App. 1, ___ P.3d ____ (2018); Crowley v. State, No. 11-16-00210-CR. (Tex. App. July 28, 2018); Ukwuachu v. State, No. PD-0366-17 (Tex. Crim. App. June 6, 2018).

165. Emerson v. Dart, 900 F.3d 469, 471 (7th Cir. 2018).

166. *Id.*

167. *Id.*

> OF THIS EMPLOYER HAS THEM BELIEVING THEIR OWN [poop emoji].[168]

In response to the posting of this message, the County moved for sanctions and the district court order her to pay the County "just under $17,000 as compensation for the time it spent opposing her misconduct."[169] The Seventh Circuit affirmed that award and in so doing quoted the woman's message to the Facebook group.[170]

The Seventh Circuit thus became the first federal circuit court to use the smiley face and poop emojis in an opinion. It did not use them to communicate legal analysis in the opinion but just included them as evidence before the court. Appellate practitioners can expect other courts to start including emojis and emoticons in published opinions when they form part of the evidence under review.

168. *Id.* at 472. The smiley face and poop emojis can be seen in the original slip opinion for this case, Emerson v. Dart, No. 17-2614, slip op. at 4–5 (7th Cir. Aug. 14, 2018).

169. *Emerson*, 900 F.3d at 472.

170. *Id.* at 471.