

**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).

Maurice Miller Baker

2. **Position:** State the position for which you have been nominated.

Judge, United States Court of International Trade

3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Office: McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001

Residence: Clifton, Virginia

4. **Birthplace:** State year and place of birth.

1962; Houma, Louisiana

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1987; U.S. Naval War College; no degree

1981 – 1984, Tulane University Law School; J.D., 1984

1980 – 1981, Louisiana State University; no degree (accepted into law school with equivalent of three undergraduate years of work as part of an accelerated program)

1979 – 1980, Nicholls State University; no degree (attended part-time during high school)

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation

from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2000 – present

McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
Partner

1993 – 2000

Carr Goodson Warner, P.C.
[now Carr Maloney, P.C.]
1301 K Street, N.W., Suite 400 East Tower
Washington, D.C. 20005
Partner (1996 – 2000)
Associate (1993 – 1995)

1991 – 1993

U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510
Counsel to Senator Orrin Hatch, Ranking Member (Full Committee, 1993; Subcommittee on Patents, Copyrights and Trademarks, 1991 – 1992)

1991

Carr Goodson & Lee, P.C.
[now Carr Maloney, P.C.]
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Associate

1989 – 1991

Dilworth, Paxson, Kalish & Kauffman
[this branch office no longer exists]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate

1989

Myerson & Kuhn
[this firm closed on October 31, 1989]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate

1986 – 1989

U.S. Department of Justice

950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530

Special Assistant to the Assistant Attorney General, Civil Rights (1988 – 1989)

Attorney-Advisor, Office of Legal Policy (1986 – 1988)

1985 – 1986

Hon. Thomas G. Gee

United States Court of Appeals for the Fifth Circuit

515 Rusk Street

Houston, Texas 77002

Law Clerk

1984 – 1985

Hon. John M. Duhé, Jr.

United States District Court for the Western District of Louisiana

800 Lafayette Street

Lafayette, Louisiana 70501

Law Clerk

Summer 1983

Wilkinson & Carmody

[now Wilkinson, Carmody & Gilliam]

400 Travis Street

Shreveport, Louisiana 71101

Summer Associate

Summer 1983

Broadhurst, Brook, Mangham, Hardy & Reed

[This firm no longer exists]

Lafayette, Louisiana 70501

Summer Associate

1982 – 1983

Shushan, Meyer, Jackson, McPherson & Herzog

[This firm no longer exists]

New Orleans, Louisiana 70112

Law Clerk

Summer 1982

Legislative Bureau

Louisiana State Senate

Baton Rouge, Louisiana 70804

Intern

Summer 1981
Senator Russell B. Long
United States Senate
Washington, D.C. 20510
Intern

Other Affiliations (uncompensated):

2005 – present
Clifton Hunt III Homeowners' Association
Clifton, Virginia
President (2013 – present)
Vice-President (2005 – 2012)

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

1986 – 1995 (Honorable Discharge)
United States Naval Reserve
Lieutenant, Selected Reserve (1990 – 1994), Inactive Ready Reserve (1994 – 1995)
Lieutenant (junior grade), Selected Reserve (1988 – 1990)
Ensign, Selected Reserve (1986 – 1988)

I registered for the selective service when I was 18.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Appellate Hot List, *National Law Journal* (2008, 2010, 2014)

Brief of the Week, *National Law Journal Supreme Court Insider* (March 20, 2013)

Supreme Court and Appellate, *Legal 500* (2010 – 2017)

Leading Individuals, *Benchmark Litigation* (2009 – 2018)

National Appellate Litigation Star, *Benchmark Litigation* (2010 – 2018)

Appellate Law Ranked Lawyers, *Chambers USA* (2009 – 2013)

Litigator of the Week, *AmLaw Litigation Daily* (May 7, 2009)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Federalist Society (1985 – present)

Executive Committee, Civil Rights Practice Group (1998 – 2002)

Republican National Lawyers Association (1992 – 1994; 1998 – 2002)

United States Court of Federal Claims Bar Association (2017 – present)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Louisiana, 1984 (inactive in 1988; reactivated in 1989; inactive in 2009 – 2018; reactivated in 2018)

Virginia, 1993

District of Columbia, 1995

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 1994

United States Court of Appeals for the First Circuit, 2003

United States Court of Appeals for the Second Circuit, 2002

United States Court of Appeals for the Third Circuit, 1997

United States Court of Appeals for the Fourth Circuit, 1993

United States Court of Appeals for the Fifth Circuit, 1986

United States Court of Appeals for the Sixth Circuit, 1999

United States Court of Appeals for the Seventh Circuit, 2003

United States Court of Appeals for the Eighth Circuit, 2002

United States Court of Appeals for the Ninth Circuit, 1998

United States Court of Appeals for the Tenth Circuit, 2001

United States Court of Appeals for the Eleventh Circuit, 2003

United States Court of Appeals for the District of Columbia Circuit, 1999

United States Court of Appeals for the Federal Circuit, 2000

United States District Court for the District of Columbia, 1998

United States District Court for the Eastern District of Virginia, 1994

United States District Court for the Western District of Virginia, 1995

United States District Court for the Middle District of Louisiana, 1995

United States District Court for the Western District of Louisiana, 1996
United States Court of Federal Claims, 1990
United States Court of International Trade, 2018

My membership in the bar of the United States Court of Appeals for the Second Circuit inadvertently lapsed at some point before 2012 when I did not renew it (I do not recall receiving notification of the renewal requirement). When the lapse was brought to my attention in 2012, I renewed my membership.

My membership in the bar of the United States District Court for the Middle District of Louisiana lapsed in 2009 because I did not renew it. I renewed my membership in 2018.

11. Memberships:

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

To the best of my recollection:

Boy Scouts of America, National Capital Area Council, Bull Run District, Troop 554

Committee Chair (2003 – 2011)

Eagle Award Coordinator (2013 – 2017)

Catholics for Dole-Kemp (1996)

Clifton Hunt III Homeowners' Association, Clifton, Virginia (2003 – present)

President (2013 – present)

Vice-President (2005 – 2012)

Fairfax County Republican Committee (1992 – 1996, 2010 – 2015)

Fairfax Station Swim and Tennis Club (2003 – present)

John Carroll Society (1995 – 2001)

Knights of Columbus (1994 – 1997, 2011 – present)

Lawyers for Bush-Quayle (1992)

Loisdale Estates Homeowners' Association, Springfield, Virginia (1992 – 1997)

National Rifle Association (2010 – 2013)

Northern Virginia Republican Business Forum (2014 – present)

Reagan Alumni Association (2010 – 2015)

Reserve Officers Association (1986 – 1995)

Supreme Court Historical Society (1998 – 2002)

U.S. Naval Institute (1986 – 2010, intermittently)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, with the exception of the Knights of Columbus, which is open to male Catholics.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

ERISA Broadly Preempts State Regulation of PBM-Pharmacy and PBM-Plan Agreements, McDermott on the Subject, July 26, 2018. Copy supplied.

State of Texas Sues Federal Government to Prompt Action on Yucca Mountain, McDermott on the Subject, March 27, 2017. Copy supplied.

Eighth Circuit Rules That ERISA Expressly Preempts Iowa Pharmacy Benefit Law, McDermott on the Subject, January 13, 2017. Copy supplied.

Supreme Court Grants Certiorari in Case Involving Auer Deference, McDermott on the Subject, November 1, 2016. Copy supplied.

False Advertising Law as a Weapon Against Scam PACs, The Hill, November 5, 2015. Copy supplied.

Why Federal Agencies Run Amok, Forbes.com, April 14, 2014. Copy supplied.

Non-Direct Competitors May Sue Under the Lanham Act, Doctrine of Prudential Standing Eliminated, McDermott on the Subject, April 2, 2014. Copy supplied.

Campaign Emails, Miller Baker for State Senate (April – November 2011). Copies supplied.

Dire Straits in the Federal Courts, Corp. Counsel, November 19, 2010. Copy supplied.

Supreme Court Clarifies “Principal Place of Business” Test for Diversity Jurisdiction, McDermott on the Subject, February 26, 2010. Copy supplied.

U.S. Supreme Court Approves Challenging Unconstitutional State Tax Breaks in Federal Court, McDermott on the Subject, June 18, 2004. Copy supplied.

Fools, Drunkards, & Presidential Succession, Federalist Society, December 2001. Copy supplied.

Letter to the Editor, Wkly. Standard, July 30, 2001. Copy supplied.

Letter to the Editor, New Republic, December 28, 1992. Copy supplied.

Letter to the Editor, Wall Street J., April 14, 1987. Copy supplied.

Letter to the Editor, Wall Street J., March 28, 1983. Copy supplied.

Letter to the Editor, Daily Reveille, October 21, 1980. Copy supplied.

I recall writing an op-ed or letter to the editor that the Daily Reveille (my college newspaper) published in the summer or fall of 1980 regarding inflation and monetary policy. I do not have a copy of this and have been unable to locate it.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

During my tenure at the Justice Department’s Office of Legal Policy, the office released several “Report[s] to the Attorney General,” including the following that

I recall contributing to:

Guidelines on Constitutional Interpretation (February 19, 1988). Copy supplied.

The Constitution in the Year 2000 (January 1, 1988). Copy supplied.

Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action (November 4, 1987). Copy supplied.

Original Meaning Jurisprudence: A Sourcebook (March 12, 1987). Copy supplied.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Re: Confirmation of Senator Jeff Sessions for Attorney General of the United States, Letter from former staff members of the United States Senate Committee on the Judiciary to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein, January 6, 2017. Copy supplied.

Presidential Succession Act, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, October 6, 2004. Copy supplied.

Ensuring the Continuity of the United States Government: The Presidency, Joint Hearing before the Committee on Rules and Administration and the Committee on the Judiciary, United States Senate, September 16, 2003. Original prepared statement supplied.

Temporary Filling of House of Representatives Vacancies During National Emergencies, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, February 28, 2002. Copy supplied.

On February 4, 1998, I testified before a joint hearing of the committees on Government Affairs of the Louisiana House of Representatives and Senate regarding possible legislative responses to the Supreme Court's decision in *Foster v. Love*. No record of my remarks is available. Press report: *Foster Shuns Primary Revamp; Plans Limited to Date Change*, New Orleans Times-Picayune, February 5, 1998. Copy supplied.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the

date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

To the best of my recollection and according to my records and the records of McDermott Will & Emery:

April 17, 2018: Panelist, *South Dakota v. Wayfair, Inc. Oral Argument Roundtable*, McDermott State and Local Tax, BNA Tax, and the Council on State Taxation. Transcript and press reports supplied.

May 21, 2015: Panelist, *When Should Non-Profits Have to Disclose Their Donors?*, Thomas Jefferson Institute for Public Policy Debate. Video recording available at <https://www.youtube.com/watch?v=41EIIuufqkM>.

March 28, 2013: Panelist, *Patent Settlements in the Pharmaceutical Industry: Reading the Tea Leaves of the Supreme Court Argument*, McDermott Webcast. Slides supplied.

November 14, 2012: Panelist, *Patent Settlements in the Pharmaceutical Industry: What Will the Future Hold?*, McDermott Webcast. Slides supplied.

June 29, 2012: Panelist, *Health Care in the High Court: The Supreme Court Decision*, McDermott Webcast. Slides supplied.

May 31, 2012: Panelist, *Health Care in the High Court: Preview of the Supreme Court Decision*, McDermott Webcast. Transcript and press report supplied.

May 19, 2012: Speaker, *Candidate for Republican National Convention Delegate*, 10th Congressional District Republican Convention, Leesburg, Virginia. I have no notes, transcript, or recording. The address of the 10th Congressional District Republican Committee is Post Office Box 650552, Potomac Falls, Virginia 20165.

March 29, 2012: Panelist, *Health Care in the High Court: Reading the Tea Leaves of the Supreme Court Arguments*, McDermott Webcast. Agenda supplied.

November 1, 2011: Speaker, *Candidate Forum*, South County Secondary School, Lorton, Virginia. Press report supplied.

October 19, 2011: Speaker, *Candidate Forum*, Robinson High School, Fairfax, Virginia. Video recording supplied.

October 12, 2011: Speaker, *Candidate Forum*, Prince William Committee of 100, Lake Ridge, Virginia. Video recording and press report supplied.

October 12, 2011: Speaker, *Candidate Debate*, Mt. Vernon/Lee Chamber of Commerce, Alexandria, Virginia. Video recording supplied.

October 4, 2011: Speaker, *Candidate Debate*, Greenspring Retirement Community, Springfield, Virginia. Video recordings supplied (the main recording omits my closing statement; the second recording is an excerpt that includes a portion of my closing statement).

October 2, 2011: Speaker, *Candidate Forum*, Beth El Hebrew Congregation, Alexandria, Virginia. Press report supplied.

September 23, 2011: Speaker, *Candidate Forum*, South County High School, Lorton, Virginia. Video recording supplied.

August 23, 2011: Speaker, *Primary Election Victory Party*, Lorton, Virginia. Press report supplied.

August 2, 2011: Speaker, *Primary Candidate Debate*, Greenspring Retirement Community Republican Club, Springfield, Virginia. Video recording supplied.

July 21, 2011: I gave brief remarks regarding my candidacy for state office at the Virginia Citizens Defense League Annandale, Virginia, July 21, 2011. I have no notes, transcript, or recording. The address of the Virginia Citizens Defense League is Post Office Box 513, Newington, Virginia 22122.

June 2, 2011: I gave brief remarks regarding my candidacy for state office at the Alexandria City Republican Committee, Alexandria, Virginia. I have no notes, transcript, or recording. The address of the Alexandria City Republican Committee is Post Office Box 245, Alexandria, Virginia 22313.

April 18, 2011: Speaker, *Primary Candidate Debate*, Republican Women of Clifton, Clifton, Virginia. I have no notes, transcript, or recording. The address of the Republican Women of Clifton is 12644 Chapel Road, Clifton, Virginia 20124.

March 15, 2011: I gave brief remarks regarding my candidacy for state office at the Lee District Republican Committee, Alexandria, Virginia, 2011. I have no notes, transcript, or recording. The address of the Lee District Republican Committee is 4246 Chain Bridge Road, Fairfax, Virginia 22030.

March 15, 2011: Speaker, *Candidate Forum*, Northern Virginia Tea Party, Falls Church, Virginia. I have no notes, transcript, or recording. The address of the

Northern Virginia Tea Party is Post Office Box 223472, Chantilly, Virginia 20153.

February 28, 2011: I gave brief remarks regarding my candidacy for state office at the Prince William County Republican Committee, Manassas, Virginia. I have no notes, transcript, or recording. The address of the Prince William County Republican Committee is 4431 Prince William Parkway, Woodbridge, Virginia 22192.

February 27, 2011: Speaker, *Campaign Kickoff*, Clifton, Virginia. Video recording supplied.

February 2, 2011: Speaker, *Primary Candidate Forum*, Fairfax County Republican Committee, Falls Church, Virginia. I have no notes, transcript, or recording. The address of the Fairfax County Republican Committee is 4246 Chain Bridge Road, Fairfax, Virginia 22030.

February 1, 2011: I gave brief remarks regarding my candidacy for state office at the Greenspring Retirement Community Republican Club, Springfield, Virginia. I have no notes, transcript, or recording. The address of the Greenspring Retirement Community Republican Club is 7410 Spring Village Drive, Springfield, Virginia 22150.

September 17, 2009: Panelist, *Developments in Federal Arbitration Practice*, McDermott Webcast. Written materials supplied.

March 20, 2008: Panelist, *Washington State Grange v. Washington State Republican Party*, Federalist Society SCOTUScast. Audio recording available at <https://fedsoc.org/commentary/podcasts/scotuscast-3-20-08-featuring-miller-baker>.

November 20, 2007: Panelist, *Washington State Grange v. Washington State Republican Party*, Federalist Society SCOTUScast. Audio recording available at <https://fedsoc.org/commentary/podcasts/scotuscast-11-20-07-featuring-miller-baker>.

October 23, 2003: *Presidential Succession*, Continuity of Government Commission, Brookings Institute and American Enterprise Institute. Video recording available at <https://www.c-span.org/video/?178820-2/presidential-succession>.

November 30, 2001: I spoke on election law reform to the New Orleans chapter of the Federalist Society. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

April 1, 2000 (approximate): I spoke at a conference on election policy sponsored

by the Voting Integrity Project in Washington, D.C. I have no notes, transcript, or recording. Press report supplied. The address of the Voting Integrity Project (a non-profit group that is no longer operational) was Post Office Box 6470, Arlington, Virginia 22206.

January 22, 1997: I spoke at the Racquet Club of Philadelphia at an event sponsored by the Federalist Society. The topic was civil rights law. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

Fall 1994 (approximate): I recall speaking at a meeting of my homeowners' association in Springfield, Virginia, as a surrogate for congressional candidate Kyle McSarrow. I have no notes, transcript, or recording.

Fall 1992 (approximate): I recall speaking at the Georgetown University Law School as a surrogate for the Bush-Quayle campaign. I have no notes, transcript, or recording. The address of Georgetown University Law School is 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

Fall 1980 (approximate): In college, I participated in a number of debates or talks on campus in connection with the 1980 presidential campaign. I have no notes, transcript, or recording. Undated press report supplied. The address of Louisiana State University is 1146 Pleasant Hall, Baton Rouge, Louisiana 70803.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Since I returned to private practice from the Senate Judiciary Committee staff in 1993, I have given numerous print, broadcast, and internet media interviews in connection with my own cases, as a commentator on legal issues, and in connection with my own campaign for elective office in 2011. I have searched Lexis-Nexis, Westlaw, Google, McDermott's records, and my own records for press reports of those interviews, and the results of those searches are as follows:

Obama's Supreme Court Pick Is Highly Regarded Antitrust Scholar, Deal, March 17, 2016. Copy supplied.

Getting to Know SCOTUS Nominee Merrick Garland, Bloomberg BNA Big Law Business, March 16, 2016. Copy supplied.

Scalia's Death Limits Chances for Pro-Business Rulings, Bus. Ins., February 29, 2016. Copy supplied.

Supreme Court Pick to Face Long Odds, Associated Press Online, February 24,

2016. Copy supplied.

Scalia's Legacy: A Court Transformed, The Hill, February 20, 2016. Copy supplied.

Remembering the Life, Career of Justice Scalia, Fox Business Network, February 19, 2016. Video recording available at <http://video.foxbusiness.com/v/4764817064001/?#sp=show-clips>

Why Obama Needs a "Sacrificial Lamb" for the Supreme Court, National Journal, February 18, 2016. Copy supplied.

Other Suits Seeking to Derail Health Care Reform; U.S. House of Representatives v. Burwell, Bus. Ins., January 4, 2016. Copy supplied.

Other Suits Seeking to Derail Health Care Reform; Matt Sissel v. Department of Health and Human Services, Business Insurance, January 4, 2016. Copy supplied.

High Court to Take on Religious Nonprofit Groups' Challenge to ACA Contraceptive Mandate, Bus. Ins., January 3, 2016. Copy supplied.

D.C. Circuit Vacates Halbig, Grants Rehearing En Banc, Tax Notes Today, September 5, 2015. Copy supplied.

The Appellate Hot List, McDermott Will & Emery, Nat'l L.J., November 17, 2014. Copy supplied.

Obamacare in the Supreme Court (Again), Marketplace, November 3, 2014. Copy supplied.

The Supreme Court 'What-If' Game, National Law Journal, September 1, 2014. Copy supplied.

Federal Court Ruling Orders Microsoft to Violate International Law, Legal Monitor Worldwide, August 4, 2014. Copy supplied.

Obamacare Fight Carries Risks for Republicans in 2016 Swing States, Bloomberg News, July 23, 2014. Copy supplied.

Aereo's Future in Doubt After Supreme Court Sides with Broadcasters, Bloomberg Television, June 25, 2014. I have no recording or transcript. I have supplied a contemporaneous summary prepared by McDermott's media department.

How Did Aereo Fare in Front of the Supreme Court?, Bloomberg Television,

contemporaneous summary prepared by McDermott's media department.

Court Opens Lanham Claims to Non-Direct Competitors, McDermott on the Subject, March 25, 2014. Copy supplied.

Lexmark May Be Liable for Attacking Printer-Cartridge Rivals, Supreme Court Says, Forbes.com, March 25, 2014. Copy supplied.

General Assembly Could Settle Race; Strategy Could Have Consequences if Used to Settle Razor-Thin Attorney General Race, Wash. Times, November 15, 2013. Copy supplied.

Attorney General's Race Still Too Close to Call, Wash. Post, November 14, 2013. Copy supplied.

Virginia AG Race: 'Anybody's Guess', Politico, November 13, 2013. Copy supplied.

Herring Adds to Lead in Late Count, Wash. Post, November 13, 2013. Copy supplied.

Novo Asks SCOTUS to Review Foreign Manufacturer Liability Wrinkles, Wash. Drug Letter, September 2, 2013. Copy supplied.

No Authorization, No Self-Defense for Killing in Iraq, Army Times, June 24, 2013. Copy supplied.

Supreme Court Denies Edmond Soldier's Petition, Edmond Sun (Oklahoma), June 3, 2013. Copy supplied.

Brief of the Week: Retired Military Brass Seek to Clarify Right of Self-Defense in Combat Zones, Nat'l L.J., March 20, 2013. Copy supplied.

Generic-Drug Deals Challenged in Supreme Court Case, Cong. Q. News, March 19, 2013. Copy supplied.

Retired Officers Petition High Court on Self-Defense Ruling, Army Times, March 18, 2013. Copy supplied.

President's 'Designated Survivor' Remembers Being on Call, Intelligencer, February 14, 2013. Copy supplied.

Clarity at Last; Providers Welcome Justices' Long-Awaited ACA Ruling, Will Focus Now on Implementing Law, Mod. Healthcare, July 2, 2012. Copy supplied.

Supreme Court Upholds Health Care Mandate, CNBC-TV, June 28, 2012. I have

no recording or transcript. I have supplied a contemporaneous summary prepared by McDermott's media department.

Ruling Could Redefine Federal Power; Court to Decide Fate of Health Law, Boston Globe, June 28, 2012. Copy supplied.

Obama Warns Supreme Court on Health-Care Law; U.S. President Says He's Confident Law Will Be Upheld, MarketWatch, April 2, 2012. Copy supplied.

Court Ambiguous on Health Care, But Insurers OK; Analysts Unsure on Justices' Direction After Landmark Hearings, MarketWatch, March 29, 2012. Copy supplied.

Obamacare Foes Score Points, But Kennedy's a Wild Card, Forbes.com, March 27, 2012. Copy supplied.

Court Heads to Core of Health Care Dispute; Justices Signal That Old Law Is No Barrier to Current Case, Boston Globe, March 27, 2012. Copy supplied.

Debate over Tax Law Marks Start of Health Care Case, Boston Globe, March 26, 2012. Copy supplied.

It's All or Nothing for Healthcare Challengers Today, Forbes.com, March 26, 2012. Copy supplied.

The Willis Report, Fox Business Network, November 25, 2011. Copy supplied.

The Willis Report, Fox Business Network, November 14, 2011. Copy supplied.

Direction of Legislature Likely to Hinge on N.Va.; Several Races Come Down to the Wire in 'Different' Year, Wash. Times, November 7, 2011. Copy supplied.

Fairfax School System Issues Are Creeping into Senate Race, Wash. Post, October 30, 2011. Copy supplied.

State Senate District 39, Wash. Post, August 18, 2011. Copy supplied.

Battle for the 39th; Two Republicans Vying to Take on Incumbent Sen. George Barker, Springfield Connection (Virginia), August 18, 2011. Copy supplied.

GOP Primary Challengers Fight over Senate Seats, Wash. Post, August 18, 2011. Copy supplied.

Can Miller Baker Translate Courtroom Experience to State Politics?, Burke Patch (Virginia), August 14, 2011. Copy supplied.

Taking on Barker; Two Republicans Vie to Challenge Incumbent Viewed as Vulnerable, Alexandria Gazette Packet (Virginia), August 10, 2011. Copy supplied.

Redistricting Alters Candidates' Battleground; Precincts Switch from Lee to Mount Vernon, Fairfax Connection (Virginia), June 8, 2011. Copy supplied.

Wham-O Hurls Constitutional Challenge to Patent Marking Statute, National Law Journal, November 16, 2010. Copy supplied.

Q&A with McDermott Will's Miller Baker, Law360, November 17, 2009. Copy supplied.

Litigator of the Week: M. Miller Baker of McDermott Will & Emery, The AmLaw Litigation Daily, May 7, 2009. Copy supplied.

High Court Reverses Andersen Arbitration Ruling, Law360, May 4, 2009. Copy supplied.

Supreme Court Backs Pension Termination over Merger, Financial Week, June 11, 2007. Copy supplied.

Full Circuit to Hear CAA Cases Jointly, Roll Call, May 2, 2005. Copy supplied.

Scholars Praise Succession Plan, Daily News (Los Angeles), October 7, 2004. Copy supplied.

It's Armageddon: Who's In Charge Here?, Fortune Int'l, February 9, 2004. Copy supplied.

Oregon Vote-by-Mail Plan Clears High Court, Wash. Times, April 16, 2002. Copy supplied.

Fox News, August 20, 2001. According to McDermott's media records, I was interviewed about Oregon's vote-by-mail system on this date. I have no notes, transcript, or recording.

U.S. Appeals Court Upholds State's Early Voting System, Chattanooga Times Free Press (Tennessee), August 4, 2001. Copy supplied.

Vote-by-Mail Law Upheld on Appeal, L.A. Times, July 12, 2001. Copy supplied.

Court Upholds Vote-by-Mail System, Associated Press Online, July 11, 2001. Copy supplied.

Gore's Hopes Rest with Florida Court: Democrat Pledge that New Challenge

Will Be Their Last Paves Way for Final Decision on Presidency by End of Week, The Guardian (London), December 6, 2000. Copy supplied.

Election 2000: Florida Supreme Court Sets a New Deadline and Oral Arguments, CNN Burden of Proof, December 5, 2000. Copy supplied.

Who Do You Think Is Going to Decide This Election?, CNN Talkback Live, November 30, 2000. Copy supplied.

Elections Law Experts Tackle the Big Issues, Hartford Courant, November 23, 2000. Copy supplied.

Palm Beach Story: Angry Voters, Contested Ballot; Disputes About Design Are Infrequent; Few Precedents for This Kind of Case, Wash. Post, November 11, 2000. Copy supplied.

With 12.6M At Stake, Reform Party Flap Rages, Times Union (Albany, New York), September 30, 2000. Copy supplied.

Voting on the Net: The Jury's Still Out; Is It a Boon to Democracy or a Promoter of Class Politics?, Star Trib. (Minneapolis), April 3, 2000. Copy supplied.

Inequality Seen in Voting Via the Internet; Minorities Have Less Access, Group Says, Richmond Times-Dispatch, April 2, 2000. Copy supplied.

Record Primary Turnout Dems' Vote Attracted Across Racial Lines, Arizona Republic, March 25, 2000. Copy supplied.

John McCain Returns to the Senate; General Election Cash Starts Flowing Early; Bush and Gore Battle over School Reform, CNN Inside Politics, March 20, 2000. Copy supplied.

Controversy over Online Voting in the Arizona Democratic Primary, Nat'l Pub. Radio Morning Edition, March 10, 2000. Copy supplied.

Student Briefing Page on the News, Newsday (New York), March 9, 2000. Copy supplied.

Net Voting Runs Up Against Rights Laws; Arizona Suit Asks Whether Various Minority Groups Had Fair Access, Atlanta Journal-Constitution, March 9, 2000. Copy supplied.

Lawsuit alleges bias in online vote - Group says Arizona Democrats' election on Internet excludes minorities, poor, Austin-American Statesman, March 9, 2000. Copy supplied.

"Digital Divide" Poses Challenge to First "E-lection", Cox News Service, March 8, 2000. Copy supplied.

U.S. Judge Allows Arizona to Accept Internet Votes, L.A. Times, March 1, 2000. Copy supplied.

Judge allows Demos to hold online vote, Arizona Daily Star, March 1, 2000. Copy supplied.

Anyone Can Run in N.H. All It Takes Is \$1,000, Even if There's a Boot on Your Head, Post-Standard (Syracuse, New York), February 1, 2000. Copy supplied.

Fifth Circuit Upholds Texas' Early Voting Laws, Associated Press, January 17, 2000. Copy supplied.

Voting by Mail, Nat'l Pub. Radio Weekend Edition, October 31, 1999. Copy supplied.

Vote-by-Mail System Hinges on the Definition of an Election, Associated Press State & Local Wire, September 14, 1999. Copy supplied.

Courts to Consider Challenge to Vote-by-Mail Voting System, Associated Press State & Local Wire, September 13, 1999. Copy supplied.

Test Case Challenges Mail Vote in Oregon; A Federal Court Today Will Consider Whether Early Ballots Violate an 1872 Law Declaring a Single Federal Election Day, Oregonian, September 13, 1999. Copy supplied.

Widow Seeks In-Law's Share of State Award; Brother Got \$10,000, Owes Finn \$13,000, Richmond Times-Dispatch, July 25, 1999. Copy supplied.

Finn Wants Share of In-Law's Award; Widow Asks to Garnish State Payment, Wash. Post, July 24, 1999. Copy supplied.

I recall being interviewed on the Diane Rehm Show in 1999 or 2000 to comment on a lawsuit challenging the lack of voting representation in Congress for citizens of the District of Columbia. I have no notes, transcript, or recording.

Virginia Group Tosses a Lawsuit into Oregon's Balloting on Vote-By-Mail, Oregonian, November 5, 1998. Copy supplied.

Judge's Louisiana Ruling May Give Boost to Plan for Preserving October Primary Date, Roll Call, May 14, 1998. Copy supplied.

Political Chaos on the Bayou: Court Nixes La. Elections, Roll Call, December 4, 1997. Copy supplied.

High Court Strikes Down Voting Rules in Louisiana, N.Y. Times, December 3, 1997. Copy supplied.

Court Takes up La. Open Primary; Justices Grill Ieyoub on Law, New Orleans Times-Picayune, October 7, 1997. Copy supplied.

Jenkins Fights Registrars' Bills; Copying Charges Called Excessive, New Orleans Times-Picayune, September 13, 1997. Copy supplied.

Jenkins' Group Claims Registrars Overcharged, Advocate (Baton Rouge, Louisiana), September 12, 1997. Copy supplied.

Jenkins Owes State \$60,000 for Election Probe, New Orleans Times-Picayune, February 26, 1997. Copy supplied.

Bills Mount for Jenkins Campaign; Elections Official Says Camp Owes More Than \$60,000, Advocate (Baton Rouge), February 25, 1997. Copy supplied.

Court Orders Changes in La. Primary System, New Orleans Times-Picayune, July 31, 1996. Copy supplied.

Louisiana's Open Primary System Violates Federal Law, Court Decides, Dallas Morning News, July 31, 1996. Copy supplied.

Conservatives Sue Va. and Democrats; Groups Seek Protection for Election Material, Wash. Post, October 10, 1995. Copy supplied.

Dispute over Voter Guides Revived in Suits, Richmond Times-Dispatch, October 5, 1995. Copy supplied.

Louisiana Suit Challenges State's Open Primary Law, Roll Call, August 10, 1995. Copy supplied.

Open Primary? Lawsuit Could Bring Welcome State Change, Shreveport J., August 10, 1995. Copy supplied.

Suit Asks for End of Open Primary; Party System Could Return, New Orleans Times-Picayune, August 9, 1995. Copy supplied.

Court Lifts Injunction on Voter Guide; Two Groups Plan Mass Distribution, Wash. Times, November 2, 1993. Copy supplied.

2 Groups Sue Judge over Voter-Guide Ban; Injunction Called Unconstitutional, Wash. Times, October 29, 1993. Copy supplied.

Judge Affirms Ban on Pro-Family Voting Guide, Wash. Times, October 28, 1993.
Copy supplied.

Election to End Quade/Baker Rivalry, Daily Reveille, November 4, 1980.

Reagan Proves Victorious in Low Turnout Mock Vote, Daily Reveille, undated
(presumably October 1980).

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have never held judicial office.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an “automatic” recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have never held judicial office.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have never held elective or appointive office. In 2011, I was a candidate for the Virginia Senate in the 39th District. I won the Republican nomination in a

contested primary with 73% of the vote, and lost the general election with 47% of the vote.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

As an attorney, I have provided legal services to the following candidates and election committees:

Cuccinelli for Governor (2013 – 2015)
Obenshain for Attorney General (2013)
Republican Party of Virginia (2013)
Vitter for Senate (2010)
Fimian for Congress (2010)
Republican National Committee (2004 – 2010)
Ashcroft for Senate (2000)
Keyes for President (2000)
National Republican Congressional Committee (1999 – 2000)
National Republican Senatorial Committee (1996 – 2000)
Ensign for Senate (1998)
Gilmore for Governor (1997)
Jenkins for Senate (1996)
Republican Party of Louisiana (1995)
Bush-Quayle Reelection Campaign (1992)

I have provided non-legal services to the following campaigns and election committees:

Northern Virginia Republican Business Forum PAC (hosted fundraiser) (2014)
Obenshain for Attorney General (hosted fundraiser) (2013)
Marshall for Delegate (canvassing) (2013)
Allen for Senate (hosted fundraiser) (2012)
Fimian for Congress (canvassing and hosted fundraiser) (2010)
Cuccinelli for Attorney General (hosted fundraiser) (2009)
Cuccinelli for State Senate (recount volunteer) (2007)
O'Brien for State Senate (hosted meet and greet) (2007)
Hatch for President (hosted fundraiser) (2000)
Vitter for Congress (raised money) (1999)
(John) Warner for Senate (poll watching) (1996)
Braunlich for School Board (hosted fundraiser) (1995)
Hatch for Senate (hosted fundraiser) (1994)
McSllarrow for Congress (poll watching and canvassing; hosted meet and greet; surrogate speaker) (1994)

Allen for Governor (poll watching and canvassing) (1993)
Bush-Quayle Reelection Campaign (surrogate speaker) (1992)
McSarrow for Congress (poll watching and canvassing) (1992)
Carter-Mondale Reelection Campaign (college student group chair) (1980)
Tauzin for Congress (research) (1980)
Treen for Governor (phone banking) (1979)
Huckaby for Congress (canvassing and sign placement) (1976)
Hughes for Louisiana Supreme Court (envelope stuffing) (1975)

I have held the following party and election committee offices and memberships:

Republican Party of Virginia, State Convention Delegate (1994, 1996, 2001, 2008, 2009, 2013)
Republican Party of Virginia, Congressional District Convention Delegate (CD8, 1996; CD11, 2008; CD10, 2012, 2016)
Fairfax County Republican Committee, Member (1992 – 1996, 2010 – 2015)
Young Democrats of Louisiana, Member (1979 – 1980)

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

After graduating from law school in May 1984, I began a clerkship the following July with Judge John M. Duhé, Jr., of the U.S. District Court for the Western District of Louisiana. That clerkship ended in the summer of 1985. I then began a clerkship with Judge Thomas G. Gee of the U.S. Court of Appeals for the Fifth Circuit, which ended in the summer of 1986.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1986 – 1989
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Special Assistant to the Assistant Attorney General, Civil Rights (1988 – 1989)

Attorney-Advisor, Office of Legal Policy (1986 – 1988)

1989

Myerson & Kuhn

[this firm closed on October 31, 1989]

1001 Pennsylvania Avenue, N.W.

Suite 275 North

Washington, D.C. 20004

Associate

1989 – 1991

Dilworth, Paxson, Kalish & Kauffman

[this branch office no longer exists]

1001 Pennsylvania Avenue, N.W.

Suite 275 North

Washington, D.C. 20004

Associate

1991

Carr Goodson & Lee, P.C.

[now Carr Maloney, P.C.]

1919 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

Associate

1991 – 1993

U.S. Senate Committee on the Judiciary

Dirksen Senate Office Building

Washington, D.C. 20510

Counsel to Senator Orrin Hatch

1993 – 2000

Carr Goodson Warner, P.C.

[now Carr Maloney, P.C.]

1301 K Street, N.W., Suite 400 East Tower

Washington, D.C. 20005

Partner (1996 – 2000)

Associate (1993 – 1995)

2000 – present

McDermott Will & Emery LLP

500 North Capitol Street, N.W.

Washington, D.C. 20001

Partner

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

After my judicial clerkships, I served in the Justice Department from July 1986 until January 1989, where I provided legal and policy advice to senior Justice Department officials. From 1989 to 1991, as a junior associate in private practice, my practice focused primarily on securities litigation, with a brief introduction to insurance coverage in 1991. From 1991 to 1993, I took a sabbatical from private practice to serve as counsel to the Senate Judiciary Committee, where I provided legal and policy advice to Senator Orrin Hatch on issues before the committee. In 1993, I returned to private practice, and my focus over the following seven years was primarily insurance coverage and election-related litigation in state and federal courts across the country. Beginning in 2000 with my move to McDermott Will & Emery, my practice evolved over time into an “issues and appeals” practice encompassing a wide range of civil (and occasionally white-collar criminal) matters reflecting McDermott’s very broad practice. In 2006, I was appointed co-chair of McDermott’s appellate practice group, and I have continued in that role until the present.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

From 1989 to 1991, I principally represented publicly-traded corporations and individuals in securities litigation. From 1993 until the 2000s, I represented major insurance companies in coverage litigation in a national practice. During the same time period, I represented national campaign committees, political candidates, state political parties, non-profit entities, and individuals in a national election-law practice. Beginning in 2000 with my move to McDermott Will & Emery, my practice gradually evolved into an “issues and appeals” litigation practice representing major publicly-traded corporations, privately-held businesses, nonprofit entities, agricultural cooperatives, and national trade associations in myriad subject matters reflecting McDermott’s very broad practice footprint, including health care, patents and intellectual property, energy, environmental law, securities and white collar defense, food and beverage, administrative law, antitrust, employee benefits, agro-business, insurance, international trade,

federal tax, and state and local tax.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Virtually 100% of my practice has involved actual or anticipated litigation. I have appeared in federal and state trial courts in 17 states and the District of Columbia to argue injunctions, dispositive motions, and other motions. I have argued 19 appeals in federal and state appellate courts, including appeals in nine of the 13 federal courts of appeals. In addition to appearing in trial and appellate courts, I have drafted and/or edited hundreds of trial and appellate court briefs, including in cases in which I neither appeared in court nor appeared on the papers. I have also mooted dozens of trial and appellate arguments for colleagues and co-counsel.

- i. Indicate the percentage of your practice in:

1. federal courts:	88%
2. state courts of record:	10%
3. other courts:	0%
4. administrative agencies:	2%

- ii. Indicate the percentage of your practice in:

1. civil proceedings:	98%
2. criminal proceedings:	2%

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

My practice has always focused on complex civil litigation, which is infrequently resolved at the trial court level in trials. With one exception (a case resolved through a bench trial), all of the matters that I have litigated in trial courts were resolved at that level either by settlement—in one major case, on the eve of trial—or by dispositive motion. As sole counsel, chief counsel, and associate counsel, I have litigated numerous cases to a final decision at the trial court stage by way of dispositive motion or post-judgment motion.

Since 2006, as co-chair of McDermott's appellate practice, my practice has involved "issues and appeals." In the context of trial court proceedings, that means serving as lead counsel in cases involving purely legal issues. In trial court cases involving or potentially involving evidentiary hearings with jury or bench trials, that means serving as lead counsel with regard to dispositive, pre-trial, and post-trial motions turning on legal questions.

- i. What percentage of these trials were:
 - 1. jury: 0%
 - 2. non-jury: 100%

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

(1) I have argued three cases in the Supreme Court as counsel of record:

Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009)
Beck v. PACE Int'l Union, 551 U.S. 96 (2007)
Foster v. Love, 522 U.S. 67 (1997)

Transcripts and briefs supplied.

(2) I have been co-counsel at the merits stage for parties in seven Supreme Court cases:

Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016)
Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016)
Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014)
Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013)
FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007)
Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (per curiam)
Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005)

(3) I have been counsel of record or co-counsel at the merits stage for *amici curiae* in ten Supreme Court cases:

Frank v. Gaos, No. 17-961
Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067 (2018)
Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015)
Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015)
Horne v. Dep't of Agric., 569 U.S. 513 (2013)
Randall v. Sorrell, 548 U.S. 230 (2006)
Texaco Inc. v. Dagher, 547 U.S. 1 (2006)
Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005)
Gutierrez v. Ada, 528 U.S. 250 (2000)
Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)

(4) I have been co-counsel for a party in one case in which the opposing party sought emergency relief from the Supreme Court:

Democratic Nat'l Comm. v. Republican Nat'l Comm., 543 U.S. 1304 (2004)
(Souter, J., in chambers)

(5) I have been counsel of record or co-counsel at the certiorari and jurisdictional (i.e., direct appeals from three-judge district court panels) stages for parties in 31 cases in the Supreme Court. (An asterisk indicates that the Supreme Court granted certiorari or noted probable jurisdiction; in three cases in which I was counsel of record for the petitioner or petitioners, the Court granted the petition for a writ of certiorari.)

Pfeil v. State St. Bank & Tr. Co., No. 15-1199
**Universal Health Servs., Inc. v. United States ex rel. Escobar*, No. 15-7
Zebrowski v. Evonik Degussa Corp. Admin. Comm., No. 14-703
**Gobeille v. Liberty Mut. Ins. Co.*, No. 14-181
Corr v. Metro. Wash. Airports Auth., No. 13-1559
Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., No. 13-269
**Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873
Stora Enso N. Am. v. Parliament Paper, Inc., No. 12-569
State St. Bank & Tr. Co. v. Pfeil, No. 12-256
Extreme Networks, Inc. v. Enterasys Networks, Inc., No. 10-1199
Borden v. Sch. Dist. of E. Brunswick, No. 08-482
Aristocrat Techs. Austl. Pty Ltd. v. Int'l Game Tech., No. 08-446
**Arthur Andersen LLP v. Carlisle*, No. 08-146
Cemco Inv'rs, LLC v. United States, No. 07-1526
Convolve, Inc. v. Seagate Tech., LLC, No. 07-656
**FEC v. Wis. Right to Life, Inc.*, No. 06-969
Blackwater Sec. Consulting, LLC v. Nordan, No. 06-857
City of Gettysburg v. United States, No. 06-235
**Beck v. PACE Int'l Union*, No. 05-1448
Christian Civic League of Me., Inc. v. FEC, No. 05-1447
Reenas Tech. Am., Inc. v. United States, No. 05-986
**Wis. Right to Life, Inc. v. FEC*, No. 04-1581
McEnroe v. Ramirez, No. 03-871
Boca Investering P'ship v. United States, No. 02-1859
Continental Ins. Co. v. Allianz Ins. Co., No. 02-1275
Carson Harbor Vill., Ltd. v. Braley, No. 01-1091
Decker v. Bradbury, No. 01-732
Logitech, Inc. v. Gart, No. 01-710
Voting Integrity Project, Inc. v. Bomer, No. 99-1685
Jordahl v. Democratic Party of Va., No. 97-859
**Foster v. Love*, No. 96-670

(6) I have been counsel of record or co-counsel at the certiorari stage for *amici curiae* in six Supreme Court cases:

Xue v. Sessions, No. 16-1274

Metro. Edison Co. v. Pa. Pub. Util. Comm'n, No. 14-995
Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs, No. 14-493
Behenna v. United States, No. 12-802
Deloitte & Touche LLP v. RGH Liquidating Tr., No. 11-510
CropLife Am. v. Baykeeper, Nos. 09-533, 09-547

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) *Maynard v. CGI Techs. & Sols. Inc.*, 227 F. Supp. 3d 773 (E.D. Ky. 2017); *Maynard v. CGI Techs. & Sols. Inc.*, No. 3:16-cv-0037-GFVT, 2017 WL 5749668 (E.D. Ky. March 31, 2017), *vacated sub nom. Atkins v. CGI Techs. & Sols. Inc.*, No. 17-5506, 2018 WL 798393 (6th Cir. February 9, 2018), on remand, *Atkins v. CGI Techs. & Sols., Inc.*, No. 3:16-CV-0037-GFVT, 2018 WL 4344457 (E.D. Ky. 2018)

In this litigation, I represented CGI Technologies and Solutions Inc. ("CGI") as lead appellate counsel. The case involved important questions regarding the scope of "reverse preemption" under the McCarran-Ferguson Act.

In 2016, the liquidator of an insolvent Kentucky health insurer sued CGI in Kentucky state court for contract and tort claims arising out of CGI's provision of administrative services to the insolvent insurer. CGI removed the action to the U.S. District Court for the Eastern District of Kentucky on the basis of diversity jurisdiction, and brought a separate federal court action under the Federal Arbitration Act ("FAA") to compel arbitration of the liquidator's claims. The district court (Van Tatenhove, J.) denied the motion to compel arbitration without prejudice.

CGI took an interlocutory appeal to the Sixth Circuit, and I argued that appeal before a panel comprising Judges Keith, McKeague, and Stranch. The issues presented on appeal included whether state law "reverse preempts" the federal diversity jurisdiction statute and the FAA by operation of the McCarran-Ferguson Act, and whether the text of the FAA forecloses application of the *Burford* and *Colorado River* abstention doctrines as a matter of law when arbitration is sought. On February 9, 2018, in an unpublished opinion, the panel vacated the district court's order denying

arbitration. The panel held that Kentucky law did not “reverse preempt” the FAA by operation of the McCarran-Ferguson Act, declined to abstain on the basis of the *Burford* and *Colorado River* abstention doctrines, and remanded for further proceedings in the district court.

On remand, the district granted CGI’s motion to compel arbitration, and stayed proceedings pending arbitration.

Principal co-counsel:

Margaret H. Warner
McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 756-8000

Douglas L. McSwain
Wyatt, Tarrant & Combs LLP
250 West Main Street, Suite 1600
Lexington, Kentucky 40507
(859) 288-7471

Principal opposing counsel:

Perry M. Bentley
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
(859) 231-3000

(2) *Brigham and Women’s Hosp., Inc., v. Perrigo Co.*, Nos. 17-1950, 17-2021 (Fed. Cir. 2017).

Brigham and Women’s Hospital (“Brigham”) brought this patent infringement case against Perrigo Company (“Perrigo”) in the U.S. District Court for the District of Massachusetts. After the jury found Perrigo liable for patent infringement and awarded \$10.2 million in damages, the clerk of the district court purported to enter “judgment” against Perrigo. The clerk’s “judgment,” however, did not dispose of the plaintiff’s claim for enhanced damages. Perrigo filed post-judgment motions and appealed to the Federal Circuit. The district court then ruled that Perrigo’s post-judgment motions and appeal were untimely. In the same order, the district court also denied Brigham’s claim for enhanced damages, thus resolving the last open merits issue in the case.

Although I was not involved in the trial or post-judgment motion practice in the district court, I became involved in the litigation as lead appellate counsel for Perrigo

after the district court ruled that Perrigo's post-judgment motions were untimely. Perrigo appealed to the Federal Circuit from the district court's order denying its post-judgment motions and refiled those motions on the theory that the district court's ruling on enhanced damages created a "final decision" for purposes of the Federal Circuit's appellate jurisdiction under 28 U.S.C. § 1295(a)(1).

In the Federal Circuit, Brigham moved to dismiss Perrigo's original appeal and to limit the issues in Perrigo's second appeal to the district court's final order. Judge Wallach, sitting as a single circuit judge under Federal Rule of Appellate Procedure 27, denied the motion to dismiss Perrigo's original appeal and to limit the issues in Perrigo's second appeal, reasoning that although the district court's original "judgment" may have been "final except for an accounting" for purposes of the Federal Circuit's interlocutory appellate jurisdiction under 28 U.S.C. § 1292(c), it was not a "final decision" for purposes of the Federal Circuit's appellate jurisdiction under 28 U.S.C. § 1295(a)(1) because it did not dispose of Brigham's claim for enhanced damages. Judge Wallach further noted that interlocutory appeals from § 1292(c) judgments are permissive, not mandatory, and that Perrigo was free to wait to appeal all issues upon the entry of a "final decision" for purposes of § 1295(a)(1). Judge Wallach then deactivated the appeals pending the district court's resolution of Perrigo's refiled post-judgment motions, which were necessarily timely under Judge Wallach's reasoning.

Brigham moved for reconsideration, contending, *inter alia*, that Judge Wallach's order was procedurally improper. The full motions panel, in an opinion written by Judge Wallach and joined by Judges Newman and Stoll, denied Brigham's motion for reconsideration and reaffirmed (at greater length) the reasoning of Judge Wallach's original order.

When the district court subsequently considered Perrigo's refiled post-judgment motions on the merits, it granted Perrigo's motion for judgment as a matter of law on non-infringement, which had the effect of vacating the judgment against Perrigo. The district court thereafter entered an amended final judgment in favor of Perrigo. At the time I submitted this questionnaire response, appeals were pending from the amended final judgment.

Principal opposing counsel:

James M. Bollinger
Troutman Sanders LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000

(3) *Pharm. Care Mgmt. Ass'n v. Gerhart*, No. 4:14-cv-00345 (S.D. Iowa); 852 F.3d 722 (8th Cir. 2017)

In this litigation, I represented the Pharmaceutical Care Management Association (“PCMA”), the national trade association for pharmacy benefit managers (“PBMs”), in an important case regarding the scope of express preemption under the Employee Retirement Income Security Act of 1974 (“ERISA”). PBMs administer the prescription drug benefit for health plans, including health plans governed by ERISA.

In 2013, the Iowa Legislature enacted a statute regulating prices set in contracts between PBMs and retail pharmacies and requiring PBMs to report pricing information to the state. PCMA challenged the law in district court on various grounds, including that ERISA expressly preempted the Iowa law insofar as it regulated PBMs serving as third-party-administrators for ERISA plans. I assumed the role of lead counsel for PCMA after the complaint was filed.

Iowa moved to dismiss PCMA’s complaint for failure to state a claim. After a motions hearing where I argued for PCMA, the district court (Jarvey, J.) granted Iowa’s motion to dismiss for failure to state a claim. PCMA then appealed to the Eighth Circuit, where I argued the appeal. The court of appeals, in an opinion by Judge Perry (of the U.S. District Court for the Eastern District of Missouri, sitting by designation) and joined by Judges Murphy and Shepherd, reversed the district court. The court reasoned that the challenged Iowa statute had both a prohibited “reference to” and “connection with” ERISA plans for purposes of ERISA express preemption. As to the former ground, the Iowa statute contained impermissible explicit and implicit references to ERISA plans. As to the latter ground, the Iowa statute impermissibly dictated ERISA plan choices and interfered with uniformity in ERISA plan administration. The court of appeals also accepted PCMA’s request to enter judgment in favor of PCMA on the purely legal question of ERISA preemption, rather than remand for further proceedings, even though the case was on appeal from the district court’s grant of a Federal Rule of Civil Procedure 12(b)(6) motion.

Co-counsel:

Jason M. Casini
Whitfield & Eddy, PLC
699 Walnut Street
Des Moines, Iowa 50309
(515) 246-5580

Principal opposing counsel:

Jordan Esbrook
Assistant Attorney General
Office of the Attorney General
Hoover State Office Building
1305 East Walnut Street
Des Moines, Iowa 50319
(515) 281-8159

(4) *Harrington v. Ciba Vision Corp.*, No. 3:08-cv-00251 (W.D.N.C.); *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321 (Fed. Cir. 2010); *United States ex rel. FLFMC, LLC v. Wham-O, Inc.*, No. 11-1067 (Fed. Cir.).

These related cases involved fundamental issues of Article III standing, the separation of powers under Article II, and the structural Constitution.

The patent marking statute, 35 U.S.C. § 292, imposes liability for civil penalties on any person who marks any unpatented article with the word “patent” or a number indicating that the product is protected by a patent. Until 2011, § 292 also contained a *qui tam* provision allowing a relator to sue to recover the penalty, which if awarded was divided equally between the government and the relator. Approximately ten years ago, creative plaintiff lawyers began to use § 292’s *qui tam* provision to harass companies that were selling products with expired patent numbers, even though the relators bringing the action suffered no actual harm themselves from the expired patent numbers. Over one thousand such suits were filed across the country, mainly for the purpose of extracting settlements. One of those harassed companies was my client Ciba Vision, which was sued in the U.S. District Court for the Western District of North Carolina because one of its products was marked with an expired patent number.

I appeared in that suit in 2009 for the purpose of asserting two distinct constitutional challenges to the *qui tam* provision of § 292, and the United States intervened for the purpose of defending the statute. First, I contended that the relator lacked constitutional standing under Article III because the relator lacked any personal injury-in-fact. The injury to the government’s *sovereign* interest in compliance with its laws—in contrast to the government’s proprietary interest in recovering damages—is not assignable and thus could not confer Article III standing on the relator. Second, I contended that the *qui tam* provision of § 292 violated the separation of powers, and specifically the Take Care Clause and Appointments Clause of Article II of the Constitution, by delegating to the relator the Executive Branch’s exclusive law enforcement authority.

After two motions hearings at which I argued for Ciba Vision, the district court (Whitney, J.) rejected those arguments and declined our request to certify those issues to the U.S. Court of Appeals for the Federal Circuit for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). One of my colleagues then proceeded to try the merits of the case and won. The relator declined to appeal.

In the meantime, Brooks Brothers was one of the hundreds of other companies sued for false patent marking (in its case because a bow tie contained an expired patent number), and the district court in that case dismissed the relator’s case for lack of Article III standing. The relator appealed to the Federal Circuit, where I filed an *amicus curiae* brief on behalf of Ciba Vision in support of Brooks Brothers. My brief asserted both Article III standing and Article II separation of powers challenges to the

qui tam provision of § 292. In an opinion written by Judge Lourie, joined by Chief Judge Rader and Judge Moore, the court of appeals held that the reasoning of the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000)—which upheld the Article III standing of *qui tam* relators in the False Claims Act context on the basis that the assignment of the government's damages claim supplied the relator's standing—applied in this context, even in the absence of proprietary injury to the United States. The panel expressly declined to consider my Article II separation of powers argument, as Brooks Brothers failed to raise that argument either below or on appeal. Brooks Brothers then declined to seek certiorari in the Supreme Court on the Article III standing issue.

The next false marking case to make its way to the Federal Circuit involved Wham-O, the Frisbee manufacturer. Unlike Brooks Brothers, Wham-O challenged the constitutionality of the *qui tam* provision of § 292 on Article II separation of powers grounds, and I filed an *amicus curiae* brief in support of Wham-O on behalf of the U.S. Chamber of Commerce. The Federal Circuit granted leave for me to argue on behalf of the Chamber, which I did on July 11, 2011. Several weeks after argument, Congress repealed the *qui tam* provision in § 292. The Federal Circuit then dismissed the appeal as moot.

Counsel for the United States in *Harrington*:

Gordon A. Jones
Civil Division
U.S. Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
(202) 307-0473

Counsel for the relator in *Harrington*:

Glen A. Cipriani
The Harrington Practice
10130 Mallard Creek Road, Suite 110
Charlotte, North Carolina 28262
(704) 315-5804

Counsel for Brooks Brothers:

Stephen Baker
Baker and Rannells, PA
92 East Main Street, Suite 302
Somerville, New Jersey 08876
(908) 722-5640

Counsel for the United States in *Brooks Brothers*:

Douglas Letter
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3602

Counsel for the relator in *Brooks Brothers*:

The relator, Raymond Stauffer, represented himself *pro se*.

Counsel for Wham-O:

Andrew J. Dhuey
456 Boynton Avenue
Berkeley, California 94707
(510) 528-8200

Counsel for the United States in *Wham-O*:

Douglas Letter
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3602

Counsel for the relator in *Wham-O*:

David G. Oberdick
Meyer, Unkovic & Scott LLP
535 Smithfield Street, Suite 1300
Pittsburgh, Pennsylvania 15222
(412) 456-2800

(5) *Xilinx, Inc. v. Comm’r of Internal Revenue*, 598 F.3d 1191 (9th Cir. 2010).

This case involved a critical issue of “transfer pricing” tax law governing intercompany transactions under § 482 of the Internal Revenue Code and its associated regulations. Those regulations govern how a company’s true taxable income is determined in connection with controlled transactions, that is between the taxpayer and a related or affiliated entity. I represented Cisco Systems as *amicus curiae* in support of a successful petition for panel rehearing in the Ninth Circuit.

Xilinx, a major U.S. technology company, entered into a cost-sharing arrangement with its Irish subsidiary to develop certain technology. The agreement required the parties to share associated costs and provided that the parties would jointly own the technology.

In the tax years in question, Xilinx fully deducted expenses associated with stock options exercised by employees involved in the joint venture with the subsidiary. The Internal Revenue Service partly disallowed those deductions on the basis that those costs should have been shared with the Irish subsidiary. Xilinx then sued in the U.S. Tax Court, which found that two non-related entities dealing with each other at arm's length would not share costs of employee stock options, and held that the IRS's disallowance of Xilinx's deductions was arbitrary and capricious under § 482 regulations.

A divided Ninth Circuit panel comprising Judges Reinhardt, Noonan, and Fisher reversed the Tax Court. 567 F.3d 482 (9th Cir. 2009). Writing for the majority, Judge Fisher recognized that one § 482 regulation supported the taxpayer—it required that the “arms-length” standard be applied “in every case.” Under that standard, Xilinx's deductions were fully permissible because a similarly-situated company dealing at arm's length with a non-related entity in a comparable transaction would not have shared employee stock option costs. On the other hand, another regulation required that “all costs” related to transactions—such as the one at issue—be shared. Applying the canon of construction that the more specific controls over the more general, Judge Fisher's majority opinion held that the latter regulation controlled over the former regulation. Judge Noonan dissented, contending, among other things, that the canon of construction applied by the majority defeated the purpose of § 482—which was to place intercompany transactions on the same footing as arm's-length transactions between unrelated entities—and thus should be disregarded.

Xilinx petitioned for panel rehearing or rehearing en banc. In support of that petition, my McDermott colleagues and I filed an *amici curiae* brief on behalf of Cisco Systems, which was exposed to at least \$720 million in additional tax liabilities if the panel decision remained intact. Thirty-two other major U.S. corporations—representing over two trillion dollars in market capitalization and a broad cross-spectrum of industries significant to the U.S. economy—joined our brief as *amici*. Our brief argued that the panel decision upset settled business expectations, imposed potentially billions of dollars of unforeseen costs on *amici*, and created staggering financial uncertainties.

The panel withdrew its prior decision, granted rehearing without argument, and issued a new (divided) decision, this time written by Judge Noonan and joined by Judge Fisher. 598 F.3d 1191. Judge Noonan's opinion reasoned that the purpose of § 482 resolved the conflict between the two regulations, and that Treasury's interpretation of a tax treaty between the U.S. and Ireland further confirmed this conclusion. Judge Fisher, in a concurring opinion, explained that in light of the ambiguity created by the conflicting regulations, he was persuaded to change his view

in part by “what appears to have been the understanding of corporate taxpayers in similar circumstances and others.” 598 F.3d at 1198 n.2 (citing, *inter alia*, Cisco’s *amici* brief). Judge Reinhardt dissented.

Co-counsel for Cisco Systems:

Rory Little
[Of counsel to McDermott Will & Emery]
Hastings College of the Law
Professor of Law
200 McAllister Street
Room 329
San Francisco, California 94102
(415) 225-5190

Roderick Donnelly
[formerly with McDermott]
Morgan Lewis LLP
1400 Page Mill Road
Palo Alto, California 94304
(650) 843-7289

Frederick R. Chilton
[formerly with McDermott]
KPMG
3975 Freedom Circle
Santa Clara, California 95054
(408) 367-5764

Principal counsel for Xilinx:

Seth Waxman
Wilmer Hale
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6800

Counsel for the United States:

Arthur Catterall
U.S. Department of Justice
Tax Division/Appellate Section
Room 4333
P.O. Box 502
Washington, D.C. 20044
(202) 514-2937

Richard Farber
U.S. Department of Justice
Tax Division/Appellate Section
P.O. Box 502
Washington, D.C. 20044
(202) 514-2959

(6) *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

This case involved important questions concerning appellate jurisdiction under the Federal Arbitration Act (“FAA”) and the rights of non-signatories to arbitration agreements to enforce such agreements. I represented Arthur Andersen as counsel of record in the Supreme Court at both the certiorari and merits stages. I was not involved in the proceedings below.

After being sued in the U.S. District Court for the Eastern District of Kentucky on tort claims arising out of the provision of professional services, Andersen moved to arbitrate pursuant to an arbitration clause in a contract between the plaintiffs and a third party involved in the same transaction. The district court denied arbitration, which Andersen immediately appealed to the Sixth Circuit under the FAA’s interlocutory appeal provision. The Sixth Circuit held that because Andersen had not signed the contract containing the relevant arbitration clause, Andersen had neither any right of interlocutory appeal nor any cognizable arbitration rights. In so holding, the Sixth Circuit relied upon the reasoning of a then-recent D.C. Circuit decision written by then-Judge John G. Roberts.

Andersen petitioned for certiorari, which the Supreme Court granted. After merits briefing, I argued for Andersen. In an opinion by Justice Scalia, joined by Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito, the Supreme Court reversed the Sixth Circuit, disapproved of the reasoning of the D.C. Circuit decision that the Sixth Circuit had followed, and adopted both of our arguments: (1) the denial of a motion to stay pending arbitration is immediately appealable under the FAA, regardless of whether the party moving to stay is a signatory to the arbitration agreement; and (2) whether a non-signatory can enforce an arbitration agreement is a question of state, not federal, law. (No court of appeals that had previously addressed these questions had articulated the second proposition that we persuaded the Supreme Court to adopt.) The Court then remanded the case to the Sixth Circuit to determine whether Andersen’s claim to enforce the arbitration agreement was cognizable under state law. Justice Souter, joined by Chief Justice Roberts and Justice Stevens, filed a dissent.

Since this case was decided by the Supreme Court in 2009, it has been cited over 500 times by lower courts.

Principal Co-counsel:

Paul Thompson
McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 756-8032

Douglas Whitney
[formerly with McDermott]
Douglas Whitney Law Offices LLC
321 N. Clark Street, Suite 1301
Chicago, Illinois 60654
(312) 279-0510

Principal opposing counsel:

Paul M. De Marco
Waite, Schneider, Bayless & Chesley Co., L.P.A.
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
(513) 621-0267

(7) *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007).

This case involved an important issue under the Employee Retirement Income Security Act of 1974 (“ERISA”). I represented Jeffrey Beck, a bankruptcy trustee, as counsel of record in the Supreme Court at both the certiorari and merits stages. I was not involved in the proceedings below.

Mr. Beck was trustee of an insolvent company that was sued under ERISA for breach of fiduciary duty because the company, upon filing for bankruptcy and terminating its pension plan through the purchase of individual annuities, rejected a union’s proposal to merge the plan into the union’s pension plan. The bankruptcy court, the California district court, and the Ninth Circuit all held that the company breached its fiduciary duty in failing to give full consideration to the union’s proposal. The Ninth Circuit denied rehearing en banc.

The Supreme Court granted Mr. Beck’s petition for certiorari. After merits briefing, I argued for Mr. Beck. The Court reversed the Ninth Circuit in a unanimous opinion written by Justice Scalia. The Court reasoned that the company did not breach any fiduciary duty in failing to consider the union’s proposal because merger is not a permissible method of terminating a single-employer pension plan under ERISA.

Principal co-counsel:

David Rogers
[formerly with McDermott]
Winston & Strawn
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5885

Principal counsel for the United States as *amicus curiae*:

Matthew Roberts
[formerly Assistant to the Solicitor General]
U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002
(202) 502-4500

Principal opposing counsel:

Julia Penny Clark
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-2600

(8) *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 02-cv-5835 (S.D.N.Y.); *Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436 (2d Cir. 2005); *Mt. McKinley Ins. Co. v. Corning Inc.*, 818 N.Y.S.2d 73 (N.Y. App. Div. 1st Dep't 2006)

These related cases involved a “forum battle” to determine where the merits of an insurance coverage dispute would be litigated, as well as important questions of bankruptcy law and federal jurisdiction.

For almost a decade, I represented the CNA Insurance Companies in litigation and extended mediations in connection with the insurance coverage of asbestos liabilities stemming from asbestos products manufactured by Pittsburgh Corning Corporation, which filed for bankruptcy in the Western District of Pennsylvania in 2000. Corning Inc.—a 50% owner of Pittsburgh Corning— was sued in connection with those liabilities and in turn sought insurance coverage from its insurers.

One of those insurers, Mt. McKinley Insurance Company, brought a comprehensive declaratory judgment action in New York state court against Corning and its other insurers seeking a declaration of the rights and obligations of the parties with respect to Corning’s liabilities stemming from Pittsburgh Corning’s asbestos products. Corning removed the suit to the U.S. District Court for the Southern District of New York, and sought to have the litigation transferred to the Western District of

Pennsylvania, where the Pittsburgh Corning bankruptcy was pending and where Corning filed a competing adversary proceeding against its insurers. The insurers in turn moved to remand the litigation to New York state court for lack of subject matter jurisdiction and on the basis of mandatory abstention under the bankruptcy code.

After a motions hearing where I argued for CNA, Judge Cote of the Southern District of New York granted the motion to remand as to most of Corning's insurers, but denied the motion as to certain "affiliate" policies issued by certain insurers under which Pittsburgh Corning also claimed coverage. Judge Cote reasoned that Corning's claims on the "affiliate" policies implicated core bankruptcy jurisdiction and thus did not satisfy the requirements for mandatory abstention. Judge Cote then stayed the case. The state court in turn stayed those claims that had been remanded.

As lead appellate counsel for the "affiliate" insurer group, I argued appeals from both the federal district court's order denying remand and the state court's stay order.

In the insurers' appeal from the federal district court's order denying remand as to the "affiliate" policy claims, the Second Circuit, in an opinion by Judge Pooler, and joined by Judges Wesley and Cardamone, adopted our arguments and reversed the district court, holding: (1) the court of appeals had appellate jurisdiction over the insurers' appeal under the collateral order doctrine; (2) the bankruptcy code's mandatory abstention provision applies to removed actions (and overruling a long line of contrary decisions in the Southern District of New York in so holding); and (3) Corning's claims on the relevant insurance policies did not implicate "core" bankruptcy jurisdiction, and therefore mandatory abstention (requiring remand to state court) was appropriate if the claims could be timely adjudicated in state court. The Second Circuit remanded the case to the district court, which in due course remanded the "affiliate" policy claims to state court.

In the appeal of the state court's stay order, the First Department of the Appellate Division of the Supreme Court of New York reversed the state trial court's stay of proceedings. In a 3-2 decision written by Justice Sullivan, and joined by Justices Buckley and Malone, the First Department reasoned that the insurance coverage dispute was justiciable, and that the pendency of the bankruptcy proceeding and related adversary proceeding in the Western District of Pennsylvania provided no basis upon which to stay the state court proceeding. As a result, the coverage dispute was litigated in New York state court rather than the bankruptcy court of the Western District of Pennsylvania. Justice Andrias, joined by Justice Tom, dissented.

Principal co-counsel:

Gretchen A. Ramos
Squire Patton Boggs LLP
[successor firm to Carroll Burdick & McDonough LLP]
275 Battery Street, Suite 2600
San Francisco, California 94111

(415) 743-2576

Principal counsel for other insurer appellants:

Robert Goodman
[formerly with Debevoise & Plimpton, LLP, and counsel for Travelers Insurance]
Saul Ewing Arnstein & Lehr LLP
555 Fifth Avenue, Suite 1700
New York, New York 10017
(212) 980-7212

Joseph S. Grinstein
[counsel for the London Market insurers]
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, Texas 77002
(713) 653-7824

James Dennis
[counsel for the AIG insurers]
Mound Cotton Wollan & Greengrass LLP
One New York Plaza
New York, New York 10004
(212) 804-4262

Principal opposing counsel:

Thomas S. D'Antonio
Ward Greenberg Heller & Reidy LLP
1800 Bausch & Lomb Place
Rochester, New York 14604
(585) 454-0715

(9) *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168 (D. Colo. 2001)

This case involved important questions of preemption, commercial speech protected by the First Amendment, and the “dormant” Commerce Clause.

In 2001, I filed suit against Colorado challenging a state law that prohibited insect repellent manufacturers from making the claim of “safe for kids” on product labels. My client, Bioganic Safety Brands, alleged that the Federal Insecticide, Fungicide, and Rodenticide Act preempted the Colorado law, and that the Colorado law also violated the First Amendment and Dormant Commerce Clause of the U.S. Constitution. I served as lead counsel for Bioganic. The district court (Babcock, J.) consolidated Bioganic’s preliminary injunction request with a trial on the merits. After a one-day bench trial where I argued the legal issues and my co-counsel

handled the evidentiary issues, the district court entered judgment in favor of Biogonic on all three claims and enjoined enforcement of the Colorado statute. Colorado did not appeal.

Co-counsel:

Timothy O'Neill
Snell & Wilmer
Tabor Center
1200 Seventeenth Street, Suite 1900
Denver, Colorado 80202
(303) 634-2003

Opposing counsel:

David L. Joeris
Office of the Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway
Denver, Colorado 80203
(720) 508-6433

(10) *Love v. Edwards*, No. 3:95-cv-788 (M.D. La. 1995); *Love v. Foster*, 90 F.3d 1026 (5th Cir. 1996); *Foster v. Love*, 522 U.S. 67 (1997); on appeal from order on remand, *Foster v. Love*, 147 F.3d 383 (5th Cir. 1998); *Love v. Blanco*, No. 3:95-cv-788 (M.D. La. 2006) (unpublished order)

This litigation involved an important question regarding the timing of elections for members of Congress in my home state of Louisiana.

In 1995, I filed suit for a group of voters that challenged Louisiana's "open primary" system allowing for potentially conclusive congressional elections in October of federal election years, notwithstanding federal statutes that require such elections to be held on the Tuesday following the first Monday in November. Our complaint alleged that federal law preempted Louisiana's election scheme, insofar as it allowed for conclusive congressional elections prior to the day designated by federal law for congressional elections. I served as lead counsel.

The U.S. District Court for the Middle District of Louisiana (Polozola, J.) entered summary judgment in favor of the state after a motions hearing. My clients took an appeal to the Fifth Circuit, where I argued for the voters. The Fifth Circuit reversed in a 2-1 decision written by Judge Davis and joined by Judge Fallon (of the Eastern District of Louisiana, sitting by designation), reasoning that federal statutes setting a uniform national day for federal elections preempted Louisiana law as a matter of conflict preemption. *Love v. Foster*, 90 F.3d 1026 (5th Cir. 1996). Judge Dennis

dissented, and dissented again from the Fifth Circuit's denial of rehearing en banc. 100 F.3d 413 (5th Cir. 1996).

Louisiana then successfully petitioned for certiorari. After merits briefing, I argued for the Louisiana voters. The Court affirmed the Fifth Circuit in a unanimous opinion written by Justice Souter. The Court reasoned that the Fifth Circuit's conflict preemption analysis was "exactly right": Federal law set a uniform day for federal elections in November of election years, and Louisiana's election thwarted that scheme by providing for potentially conclusive congressional elections in October.

After the Supreme Court's decision, the Louisiana Legislature deadlocked and did not enact any corrective amendment to the Louisiana election code. As a result, the parties litigated what equitable remedy was appropriate in light of Louisiana severability principles. In 1998, the district court ordered that the "open primary" be moved forward to the November election date, with any necessary runoff election conducted in December. My clients, the Louisiana voters, contended that under Louisiana severability principles, Louisiana law would default to the preceding version of Louisiana law, which established a party primary system. On appeal, a panel of the Fifth Circuit comprised of Judges Wisdom, Politz, and Jones upheld the district court's remedial order, pending further word from the Louisiana Legislature. *Love v. Foster*, 147 F.3d 383 (5th Cir. 1998). My co-counsel, Daniel Balhoff, argued this appeal, although I was substantially involved in the briefing.

Louisiana conducted congressional elections under the district court's injunction in 1998, 2000, and 2004. In 2005, the Louisiana Legislature enacted a new law providing that the open primary election would be held in October, but that any outright winner would not be officially declared elected until federal election day. In January 2006, Judge Polozola enjoined enforcement of the new law—characterizing it as merely an attempt to circumvent *Foster v. Love*—and again required the state to hold the open primary on federal election day in November. I was substantially involved in the briefing for this renewed litigation, but argument at the motions hearing was handled by my co-counsel, Daniel Balhoff.

Thereafter, in 2007, the Louisiana legislature enacted a party-primary system that culminated in a conclusive election on federal election day in November, bringing state law into conformity with federal law. (After the 2010 election cycle, the Louisiana Legislature changed the system again, this time by effectively codifying the remedy created by the district court's injunction in 1998.)

Principal co-counsel:

Daniel J. Balhoff
Perry, Atkinson, Balhoff, Mengis & Burns, LLC
2141 Quail Run Drive
Baton Rouge, Louisiana 70808
(225) 767-8988

Brian M. Tauscher
[formerly with my prior firm]
40 Oakmont Drive
Concord, New Hampshire 03301
(603) 225-5552

Principal opposing counsel:

Roy A. Mongrue, Jr.
[formerly with the Louisiana Attorney General's office]
Teachers Retirement System of Louisiana
8401 United Plaza Boulevard
Baton Rouge, Louisiana 70809
(225) 925-6446

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In 2001, in the wake of the September 11 terrorist attacks, I wrote an article for the Federalist Society examining the deficiencies in the legal framework governing presidential succession. Thereafter, this Committee, the House Judiciary Committee (twice), and the Continuity in Government Commission—a joint undertaking of the Brookings Institution and the American Enterprise Institute—invited me to testify on this subject. To my knowledge, I was the first scholarly commentator to observe that in an extreme situation, the Presidential Succession Act of 1947 allows for a handful of surviving members of the House of Representatives to seize the Presidency from a cabinet officer serving as Acting President.

Beginning in 1999 and continuing for several years into the following decade, I represented CNA Insurance Companies in litigation in the U.S. District and Bankruptcy Courts for the Western District of Pennsylvania involving claims by PPG Industries, Inc., for insurance coverage of mass tort liabilities stemming from asbestos products produced by Pittsburgh Corning Corporation, an entity 50% owned by PPG. CNA provided tens of millions of dollars in primary and excess insurance coverage to PPG. These claims were ultimately resolved, after two extended mediations, by settlement in connection with the plan of reorganization filed in the Pittsburgh Corning bankruptcy in the Western District of Pennsylvania. I was CNA's sole counsel in the first mediation, which involved PPG and its primary carriers and was mediated by Harvard Law Professor Robert Mnookin. In the second mediation, which involved PPG and its excess carriers and was mediated by David Geronemus of JAMS, I was co-counsel with Rodney Eshelman.

From 1996 to 1997, I was lead pretrial counsel for CNA Insurance Companies in an insurance coverage suit brought by Bristol-Myers Squibb against CNA and several other insurers in state court in Jefferson County (Beaumont), Texas. Bristol-Myers sought a defense and indemnity from its liability insurers in connection with hundreds of millions of dollars in liability for its production and sale of defective breast implants. CNA provided tens of millions of dollars in excess insurance coverage to Bristol-Myers. After extensive discovery, motion practice, and the selection of a jury, the case settled on the eve of trial. I took and defended depositions, argued numerous procedural and dispositive motions, and was involved in jury selection. Had the case proceeded to trial, I would have second-chaired CNA's defense.

In 2018, I sent two letters to California Governor Jerry Brown in connection with pending legislation. I sent these letters on behalf of my trade association client, the Pharmaceutical Care Management Association.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught a course.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

In the two calendar years following the year of my resignation from McDermott Will & Emery, the firm will return my paid-in capital contributions. At the time of my nomination, those contributions totaled \$108,420.

Under the terms of McDermott's partnership agreement, I am eligible to receive certain post-partnership payments beginning at age 60. As of January 1, 2019, the value of those payments will be \$362,950 paid out over 72 months, followed by monthly payments of \$500 for life.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No, but I would consider the possibility of part-time teaching as an adjunct professor at a law school.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

If confirmed, I will recuse myself in any litigation where I have ever played a role. In addition, I will permanently recuse myself in all cases involving my current firm, McDermott Will & Emery. I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will follow the terms of the applicable federal statute, 28 U.S.C. § 455. I will do so automatically, without the necessity of a party moving to invoke the statute. If there is any doubt in my mind over the proper course, I will err on the side of recusal.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

According to my firm's records, in my 18 years at McDermott Will & Emery, I have billed an average of 70 hours per year to the firm's pro bono clients in a wide variety of matters.

One of the most significant pro bono matters that I have had in 25 years of private

practice was the privilege of representing 37 retired flag and general officers who filed an *amici curiae* brief in support of a petition for certiorari filed in the U.S. Supreme Court in the case of *Behenna v. United States*, No. 12-802. The petitioner, Michael Behenna, was a young Army First Lieutenant who was court-martialed and convicted of murder for killing a detainee on the battlefield during the Iraq War. At his court martial, Lieutenant Behenna contended that he killed the detainee in self-defense. In a sharply divided (3-2) decision, the Court of Appeals for the Armed Forces held that because Lieutenant Behenna acted outside the scope of his orders at the time of the incident, he categorically forfeited the right of self-defense when the detainee attempted to kill him.

My *amici* brief took no position on the truth of Lieutenant Behenna's claim that he acted in self-defense. Instead, it argued that the decision of the court of appeals—which *assumed* the truthfulness of Lieutenant Behenna's testimony—set a dangerous legal precedent for servicemembers that the Supreme Court should review and reverse. The *amici* brief argued that although Lieutenant Behenna should be subject to appropriate discipline for his unauthorized conduct, no servicemember in a combat zone should categorically forfeit the right to self-defense because his or her conduct was unauthorized. The Supreme Court denied Lieutenant Behenna's petition for certiorari, and the troubling decision of the Court of Appeals for the Armed Forces still stands as controlling precedent in military court-martial cases arising out of combat zones.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In April 2017, an official from the White House Counsel's office contacted me regarding a potential judicial nomination, and since then, I have been in periodic telephonic contact with officials from that office. On June 5, 2017, I interviewed with several attorneys from that office and from the Office of Legal Policy at the Department of Justice in Washington, D.C. On August 9, 2017, I met with an official in the Office of the U.S. Trade Representative.

Since September 18, 2017, I have been in contact with officials from the Office of Legal Policy. On June 18, 2018, the President submitted my nomination to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question

in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.