UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Edward Carroll DuMont

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

   United States Circuit Judge for the Federal Circuit.

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.

   Wilmer Cutler Pickering Hale and Dorr LLP
   1875 Pennsylvania Avenue, NW
   Washington, DC 20006

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

   1961; Oakland, California

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.

   1983 - 1986, Stanford Law School; J.D., 1986

   1979 - 1983, Yale College; B.A., 1983

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.

2002 - Present
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Partner (2004 - Present)
Counsel (2002 - 2003)
(Partial leave of absence: July 2008 - January 2009)

1997 - 2001
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant to the Solicitor General (1997 - June, 2000; January, 2001 - October, 2001)
Associate Deputy Attorney General (on detail) (July, 2000 - January, 2001)

1996 - 1997
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Associate (Litigation Group)

1992 - 1996
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant to the Solicitor General

1988 - 1992
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Associate (General Practice and Tax Groups)

1987 - 1988
Ukrit Mongkolnavin Law Office
Address at that time:
10 Sukhumvit Soi 5
Bangkok 10110, Thailand
Luce Scholar

1986 - 1987
Hon. Richard A. Posner
United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604
Law clerk

Summer 1986: After graduating from law school and before taking the California bar exam and moving to Chicago for my clerkship, I worked briefly as a summer associate at the San Francisco office of Morrison & Foerster, now located at 425 Market Street, San Francisco, CA 94105.

Summer 1985: Summer associate at Sullivan & Cromwell, 125 Broad Street, New York, NY 10004, and Ivins, Phillips & Barker, 1700 Pennsylvania Avenue, NW, Washington, DC 20006.

Summer 1984: Summer associate at Pettit & Martin, 101 California Street, San Francisco, CA 94111.

Summer 1983: Between graduation from college and starting law school, I worked as a word processing coordinator at Crosby, Heafey, Roach & May, now part of Reed Smith LLP, 1999 Harrison Street, Oakland, CA 94612.

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.

   I have not served in the military. I am registered for selective service. I was notified in 1992 that I was no longer subject to being drafted and was not required to notify the Selective Service System of future changes of address or other developments.

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.

   Recognized as a leading individual lawyer in nationwide appellate practice in the 2009 and 2010 editions of *Chambers USA: America's Leading Lawyers for Business*.

   Selected for inclusion in the appellate practice category in the 2006, 2008, 2009 and 2010 editions of *The Best Lawyers in America* and in the 2007, 2008, 2009, and 2010 editions of *Washington, D.C. Super Lawyers*.

   National Association of Attorneys General, 2006 Term Volunteer Recognition Award, for assistance to the States in their preparation for appearances before the Supreme Court of the United States.

   U.S. Department of Justice, Special Achievement Awards for high performance: 1994, 1995, 1998, 1999, 2000, 2001.

   Luce Scholarship, 1987 - 1988 (The Henry Luce Foundation, New York, NY)

Stanford Law School:

J.D. awarded with distinction, 1986
Order of the Coif, 1986
Frank Baker Belcher Award for outstanding work in Evidence, 1986
Hilmer Oehlman, Jr. Prize for outstanding work in research and legal writing, 1984
First Year Honor for highest cumulative average after the first year, 1984

Yale College:

B.A. awarded *summa cum laude*, 1983
Warren Memorial Prize for humanities student standing highest in scholarship, 1983
Departmental honors in History
Phi Beta Kappa, 1981 (elected after sophomore year)
Robert S. Kilborne traveling fellowship, 1981
E. Francis Riggs Prize for outstanding work in humanities, 1980

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.

American Bar Association
Gay, Lesbian, Bisexual and Transgender Attorneys of Washington (GAYLAW)
National LGBT Bar Association (former member)
New York State Bar Association (former member)

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.

California - December 11, 1986 (on voluntary inactive status from February 17, 1987, to June 5, 1996, while not practicing in California, as permitted by state bar rules)
New York (First Department) - August 28, 1989
District of Columbia - February 11, 2002

There have been no lapses in membership.

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 California, December 11, 1986 (on voluntary inactive status from February 17, 1987, to June 5, 1996, while not practicing in California, as permitted by state bar rules)

New York Supreme Court, Appellate Division, First Department, August 28, 1989
District of Columbia Court of Appeals, February 11, 2002

Supreme Court of the United States, 1992

United States Circuit Court for the Federal Circuit, 2004
United States Circuit Court for the District of Columbia Circuit, 2002
United States Circuit Court for the First Circuit, 1996
United States Circuit Court for the Second Circuit, 1996
United States Circuit Court for the Third Circuit, 2005
United States Circuit Court for the Fourth Circuit, 1993
United States Circuit Court for the Seventh Circuit, 2007
United States Circuit Court for the Ninth Circuit, 1993
United States Circuit Court for the Tenth Circuit, 2006

United States District Court for the Northern District of California, 1996
United States District Court for the Southern District of New York, 1996
United States District Court for the District of Columbia, 2002
United States District Court for the Southern District of California, 2005

United States Court of Federal Claims, 1990
United States Tax Court, 1990

Note: This list does not include admissions *pro hac vice*.

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.

Supreme Court Historical Society (1994 - present)
Phi Beta Kappa Society (1981 - present)
Yale Club of Washington, DC (dues paid sporadically - 2005, 2008, 2009)
Department of Justice Pride (GLBT employee organization) (est. 1994-1996, 1997-2001; from est. 1994-1996 I served as Vice President)
Yale Club of New York City (est. 1991-1992)
1727 P St. Condominium Association (est. 1994-1999; I believe I was an officer, probably the president, from 1997-1999. The building is a 4-unit converted townhouse. It changed from rental to condominium status in 1994, but the Association did not assume control from the sponsor until the fall of 1997.)
Yale and Stanford Alumni associations (since 1983 and 1986, respectively)
Yale GALA (1994 - present)

There are many organizations to which I have given money either regularly or at one time or another and which may by virtue of that fact consider or have considered me a "member." The following is a list of such groups. There may be others for which I did not retain records and which I do not recall. Where dates are shown, they indicate the years, or in some cases the first and most recent years, of donations shown by my records:

American Cancer Society (2006)
American Civil Liberties Union (1991, 1993)
American Film Institute (2003-2009)
American Foundation for AIDS Research (1992)
American Friends of Georgia (2007, 2008, 2010)
American Red Cross (2001, 2008, 2010)
Asia Foundation (2006)
Asia Society (1992, 1993)
Association for Union Democracy (1992-1994)
Astraea (1992)
Campaign for Military Service (1993)
California Supreme Court Historical Society (2004, 2006, 2010)
Carter Center (2001, 2003)
Choice in Dying (1992, 1994)
Clean Water Action (2007, 2009)
Colorado Legal Initiative Project (1993)
Compassion & Choices (2007)
Cornell Legal Information Institute (2003-2005, 2007)
D.C. Circuit Historical Society (2004)
Democratic Congressional Campaign Committee (2006, 2009)
Democratic Party (1993, 2000, 2004, 2007)
Democratic Senatorial Campaign Committee (1993, 2006, 2007, 2008)
Doctors Without Borders (2007)
Empire State Pride Agenda (1991)
Environment California (2006)
EPO Colorado (1992)
Equality California (2008)
Equality Colorado (1994)
Federal GLOBE (1993)
Food & Friends (1992-2001)
Freedom to Marry (2003)
Gay & Lesbian Victory Fund (1991-2001)
GLAAD (Gay & Lesbian Alliance Against Defamation) (1992)
Gay Men's Health Crisis (1991, 1992)
Greenbelt Alliance (2003-2007)
Human Rights Campaign (Fund) (1991-1997)
Japan-American Student Conference (2002, 2004, 2007)
Lambda Legal Defense Fund (1991-1996)
Maryknoll Society (1991, 1993)

NAACP Legal Defense Fund (1991, 1996)
NARAL (1991-1994)
National Brain Tumor Society (2009)
National Gay & Lesbian Task Force (1991-1994)
National Organization for Women (1991, 1992)
Norris Cotton Cancer Center (2007)
Oxfam America (2001, 2002, 2004)
People for the American Way (1994)
Planned Parenthood (1991, 1992)
Servicemembers Legal Defense Network (1993-2010)
Shepherd Park Citizens Association (2003-2007)
Sierra Club (1993-2010)
Smile Train (2003)
Southern Poverty Law Center (1992)
Treatment Action Group (1992-2007)
Truman National Security Project (2008)
US Public Interest Research Group (2001, 2002)
Vermonters for Civil Unions (2000)
WAMU (1993-2009)
Washington Lawyers Committee (2010)
WETA (1992-2000)
Whitman-Walker Clinic (1993, 1994, 2000, 2009)
Wilderness Society (1993)
WNYC (1996)
World Wildlife Fund (1993)
WPFW (2004-2009)

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 these organizations discriminates or previously discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or through the practical implementation of membership policies.

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.

Some of the material cited below under "speeches or talks" may have been published in meeting materials, but if so I have no copies other than as included in the attachments to this questionnaire.

During college I wrote an essay on an international relations topic for a student publication, which I am told by the friend who edited it was called "The International Forum at Yale." As I recall the essay was titled "How Many Legions Has the Pope?" and discussed the seemingly increasing importance of religion in international affairs. I have not been able to locate a copy.

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.

None.

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.

In 2002, I signed a group letter on behalf of former colleagues in the Solicitor General's Office supporting the nomination of Miguel Estrada to be a judge of the United States Court of Appeals for the District of Columbia Circuit.

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.

March 10, 2006 - Panel on "Change at the Supreme Court: What does it mean for environmental law?" at the 35th Annual Conference on Environmental Law sponsored by the ABA Section of Environment, Energy, and Resources and held in Keystone, Colorado. Prepared remarks attached.

September 1, 2004 - Panel on "Supreme Court Review and Preview" presented by the District of Columbia Bar Continuing Legal Education Program and the Federal Bar Association Judiciary Division in Washington, D.C. Prepared materials attached.

October 27, 2000 - After the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), I participated in a roundtable discussion, sponsored by the American Criminal Law Review and held in Washington, D.C., on the implications of that decision for federal criminal sentencing and what issues would have to addressed in future cases. I have not located any notes or materials from that presentation, and I do not believe I prepared any written remarks, but I attach a copy of an Editor's Note listing me as a participant. *Editor's Note on* Apprendi *Symposium Articles*, 38 Am. Crim. L. Rev. 241 (2001). Note that it is possible I also participated in another panel discussion relating to *Apprendi*. I have not located any notes or materials from that discussion or any other confirmation that it occurred or exactly when or under whose sponsorship, although it would also have been in Washington, D.C. What I recall may only have been a preparatory meeting for the roundtable discussion just noted.

April 9, 1999 - Panel on tribal sovereign immunity legislation at the Federal Bar Association 24th Annual Indian Law Conference in Albuquerque, New Mexico. Prepared remarks: Tribal Sovereign Immunity and the Supreme Court (attached).

December 10, 1997 - Panel on oral argument at a Supreme Court Advocacy Seminar held at the Supreme Court by the National Association of Attorneys General. I have not located any notes or personal materials from the presentation, but a copy of the discussion topics suggested by the organizers is attached. I do not believe I prepared any written remarks.

At some point when I was employed at the Solicitor General's Office, I did a presentation to a group of federal employees — I believe lawyers employed by federal agencies — at a meeting in Washington, D.C., concerning the functions and operation of the Solicitor General's Office. I have not located any notes or materials from the presentation, and I do not believe I prepared any written remarks.

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.

I was quoted briefly in an item by Supreme Court reporter Tony Mauro in the Court Watch segment of *Legal Times*, Vol. 26, Issue 6 (Feb. 10, 2003), discussing the Supreme Court's new policy on "lodgings." A copy of that piece is attached. The item was syndicated and appeared in other journals under different headings (e.g., *No More Easy 'Lodging' at Court*, 171 N.J.L.J. 570 (Feb. 17, 2003)).

A letter of mine was quoted in a short tribute to former Stanford Law School Professor John Kaplan that was reprinted in the *Stanford Law Review*. Paul Brest, *Recollections*, 42 Stan. L. Rev. 848, 850 (1990).

When I was traveling in China in 1988, at the conclusion of my year as a Luce Scholar, I and the friends I was with were interviewed briefly by a television reporter doing a travel story. I was later told by friends that they saw a brief clip of me responding to a question about the travel experience. I believe a friend taped the clip for me and I eventually saw it on my return to the United States. I do not have a copy.

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 a judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials? ___%; bench trials ___% [total 100%]

civil proceedings? ___%; criminal proceedings? ___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If

any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

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 been a judge.

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 had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office. I have not held any elective office, or any

appointed office as I understand that term to be used in this question. From July 2000 to January 2001, while serving in a career civil service position as an Assistant to the Solicitor General, I was detailed to serve temporarily as an Associate Deputy Attorney General, a position that would normally be filled by appointment (although not subject to confirmation). I would have been selected for that position either by then-Deputy Attorney General Eric Holder or by then-Principal Associate Deputy Attorney General Jonathan Schwartz.

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.

I did some volunteer data entry in support of canvassing efforts for the Obama presidential campaign in Virginia on one or two evenings in the days just before the 2008 election. I also did some volunteer legal work for the campaign in August and September, 2008, working with others to analyze recent court decisions.

Sometime during the 1979-1980 school year (my freshman year in college) I was enlisted by a friend to drive a car in a motorcade when George H.W. Bush made a campaign visit to Yale. I believe that in the summer of 1980 I volunteered briefly for the John Anderson presidential campaign.

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;

From August, 1986, to August, 1987, I clerked for the Hon. Richard A. Posner, United States Court of Appeals for the Seventh Circuit

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.

2002 - Present
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Partner (2004 - Present)
Counsel (2002 - 2003)
(Partial leave of absence: July 2008 - January 2009)

1997 - 2001
United States Department of Justice
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Associate (Litigation Group)

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Assistant to the Solicitor General

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Sullivan & Cromwell LLP
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1987 - 1988
Ukrit Mongkolnavin Law Office
Address at that time:
10 Sukhumvit Soi 5
Bangkok 10110, Thailand
Luce Scholar

1986 - 1987
Hon. Richard A. Posner
United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604
Law clerk

Summer 1986
Morrison & Foerster LLP
Now located at:
425 Market Street
San Francisco, CA 94105
Summer associate

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 not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

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

After law school, I spent a year (1986-1987) clerking for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit in Chicago. I then spent a year (1987-1988) in Bangkok, Thailand, on a fellowship sponsored by the Henry Luce Foundation (the Luce Scholarship). During the Luce year I was associated with a Thai law firm and had some opportunity to observe international commercial practice in a developing country (as well as receiving extensive exposure to a rich foreign culture). For example, I helped to prepare or edit English-language contracts for non-Thai investors, such as an American investor who wanted to develop a shrimp farm.

In late 1988, I began private practice in New York with Sullivan & Cromwell, a major Wall Street firm. I initially split my time between the corporate and tax groups, but fairly quickly concentrated on tax work.

In 1992, I moved to Washington and joined the Solicitor General's Office at the Department of Justice, where I primarily represented the United States or federal agencies or officers before the Supreme Court of the United States.

I remained with the Solicitor General's Office until late 2001, with two exceptions. First, in 1996 I returned briefly to my previous New York firm, this time as a litigator. This afforded me additional valuable experiences, but for personal reasons I decided that it would be best to move back to Washington, where I was re-hired by the Solicitor General's Office in early 1997.

Second, from approximately July 2000 to January 2001, I was detailed to serve as an Associate Deputy Attorney General. In that position I had particular responsibility for computer crime and privacy issues.

In 2002 I returned to private practice as an appellate litigator at what is now Wilmer Cutler Pickering Hale and Dorr LLP. At WilmerHale my practice has involved primarily Supreme Court and appellate litigation, together with some trial-level work and client counseling, and has covered a range of complex or novel legal issues, often with substantial policy or legislative dimensions. From approximately July, 2008, to January, 2009, I arranged to take an informal sabbatical leave from the partnership, continuing to work on existing client projects but otherwise taking some time off, working on a few personal projects, and considering the next stage of my career.

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

During my first employment at Sullivan & Cromwell in New York (1988-1992), the tax group's clients typically included large U.S. and non-U.S. corporations with transactions or financings being handled by the firm; large U.S. and non-U.S. banks (investment and commercial) and other financial institutions; substantial non-profit organizations; and some wealthy individuals and their business or charitable interests. My work involved a wide range of issues, such as the tax structuring of corporate transactions; the tax analysis of complex financial products and cross-border financial transactions; and the special tax issues of not-for-profit organizations. I also did some legal analysis and organizational work for an entity formed to help bring a political convention to the city, and helped to staff a wills clinic for persons living with HIV or AIDS.

At the Solicitor General's Office (1992-1996; 1997-2001), my clients were the United States or particular government agencies or officials in their official capacities. I worked with lawyers from around the government on a variety of matters, reflecting the range of government activities and programmatic interests. For example, of the 18 cases that I argued before the Supreme Court, six involved criminal law (including important constitutional questions relating to criminal sentencing); two involved tax issues; one involved a First Amendment challenge to restrictions on the

release of government records; two involved federal civil rights laws; four involved administrative law issues or questions under complex federal statutory schemes; and the remaining three involved significant questions of government contracts law, federal banking law, and federal Indian law, respectively. My work in cases I worked on but did not argue involved an even broader range of subjects.

During my second stint at Sullivan & Cromwell (1996-1997), this time as a litigator, the clients I worked with were again typically large U.S. or foreign corporations or financial institutions. Although my stay at the firm this time was relatively brief, I had opportunities, for example, to help with and observe a patent infringement trial; to frame and participate in a trademark and trade-name action (including relatively early issues arising out of the use of recognized marks on the internet); and to help with a corporate internal investigation.

When I was on detail to the Deputy Attorney General's Office (July, 2000 to January, 2001), my job involved oversight and issue-management, policy and organizational issues, working with Department components, and sometimes working with the White House, outside groups, or legislative staff. My primary areas of responsibility were computer crime and privacy. I participated, for example, in Justice Department and Administration efforts to propose legislation updating the Electronic Communications Privacy Act; to make progress on an international treaty addressing electronic communications and data privacy; and to respond to controversy generated by the Federal Bureau of Investigation's use of an electronic tool for purposes of capturing certain email information during authorized investigations.

At WilmerHale (2002-date), I have worked for a wide range of clients, including large U.S. or foreign corporations; insurance companies and other financial institutions; Indian tribal governments; industry associations; and individual criminal defendants. I have worked on Supreme Court, other appellate, and trial-level matters involving a wide variety of subject matters, including patent, trademark, and copyright issues; antitrust and competition law; Indian gaming related issues; criminal law; administrative law; federal preemption; and constitutional and complex statutory questions, such as federal constitutional restrictions on state tax jurisdiction or how personal constitutional privileges apply to a public official or his or her office. I have also worked on non-litigation matters, such as efforts to frame legislation to reform the asbestos litigation system or providing advice to a non-profit corporation concerning legal obligations under its charter. In pro bono matters I have, for example, helped represent the congressional sponsors of the Bipartisan Campaign Reform Act in defending the constitutionality of that legislation; been part of a team that represented a criminal defendant on appeal and then on a post-

conviction motion that has resulted in a federal magistrate's recommendation that our client be granted a new trial; and supervised or counseled associates handling appeals or amicus projects in criminal, immigration, civil rights, and veteran's benefits cases.

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.

As a tax or corporate lawyer at Sullivan (1988-1992), 90-95% of my work involved transactions or counseling. I did get involved in one substantial tax litigation that I recall, but mostly in background factual development. I did not appear in court.

At the Solicitor General's Office (1992-1996; 1997-2001), my work was 90-95% litigation or closely related to litigation (e.g., making recommendations to the Solicitor General concerning whether to authorize requests for further review of adverse decisions of federal district or circuit courts or to authorize intervention or amicus participation in cases not otherwise involving the United States). It also involved some counseling and special projects. I typically appeared in the Supreme Court two or three times per term, and I appeared one time each in the First, Fourth, and Ninth Circuits.

During my second stint at Sullivan (1996), my work was all litigation or litigation-related (e.g., internal investigations or preparation for actual or potential litigation). I do not recall appearing personally in court, although I did attend and assist in the background at a patent trial and filed appearances in litigation.

During my detail to the Deputy Attorney General's Office (2000-2001), my job involved management or oversight, not litigation. I did not appear in court.

At WilmerHale (2002-date), my work has been 85-90% litigation—largely in the Supreme Court or other appellate courts, although with some trial-level work on dispositive or other important motions. The remainder has been counseling or analytical work, such as a major project for one client analyzing constitutional issues related to a proposed overhaul of the asbestos litigation system and participating in industry groups working on related legislative proposals. I have been involved in a great deal of appellate or dispositive-motion briefing, but I have personally argued only once in the Federal Circuit (en banc), once in the Seventh Circuit, and twice in district courts (the Southern District of California and the Eastern District of Virginia).

i. Indicate the percentage of your practice in:
   1. federal courts; 95%
   2. state courts of record; 5%
   3. other courts;

4. administrative agencies

ii. Indicate the percentage of your practice in:
1. civil proceedings; 80%
2. criminal proceedings. 20%

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.

I assisted in one patent case tried to verdict. I was associate counsel in three cases resolved by summary judgment, in each of which I took a leading role in briefing but did not present oral argument.

i. What percentage of these trials were:
1. jury;
2. non-jury.

The patent case was a jury trial; the other two cases were resolved by the court on summary judgment.

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.

While I was an Assistant to the Solicitor General, I argued 18 cases before the Supreme Court. Copies of argument transcripts and of associated briefs for which I had substantial responsibility are attached:

1. *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (for the United States) (whether the Indian Gaming Regulatory Act exempted Tribes from certain federal excise taxes).

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (for the United States as amicus supporting respondent) (constitutional right to jury findings on factors that increase statutory maximum sentence).

3. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (for the United States as amicus supporting petitioner) (standards for evaluating ineffective assistance claims in cases where defendant pleaded guilty and counsel did not file notice of appeal).

4. *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (for the United States as amicus supporting petitioner) (First Amendment

challenge to statute that regulated public access to addresses of crime victims and persons arrested).

5. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (for the United States as amicus supporting respondent) (Americans with Disabilities Act—proof of disability, employer's reliance on government safety regulations). (Note: I did not work on the briefs in this case.)

6. *Jones v. United States*, 526 U.S. 227 (1999) (for the United States) (construction of federal carjacking statute; constitutional right to jury findings on factors that increase statutory maximum sentence).

7. *Edwards v. United States*, 523 U.S. 511 (1998) (for the United States) (application of federal sentencing guidelines where jury's verdict did not specify type or quantity of drugs involved in a conspiracy).

8. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (for the United States as amicus supporting petitioner) (Indian Tribe's sovereign immunity from suit on a commercial contract).

9. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997) (for the United States as amicus) (statute of limitations in ERISA action for amounts owed by employer for withdrawal from multi-employer plan). (Note: I did not work on the briefs in this case.)

10. *Hercules, Inc. v. United States*, 516 U.S. 417 (1996) (for the United States) (manufacturer's contract claim against United States for cost of defending and settling tort suits arising out of manufacture of Agent Orange).

11. *Witte v. United States*, 515 U.S. 389 (1995) (for the United States) (propriety of considering uncharged conduct when sentencing defendant, under federal sentencing guidelines, for offense of conviction).

12. *Ludwig v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (for Comptroller Ludwig) (companion case to *NationsBank of N.C., N.A. v. VALIC*) (sustaining Comptroller of the Currency's determination that National Bank Act permits national banks to serve as agents for sale of annuities).

13. *Brown, Sec'y of Veterans Affairs v. Gardner*, 513 U.S. 115 (1994) (for Secretary Brown) (requirements for veterans to establish compensable disability resulting from VA medical treatment).

14. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) (for the Director) (placement of burden of persuasion with respect to claims for compensation under the Black Lung Benefits Act).

15. *Beecham v. United States*, 511 U.S. 368 (1994) (for the United States) (effect of state restoration of civil rights on federal firearms restrictions based on prior federal conviction).

16. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) (for the United States as amicus) (validity of local airport fees under the Anti-Head Tax Act and the Commerce Clause).

17. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (for the United States as amicus) (effect, in an employment discrimination case, of trier-of-fact's disbelief of employer's proffered non-discriminatory reason for employment action).

18. *Good Samaritan Hosp. v. Shalala, Sec'y of HHS*, 508 U.S. 402 (1993) (for Secretary Shalala) (operation of Medicare reimbursement statute and regulations).

Also as an Assistant to the Solicitor General, and in addition to cases already listed above, my name appeared on briefs on the merits in 17 cases—6 cases in which the government was a party and 11 in which the government participated as an amicus:

1. *TRW Inc. v. Andrews*, No. 00-1045. Whether the limitation period under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, began to run at the time of an alleged violation or was subject to a "discovery" rule. Brief for the United States and the Federal Trade Commission as amici curiae supporting respondent. Reversed, 534 U.S. 19 (2001).

2. *Atkinson Trading Co., Inc. v. Shirley*, No. 00-454. Validity of a hotel occupancy tax imposed by the Navajo Nation on non-Indian guests at a hotel owned and operated by a non-Indian corporation on land it owned in fee simple. Brief for the United States as amicus curiae supporting respondents. Reversed, 532 U.S. 645 (2001).

3. *Castillo v. United States*, No. 99-658. Whether the type of firearm used or carried by an offender was a sentencing factor or an element of an aggravated offense under a the version of 18 U.S.C. 924(c)(1) then in effect. Brief for the United States as respondent. Reversed, 530 U.S. 120 (2000).

4. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, No. 99-150. Inherent distinctiveness for purposes of Lanham Act trade-dress protection. Brief for the United States as amicus curiae supporting petitioner. Reversed, 529 U.S. 205 (2000).

5. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, No. 98-231. Whether a federal district court had the power to enjoin a defendant that was threatened with insolvency or was likely to dissipate its assets from transferring

assets that were not the subjects of suit, if the order was necessary to preserve the plaintiff's ability to collect a money judgment that was likely to be entered in its favor. Brief for the United States as amicus curiae supporting respondents. Reversed, 527 U.S. 308 (1999).

6. *Dickinson, Commissioner of Patents & Trademarks v. Zurko*, No. 98-377. Whether factual findings made by the Patent and Trademark Office in patent proceedings should be reviewed under a standard more stringent than that normally used to review agency factfinding under the APA. Brief for the petitioner. Reversed, 527 U.S. 150 (1999).

7. *Anderson, Director, Cal. Dep't of Social Services v. Roe*, No. 98-97. Whether a durational residency test for full state welfare benefits impermissibly burdened an aid recipient's federal constitutional right to establish residence and citizenship in a new State. Brief for the United States as amicus curiae supporting petitioners in part and respondents in part. Affirmed, 526 U.S. 489 (1999).

8. *Holloway v. United States*, No. 97-7164. Whether a conditional intent to cause death or serious bodily harm if necessary in order to steal the victim's car satisfied the intent requirement of the federal carjacking statute, 18 U.S.C. 2119. Brief for the United States as respondent. Affirmed, 526 U.S. 1 (1999).

9. *Caron v. United States*, No. 97-6270. Whether a partial state firearms disability resulting from prior state convictions meant that those convictions continued to count as prior convictions for purposes of federal firearms restrictions, even if the defendant's civil rights had been restored within the meaning of 18 U.S.C. 921(a)(20). Brief for the United States as respondent. Affirmed, 524 U.S. 308 (1998).

10. *Brogan v. United States*, No. 96-1579. Whether an "exculpatory no" was excluded from the general federal false-statement prohibition, 18 U.S.C. 1001. Brief for the United States as respondent. Affirmed, 522 U.S. 398 (1998).

11. *Miller v. Albright, Sec'y of State*, No. 96-1060. Constitutionality of a distinction drawn by the Immigration and Nationality Act, 8 U.S.C. 1409, between children born abroad out of wedlock to U.S.-citizen mothers and those so born to U.S.-citizen fathers. Brief for the respondent. Affirmed, 523 U.S. 420 (1998).

12. *General Electric Co. v. Joiner*, No. 96-188. Whether the court of appeals applied an erroneous standard of appellate review of a federal trial court's decision to admit or exclude expert scientific evidence. Brief for the United States as amicus curiae supporting petitioners. Reversed, 522 U.S. 136 (1997).

13. *State Oil Co. v. Khan*, No. 96-871. Whether maximum resale price maintenance should remain a per se violation of Section 1 of the Sherman Act.

Brief for the United States and the Federal Trade Commission as amici curiae supporting reversal. Reversed, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

14. *Barnett Bank of Marion County, N.A. v. Gallagher, Florida Insurance Comm'r*, No. 94-1837. Whether 12 U.S.C. 92, which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempted a state law that prohibited most national banks from engaging in most insurance agency activities. Brief for the United States and the Comptroller of the Currency as amici curiae supporting petitioner. Reversed, 517 U.S. 25 (1996).

15. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, No. 92-854. Availability of private actions for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934. Brief for the Securities and Exchange Commission as amicus curiae in support of respondent. Reversed, 511 U.S. 164 (1994).

16. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, No. 91-2024. Equal access to public school facilities for public or community groups whose otherwise permissible proposed uses evinced a religious point of view. Brief for the United States as amicus curiae supporting petitioners. Reversed, 508 U.S. 384 (1993).

17. *Hazen Paper Co. v. Biggins*, No. 91-1600. Definition of "willfulness" applicable in cases of individual discriminatory treatment under the Age Discrimination in Employment Act. Brief for the United States and the EEOC as amici curiae supporting affirmance. Affirmed in part, vacated in part, 507 U.S. 604 (1993).

Also as an Assistant to the Solicitor General, my name appeared on petitions for certiorari in 11 cases:

1. *United States v. Ahumada-Aguilar*, No. 99-1872. Constitutionality of requirements for transmission of citizenship to children born abroad out of wedlock, with associated questions of standing and remedy. Granted, vacated, and remanded, 533 U.S. 913 (2001).

2. *Herman, Sec'y of Labor v. L.R. Willson & Sons, Inc.*, No. 98-188. Procedural questions relating to the charging and proof of employer violations of the Occupational Safety and Health Act. Denied, 525 U.S. 962 (1998).

3. *Lehman [later Dickinson], Commissioner of Patents v. Zurko*, No. 98-377. Whether factual findings made by the Patent and Trademark Office in patent proceedings should be reviewed under a standard more stringent than that normally used to review agency factfinding under the APA. Granted, 525 U.S. 961 (1998).

4. *United States v. Qualls*, No. 98-19. Whether a partial state firearms disability resulting from prior state convictions meant that those convictions continued to count as prior convictions for purposes of federal firearms restrictions, even if the defendant's civil rights had been restored within the meaning of 18 U.S.C. 921(a)(20). This petition sought vacatur and remand in light of the Court's decision on the same point in *Caron v. United States*, listed above under merits briefs. Granted, vacated, and remanded, 525 U.S. 957 (1998).

5. *Immigration & Naturalization Service v. Yang*, No. 95-938. Challenge to the Ninth Circuit's failure to defer to the Attorney General's exercise of discretion in declining to waive deportation of an alien based on various acts of immigration fraud. Granted, 516 U.S. 1110 (1996).

6. *Babbitt, Sec'y of the Interior v. Phillips Petroleum Co.*, No. 94-1292. Enforceability of agency order requiring recomputation of production value for royalty purposes; validity of the Fifth Circuit's "substantial impact" test for distinguishing "interpretive" from "legislative" agency rules for purposes of the APA's notice-and-comment requirements. Denied, 514 U.S. 1092 (1995).

7. *Shalala, Sec'y of Health & Human Services v. Health Ins. Ass'n of America, Inc.*, No. 94-919. Validity of regulations under the "Medicare as secondary payer" program; challenge to the D.C. Circuit's decision to accord less deference to agency interpretive regulations in cases involving conduct predating the issuance of the regulations. Denied, 513 U.S. 1147 (1995).

8. *Ludwig, Comptroller of the Currency v. Variable Annuity Life Ins. Co.*, No. 93-1613. Challenge to the Fifth Circuit's decision rejecting the Comptroller's determination that the National Bank Act permits national banks to act as agents for the sale of annuities. Granted, 511 U.S. 1141 (1994).

9. *Shalala, Sec'y of Health & Human Services v. Guernsey Memorial Hospital*, No. 93-1251. Whether HHS regulations required use of GAAP accounting for purposes of Medicare reimbursement. Granted, 511 U.S. 1016 (1994).

10. *Brown, Sec'y of Veterans Affairs v. Gardner*, No. 93-1128. Validity of the VA's longstanding construction of 38 U.S.C. 1151 to require a showing of fault on the part of the VA in order to recover benefits for disability caused by VA medical treatment. Granted, 511 U.S. 1017 (1994).

11. *Director, Office of Workers' Compensation Programs, United States Dep't of Labor v. Greenwich Collieries*, No. 93-744. Validity of the "true doubt" rule applied in Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act benefits adjudications. Granted, 510 U.S. 1068 (1994).

Also as an Assistant to the Solicitor General, my name appeared on 12 amicus briefs setting forth the views of the United States at the petition stage:

1. *Arons v. Office of Disciplinary Counsel of the Supreme Court of Delaware*, No. 00-509. Whether the Individuals with Disabilities Education Act establishes a clear federal right to non-lawyer representation in state administrative hearings that preempts a contrary state rule against the unauthorized practice of law. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 532 U.S. 1065 (2001).

2. *Janakakis-Kostun v. Janakakis*, No. 99-1496. Questions concerning application of the "grave risk" exception to the responsibility to return an abducted child under Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 531 U.S. 811 (2000).

3. *Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem. Hosp.*, No. 99-905. Whether petitioner stated a claim under the Sherman Act by alleging that respondents barred petitioner's entry into a market by making factual misrepresentations and boycott threats to a state agency, causing the agency to deny petitioner a certificate required for entry into the market. Brief for the United States and the Federal Trade Commission as amici curiae, at the Court's invitation, suggesting denial. Cert. denied, 530 U.S. 1261 (2000).

4. *Whitburn, Sec'y, Wisconsin Dep't of Health & Family Servs. v. Addis*, No. 98-1041. Validity, under federal law, of Wisconsin's method of determining eligibility and need levels for a class of Medicaid applicants. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 527 U.S. 1021 (1999).

5. *Slekis v. Thomas, Comm'r, Conn. Dep't of Social Servs.*, No. 98-5070. Permissible standard for State's denial of Medicaid reimbursement for item of durable medical equipment. Brief for the United States as amicus curiae, at the Court's invitation, suggesting that the petition be granted, the judgment below vacated, and the case remanded for further consideration in light of intervening administrative guidance. Granted, vacated, and remanded for reconsideration, 525 U.S. 1098 (1999).

6. *Larsen, Maryland Insurance Comm'r v. American Medical Security, Inc.*, No. 97-218. Whether Section 514 of ERISA, 29 U.S.C. 1144, precludes a State from specifying minimum coverage "attachment points," below which insurance policies drafted as "stop-loss" insurance may be sold to employee benefit plans only if they comply with the State's requirements for conventional group health insurance policies. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 524 U.S. 936 (1998).

7. *Portland General Electric Co. v. Columbia Steel Casting Co.*, No. 97-49. "State action" immunity from the federal antitrust laws. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 523 U.S. 1112 (1998).

8. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, No. 96-1037. Whether tribal sovereign immunity from suit barred an action brought against an Indian Tribe in state court to recover damages for a breach of contract arising out of commercial activity undertaken by the Tribe outside Indian country. Brief for the United States as amicus curiae, at the Court's invitation, suggesting that certiorari be granted. Cert. granted, 521 U.S. 1117 (1997).

9. *Barnett Bank of Marion County, N.A. v. Gallagher, Florida Insurance Comm'r*, No. 94-1837. Whether 12 U.S.C. 92 , which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempted a state law that prohibited most national banks from engaging in most insurance agency activities. Brief for the United States and the Comptroller of the Currency as amici curiae supporting petitioner. Cert. granted, 515 U.S. 1190 (1995).

10. *Northern Kentucky Welfare Rights Ass'n v. Jones*, No. 92-1831. Enforceability of federal statute through private cause of action under 42 U.S.C. 1983. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 512 U.S. 1218 (1994).

11. *Kalitta Flying Service, Inc. v. G.S. Rasmussen & Assoc.*, No. 91-1970. Whether a state law action for conversion and unjust enrichment, based on unauthorized use of a design approval granted by the Federal Aviation Administration, was preempted by the federal system of air safety regulation or by federal patent or copyright law. Brief for the United States as amicus curiae, at the Court's invitation, suggesting denial. Cert. denied, 508 U.S. 959 (1993).

12. *Statewide Reapportionment Advisory Committee v. Theodore*, No. 92-155, together with *Campbell v. Theodore*, No. 92-219. Whether a district court gave adequate regard to the requirements of Section 2 of the Voting Rights Act in imposing redistricting plans for use in congressional and state legislative elections in South Carolina. Brief for the United States, at the Court's invitation, suggesting vacatur and remand for reconsideration of compliance with Section 2. Vacated and remanded for consideration in light of the position presented by the Solicitor General's brief, 508 U.S. 968 (1993).

In private practice I have also participated substantially in the briefing of many cases at the Supreme Court. My name has appeared on the following briefs:

1. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (constitutionality of state ban on assisted suicide): Amicus brief for the Washington State Psychological Association and other groups and mental health professionals supporting respondents (arguing that mental-health professionals can assess whether or not a terminally ill patient is competent and has made a reasoned, informed, and voluntary decision to seek assistance in hastening death).

2. *Lemelson Medical, Education & Research Foundation v. Symbol Technologies, Inc.*, No. 01-1855 (cert. denied, Oct. 7, 2002): Brief in opposition for Symbol Technologies et al., successfully opposing certiorari in important case involving the doctrine of prosecution laches.

3. *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (constitutionality of Copyright Term Extension Act of 1998): Amicus brief for the Motion Picture Association of America, Inc., supporting respondent.

4. *Mattel, Inc. v. MCA Records, Inc.*, No. 02-633 (cert. denied, Jan. 27, 2003): Petition seeking review of questions involving alleged trademark infringement and dilution by a song title.

5. *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (intervention and appellate standing in the context of class-action settlement): Amicus brief for Citibank (South Dakota), N.A., supporting respondents.

6. *Norfolk & Western Rwy. Co. v. Ayers*, 538 U.S. 135 (2003) (availability of damages under Federal Employers' Liability Act for fear of developing cancer because of exposure to asbestos): Amicus brief for the American Insurance Association supporting petitioner.

7. *The Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, No. 01-1317 (cert. denied, Nov. 4, 2002): Supplemental brief for petitioner, responding to views expressed by the United States, in case involving whether a foreign sovereign could maintain a civil RICO action to recover damages measured in part by the value of lost foreign tax revenues.

8. *Advanta Corp. v. Riseman*, No. 02-882 (cert. denied, Feb. 24, 2003): Petition presenting the question whether a federal appellate court violates a defendant's Seventh Amendment right to a jury trial when it seeks to remedy jury error in assessing civil damages by reducing the award based on judicial inferences concerning the jury's reasoning.

9. *McConnell v. FEC*, 540 U.S. 93 (2003) (constitutionality of the Bipartisan Campaign Reform Act of 2002): Jurisdictional statement, responses, and brief on

the merits for intervenor-defendants John McCain, Russell Feingold, Christopher Shays, Martin Meehan, Olympia Snowe, and James Jeffords.

10. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (application of the Sherman Act to claims by non-U.S. plaintiffs based on alleged overcharges in transactions occurring entirely outside the United States): Although representation of the defendants/petitioners in this case was led by others, particularly in the Supreme Court, a colleague and I participated actively in the counsel group in seeking rehearing in the court of appeals and remained involved through the certiorari and Supreme Court briefing process, and our names appear on the Supreme Court briefs.

11. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005): Amicus brief on behalf of the National Congress of American Indians addressing complex questions of government contracts and appropriations law in connection with tribal self-determination contracts under the Indian Self-Determination and Education Assistance Act of 1975.

12. *Gen-Probe Inc. v. Vysis, Inc.*, No. 04-260 (petition dismissed on settlement, Oct. 14, 2004): Petition for certiorari presenting the question whether a patent licensee must refuse to pay royalties under an existing license in order to establish the case-or-controversy necessary to support federal jurisdiction over an action seeking a declaration of invalidity or non-infringement. The parties settled this case after the petition was filed. (The Court took up the issue in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), and reached the result advocated by the Gen-Probe petition, abrogating the Federal Circuit's *Gen-Probe* decision.)

13. *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, No. 05-155 (cert. denied, Oct. 11, 2005): Petition seeking review of the question whether a state court deciding a matter of foreign law is required, as a matter of federal common law, to receive and give respectful consideration to an official statement from the relevant foreign sovereign explaining the substance of its law.

14. *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, No. 05-236 (cert. denied, Oct. 17, 2005): Amicus brief for PhRMA supporting certiorari in case involving issues of commercial success and non-obviousness.

15. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (preemption of state liability claims by ERISA): Amicus brief for AAHP-HIAA and others supporting petitioners.

16. *Dretke v. Haley*, 541 U.S. 386 (2004): Amicus brief for James Liebman and other law professors, arguing that the miscarriage-of-justice principle that permits federal habeas courts to hear otherwise procedurally barred claims in unusual cases should extend to cases where a petitioner an show that earlier proceedings resulted in a demonstrably unlawful sentence.

17. *McGuire v. Reilly*, No. 04-939 (cert. denied, Apr. 18, 2005): Petition seeking review of decision upholding state law establishing speech-restrictive "buffer zone" around free-standing clinics performing abortions.

18. *San Remo Hotel L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (preclusion of relitigation in federal court of issues previously determined in state proceedings that were required to ripen federal takings claim): Brief for the respondents.

19. *Princo Corp. v. U.S. Philips Corp.*, No. 05-1341 (cert. denied, June 19, 2006): Brief opposing review in case involving antitrust/misuse challenge to the package licensing of patents.

20. *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (cert. denied, Jan. 16, 2007): Amicus brief for the Nuclear Energy Institute supporting petitioners in case involving NEPA review of nuclear facility licensing.

21. *AFG Indus., Inc. v. Cardinal IG Co., Inc.*, No. 07-493 (cert. denied, Jan. 14, 2008): Petition in patent case raising issues of appellate jurisdiction and procedure.

22. *EchoStar Comm'ns Corp. v. TiVo Inc.*, No. 08-179 (cert. denied, Oct. 6, 2008): Brief in opposition for TiVo in patent infringement case.

23. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (permissibility of EPA taking cost-benefit considerations into account in promulgating regulations addressing water intake structures at large power plants): Amicus briefs at the petition and merits stages for the Nuclear Energy Institute supporting petitioners.

24. *Cuomo v. The Clearing House Ass'n L.L.C.*, 129 S. Ct. 2710 (2009) (preemption of state investigative authority by the National Bank Act): Brief for the respondent.

25. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198 (cert. granted, 129 S. Ct. 2793 (2009); argued Dec. 9, 2009): Petition and merits briefs in case involving whether imposing class arbitration on parties whose arbitration clause is silent on the issue is consistent with the Federal Arbitration Act.

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.

Note: In selecting cases to respond to this question, I have omitted a number of significant matters that are currently pending on appeal or on remand or in which closely-related proceedings remain pending. These include:

Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., No. 08-1198 (U.S.) (argued Dec. 9, 2009; decision pending). As noted above, this case involves whether imposing class arbitration on parties whose arbitration clause is silent on the issue is consistent with the Federal Arbitration Act. WilmerHale has for some years represented one of the principal defendants (petitioners in the Supreme Court) in this and related matters. I became involved again after an unfavorable decision from the Second Circuit, and was substantially involved in drafting the successful certiorari petition and the petitioners' brief on the merits.

Princo Corp. v. U.S. International Trade Commission, No. 2007-1386 (Fed. Cir.) (argued en banc March 3, 2010; decision pending). This is a case involving patent misuse and antitrust issues in which I and others at WilmerHale represent U.S. Philips Corporation, the complainant before the ITC and intervenor on appeal. I was substantially involved in the briefing that led to the grant of en banc review and in the en banc briefing, and I argued the case before the en banc court. A previous appeal in the same matter was resolved in favor of Philips in *U.S. Philips Corp. v. ITC*, 424 F.3d 1179 (2005). I was substantially involved in the briefing of that appeal but did not argue it.

TiVo Inc. v. EchoStar Corp., No. 2009-1374 (Fed. Cir. March 4, 2010) (petition for rehearing en banc filed April 5, 2010). This is an appeal from a judgment holding EchoStar in contempt of an injunction entered in favor of TiVo in a patent infringement case. I and others at WilmerHale represent TiVo in the Federal Circuit, as we did on the original appeal from the judgment of infringement, *TiVo Inc. v. EchoStar Comm'ns Corp.*, 516 F.3d 1290 (Fed. Cir. 2008). On both appeals, I was substantially involved in the briefing but did not argue the case.

Xilinx, Inc. v. Commissioner of Internal Revenue, Nos. 06-74246, 06-74269 (9th Cir. Mar. 22, 2010) (further proceedings possible). In this significant tax case involving basic principles of "transfer pricing," I and others at WilmerHale were engaged after an unfavorable appellate decision to assist Xilinx in seeking rehearing en banc. After the filing of our rehearing petition and a number of amicus briefs, the divided panel withdrew its initial decision in favor of the government and issued new opinions ruling in favor of Xilinx.

United States v. Reyes, 577 F.3d 1069 (9th Cir. 2009) (retried Feb.-Mar. 2010; proceedings ongoing). I and others at WilmerHale were retained to represent Mr. Reyes on appeal of criminal convictions relating to alleged options "backdating." I was substantially involved in the briefing but did not argue the case. The Ninth Circuit reversed all the convictions and remanded for retrial.

United States v. Lake, 472 F.3d 1247 (10th Cir. 2007) (retrial scheduled for Sept. 2010). We were retained to represent Mr. Lake on appeal of criminal convictions resulting from allegations relating to the defendants' conduct as senior corporate executives. I was substantially involved in the briefing but did not argue the case. The Tenth Circuit reversed all the convictions, making clear that many of the charges could not be retried.

The cases below are listed in roughly chronological order:

1. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). United States Supreme Court; Rehnquist, C.J., and White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ. Briefed and argued in 1993.

I briefed and argued this while at the Solicitor General's Office, representing the United States and the Equal Employment Opportunity Commission as amici supporting the respondent. The case presented an important question concerning the burden of proof in employment discrimination cases: whether an employee who had shown that all non-discriminatory reasons advanced by the employer for an adverse employment action were unworthy of credence was entitled to a judgment of discrimination. Working with co-counsel from the EEOC and OSG, I had substantial responsibility for the final form of the government's brief arguing that, based on the Court's prior decisions, the employee in such a case was entitled to judgment as a matter of law. In a 5-4 decision, the Court rejected the government's position. The majority opinion acknowledged, however, that language in a prior decision supported the position taken by the government's brief. 509 U.S. at 517.

Co-counsel appearing with me on the brief were William C. Bryson, then Acting Solicitor General, and James P. Turner, Edwin S. Kneedler, David K. Flynn, and Rebecca K. Troth, all then of the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2217; and Donald R. Livingston, then General Counsel, and Gwendolyn Young Reams, Vincent J. Blackwood, and Karen M. Moran, all then of the EEOC, Washington, DC 20507.

The case was argued for respondent Hicks, whom our brief supported, by Charles R. Oldham, then at 317 N. 11th Street, Suite 1220, St. Louis, MO 63101, (314) 231-0464. His co-counsel were Eric Schnapper and others, then at 99 Hudson Street, Suite 1600 New York, NY 10013, (212) 219-1900.

The case was argued for petitioner St. Mary's Honor Center, a state institution, by Gary L. Gardner, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102,

(314) 751-3321. With him on the brief were Jeremiah W. (Jay) Nixon, Attorney General, and Don M. Downing, Deputy Attorney General.

2. *Ludwig, Comptroller of the Currency v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (companion case to *NationsBank of N.C., N.A. v. VALIC*). United States Supreme Court; Rehnquist, C.J., and Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. Petition filed in April, 1994; briefed and argued in 1994.

This case involved an important question of federal banking law—whether national banks were generally authorized to act as agents in the sale of annuity products—and a related question of the deference due from the courts to interpretation and implementation of federal banking law. The arguments involved both the nature of annuities as, variously, investment or insurance products, and the proper interpretation of a federal statutory provision that affirmatively authorized banks in small towns to act as agents for insurers. Working with co-counsel from the Comptroller's Office and the Department of Justice, I had substantial responsibility for the final form of the government's petition and merits brief (and associated replies), and I presented oral argument on behalf of the federal petitioners. The Court agreed unanimously with our position.

Co-counsel appearing with me on the brief were Drew S. Days, III, then Solicitor General, and Frank W. Hunger, Paul Bender, Mark B. Stern, and Jacob M. Lewis, all then of the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2217; and William P. Bowden, Jr., Chief Counsel at the time of the petition, Julie L. Williams, Chief Counsel at the time of the merits brief, and L. Robert Griffin, Rosa M. Koppel, and Yvonne D. McIntire, all then of the Office of the Comptroller of the Currency, Washington, DC 20219, (202) 874-5200.

The companion private case was argued for petitioner NationsBank by Steven S. Rosenthal, then of Morrison & Foerster, 2000 Pennsylvania Avenue, NW, Washington, DC 20006, (202) 887-1500. With him on the brief were Robert M. Kurucza, Robert G. Ballen, and Leslie J. Cloutier.

The cases were argued for respondent VALIC by David Overlock Stewart, Ropes & Gray, 1001 Pennsylvania Avenue, NW, Suite 1200 South, Washington, DC 20004, (202) 626-3900. With him on the brief were Martin E. Lybecker, Alan G. Priest, and Raymond C. Ortman, Jr.

3. *Hercules, Inc. v. United States*, 516 U.S. 417 (1996). United States Supreme Court; Rehnquist, C.J., and O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. (Justice Stevens did not participate.) Brief in opposition filed in March, 1995; briefed and argued in 1995.

This was a complex government contracts case arising from the Federal Circuit. The petitioners had manufactured Agent Orange under government contracts, and later incurred costs to litigate and settle product liability actions brought by third parties. They

argued that the United States could be held liable for those costs on contractual theories of implied warranty of specifications or implied indemnity. Working with co-counsel from the Department of Justice, I had substantial responsibility for the final form of the government's brief in opposition to the contractors' petition and then for the final form of the government's merits brief, and I presented oral argument on behalf of the United States. Although the Court granted the petition over the government's opposition, it ultimately ruled 6-2 in favor of the United States.

Co-counsel appearing with me on the brief were Drew S. Days, III, then Solicitor General, and Frank W. Hunger, Paul Bender, David S. Fishback, Alfred Mollin, Michael T. McCaul, and Burke M. Wong, all then of the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2217.

The case was argued for the petitioners by Carter G. Phillips, Sidley & Austin, 1722 Eye Street, NW, Suite 900, Washington, DC 20006, (202) 736-8000. With him on the brief were Jerold Oshinsky and others of Anderson Kill Olick & Oshinsky, 2000 Pennsylvania Avenue, NW, Suite 7500, Washington, DC 20006, (202) 728-3100; James S. Turner and Alan Dumoff of Swanking & Turner, 1424 16th Street, NW, Suite 105, Washington, DC 20036, (202) 462-8800; and Michael B. Keehan and Walter S. Rowland of Hercules, Inc., Hercules Plaza, Wilmington, DE 19894, (302) 594-5000.

4. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). United States Supreme Court; Rehnquist, C.J., and Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. Amicus brief supporting petition filed in June, 1997; briefed and argued on the merits in 1997 and 1998.

This was a significant case involving Indian tribal sovereignty and, in particular, whether tribal sovereign immunity barred an action brought against the Tribe in state court to recover damages for a breach of contract arising out of commercial activity undertaken by the Tribe outside "Indian country." Working with co-counsel at the Department of Justice and supporting counsel for the petitioner Tribe, I was substantially responsible for drafting the United States' briefs (i) responding to an invitation from the Court at the petition stage to express the views of the United States and (ii) on the merits after review was granted, and I presented oral argument for the United States as amicus. In a 6-3 opinion, the Court sustained the Tribe's sovereign immunity defense.

Co-counsel appearing with me on the brief were Walter Dellinger, then Acting Solicitor General, and Lois J. Schiffer, Edwin S. Kneedler, David C. Shilton, and Elizabeth Ann Peterson, all then of the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2217.

The case was argued for petitioner the Kiowa Tribe of Oklahoma, which the United States supported, by R. Brown Wallace of Andrews Davis Legg Bixler Milsten & Price, 500 W. Main, Oklahoma City, OK 73102, (405) 272-9241. With him on the brief was Sheila D. Tims.

The case was argued for respondent Manufacturing Technologies by John E. Patterson, Jr., Two Corporate Plaza, 5555 N. Grand Boulevard, Suite 210, Oklahoma City, OK 73112, (405) 947-1985.

5. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). United States Supreme Court; Rehnquist, C.J., and Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. Briefed and argued in 1999-2000.

While at the Solicitor General's Office, I was involved in a series of significant cases involving whether legislatures could constitutionally define statutory "sentencing factors" that determined the maximum legally permissible sentence but were to be found by the court at sentencing, not by a jury beyond a reasonable doubt. The series could be viewed as including *Witte v. United States*, 515 U.S. 389 (1995); *Edwards v. United States*, 523 U.S. 511 (1998); and *Jones v. United States*, 526 U.S. 277 (1999), all of which I argued but none of which ultimately reached the core constitutional question. The Court finally did reach the question in *Apprendi*, in which the United States participated as an amicus. Working with co-counsel at the Department of Justice, I had substantial responsibility for the final form of the government's amicus brief, and I presented oral argument on behalf of the United States supporting the State of New Jersey. In a 5-4 opinion the Court rejected the government's position, holding that any fact (other than a prior conviction) that increases the penalty for a crime beyond an otherwise applicable statutory maximum must be submitted to a jury and found beyond a reasonable doubt.

Co-counsel appearing with me on the brief were Seth P. Waxman, then Solicitor General, and James K. Robinson, Michael R. Dreeben, and Nina Goodman, all then of the Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2217.

The case was argued for respondent New Jersey, which the United States supported, by Deputy Attorney General Lisa Sarnoff Gochman, Division of Criminal Justice, R.J. Hughes Justice Complex, P.O. Box 086, Trenton, NJ 08625, (609) 292-9086. With her on the brief was New Jersey Attorney General John J. Farmer, Jr.

The case was argued for petitioner Apprendi by Joseph D. O'Neill, 30 West Chestnut Avenue, P.O. Box 847, Vineland, NJ 08362. With him on the brief was Charles I. Coant.

6. *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004). United States District Court for the District of Columbia, Judge Emmet Sullivan; United States Court of Appeals for the District of Columbia Circuit, Judges Judith Rogers, John Roberts, and Laurence Silberman. Litigated in the district court from April to September, 2002, and in the court of appeals from September, 2002, to decision in November, 2003; certiorari denied in 2004.

In this case, the Secretary of the Interior agreed to take land into trust on behalf of a California Indian tribe, which intended to generate funds for self-government by building

and operating a casino in accordance with the Indian Gaming Regulatory Act (IGRA). Two nearby cities and a citizens association sued the to block the trust acquisition, raising a variety of statutory and constitutional arguments. Our client, the Tribe, intervened as a defendant and took a very active part in the litigation, working alongside the Department of Justice. I took a leading role in briefing the Tribe's opposition to injunctive relief and its motion to dismiss or for summary judgment in the district court, which was ultimately successful; in initial appellate briefing successfully opposing a stay of the transfer of title (2002 WL 31045961); and in the Tribe's further briefing on appeal. (My colleague Seth Waxman argued the case for the Tribe in both courts.) The D.C. Circuit's opinion affirming the judgment in favor of our client was the first appellate opinion to decide an important statutory question involving the eligibility of certain types of lands for casino gaming under IGRA.

Co-counsel appearing with me on the briefs were Seth Waxman and Luke Sobota at WilmerHale; Howard Dickstein, then of Dickstein & Merrin, 2001 P Street, Suite 100, Sacramento, CA 95814, (916) 443-6911; Nicholas C. Yost of Sonnenschein, Nath & Rosenthal LLP, now at 525 Market Street, 26th Floor, San Francisco, CA 94105, (415) 882-5000, and Kirk R. Ruthenberg of Sonnenschein's Washington, DC office, 1301 K Street, NW, Suite 600, Washington, DC 20005, (202) 408-6400.

The Secretary of the Interior, whom the Tribe supported, was represented by Steven Miskinis, Patricia Miller, William Lazarus, and Elizabeth Ann Peterson, all then of the Environment and Natural Resources Division of the Department of Justice.

The City of Roseville and other plaintiffs-appellants were represented by J. Scott Smith of Angelo, Kilday & Kilduff, 601 University Avenue, Suite 150, Sacramento, CA 95825, (916) 564-6100; and William P. Horn, Harvey A. Levin, and Barbara A. Miller of Birch, Horn, Bittner & Cherot, 1155 Connecticut Avenue, NW, Suite 1200, Washington, DC 20036, (202) 659-5800.

7. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005). Supreme Court of the United States; Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. (The Chief Justice was recused.) Amicus brief filed June, 2004.

WilmerHale was engaged by the National Congress of American Indians to represent it as amicus curiae after the Supreme Court granted review in a pair of cases, one from the Tenth Circuit and one from the Federal Circuit, involving complex questions of government contracts and appropriations law in connection with tribal self-determination contracts under the Indian Self-Determination and Education Assistance Act of 1975. Working with in-house counsel and a summer associate, I was substantially responsible for the final drafting of the amicus brief, which traced the unusual development of the relevant statutory provisions over time and argued that, in light of that history, the provisions could not be interpreted to accord the Secretary of Health and Human Services discretion over the amount to be reimbursed to Tribes under ISDA contracts—regardless of whatever deference might be due, under ordinary circumstances, to the interpretations and judgments of federal administrators. In a unanimous decision, the Court agreed with

the Tribes that none of the provisions on which the government relied relieved it of the contractual obligation to pay the amounts at issue.

On the brief with me was John Dossett, General Counsel of NCAI, now at 1516 P Street, NW, Washington, DC 20005, (202) 466-7767. The Tribes were represented by Lloyd B. Miller of Sonosky, Chambers, Sachse, Miller, & Munson, LLP, 900 West Fifth Avenue, Suite 700, Anchorage, AK 99501, (907) 258-6377; with him on the brief were Carter Phillips and others of Sidley, Austin, Brown, & Wood, LLP, 1501 K Street, NW, Washington, DC 20005, (202) 736-8000. Sri Srinivasan, then Assistant to the Solicitor General, Department of Justice, Washington, DC 20530, (202) 514-2217, argued the case for the federal parties.

8. *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). United States Court of Appeals for the District of Columbia Circuit; Judges Merrick Garland, Janice Rogers Brown, and Stephen Williams. Amicus brief filed April, 2006; cased decided February, 2007.

WilmerHale was engaged by the National Indian Gaming Association to represent it as amicus curiae in this case, which presented an important question concerning whether the National Labor Relations Act applied to an enterprise carried on by an Indian tribal government on land over which the Tribe exercised governmental authority. Working closely with counsel for other amici, an associate and I took the lead in coordinating the amicus effort and producing a unified amicus brief addressing the historical and Indian-law context of the statutory question and why construing the NLRA to reach the activities in question would interfere with tribal sovereignty in ways not authorized by Congress. I was substantially responsible for the final form of much of the amicus brief. The court recognized that the case implicated important principles of federal Indian law, but ultimately disagreed with the San Manuel Band and tribal amici that applying the NLRA to the enterprise at issue in the case would impinge significantly on tribal sovereignty.

My co-counsel at WilmerHale were Seth Waxman and Ryan P. Phair. On the brief with us as counsel for other amici were: Charles A. Hobbs and Elliott A. Milhollin, Hobbs, Straus, Dean & Walker LLP, 2120 L Street, NW, Suite 700, Washington, DC 20037, (202) 822-8282; John Dossett, National Congress of American Indians, 1301 Connecticut Avenue, NW, Suite 200, Washington, DC 20036, (202) 466-7767; Richard Guest, Native American Rights Fund, 1712 N Street, NW, Washington, DC 20036, (202) 785-4166; Kaighn Smith, Drummond, Woodwum & MacMahon, 245 Commercial Street, Portland, ME 04104-5031, (207) 253-0559; Matthew L.M. Fletcher, University of North Dakota School of Law, Box 9003, Grand Forks, ND 58202, (701) 777-2264; George Forman, Forman & Associates, 4340 Redwood Highway, Suite F228, San Rafael, CA 94903, (415) 491-2310; Dale White, Mohegan Tribe of Indians, 5 Crow Hill Road, Uncasville, CT 06382, (860) 862-6245; C. Bryant Rogers, VanAmberg, Rogers, Yepa & Abeita, LLP, Box 1447, Santa Fe, NM 87504, (505) 988-8979; and John Petoskey, Grand Traverse Band of Ottawa and Chippewa Indians, 2605 N. West Bayshore Dr., Peshawbestown, MI 49682, (231) 534-7279.

The San Manuel Band and its casino, which our amicus brief supported, were represented by Jerome L. Levine (argued) and Frank R. Lawrence, Holland & Knight LLP, 633 West Fifth Street, Los Angeles, CA 90071, (213) 896-2400, and Todd D. Steenson and Lynn E. Calkins of the Chicago and Washington, DC, offices of Holland & Knight.

The case was argued for the National Labor Relations Board by David A. Fleischer, counsel for the Board, then at 1099 14th Street NW, Washington, DC 20570, (202) 273-2987. With him on the brief were Ronald E. Meisberg, then General Counsel, and others from the NLRB. Richard G. McCracken, Davis, Cowell & Bowe, LLP, 595 Market Street, Suite 1400, San Francisco, CA 94105, (415) 597-7200, filed a brief and argued for intervenor Unite Here! International Union. Richard Blumenthal, Attorney General, and others from his office, 55 Elm Street, Hartford, CT 06141, (860) 808-5050, filed a brief for intervenor the State of Connecticut.

9. *The University of Chicago v. United States*, 547 F.3d 773 (7th Cir. 2008). United States Court of Appeals for the Seventh Circuit; Judges Michael Kanne, Diane Sykes, and John Tinder. Litigated on appeal from November, 2007, to decision in October, 2008.

I and others at WilmerHale were engaged to represent The University of Chicago on appeal of an adverse district court decision in a case of first impression challenging the IRS's treatment of certain retirement plan contributions for purposes of the Federal Insurance Contribution Act (i.e., Social Security and Medicare taxes). The case involved complex questions of statutory interpretation, statutory and legislative history, and the interrelationship of different provisions of the Internal Revenue Code. Working with co-counsel, I was substantially responsible for the final drafting of the University's briefs, and I argued the case for the University. The court sustained the IRS's treatment of the contributions at issue.

My co-counsel were Randolph Goodman, F. David Lake, Jr., and Justin Rubin of WilmerHale; Thomas D. Sykes, McDermott Will & Emery LLP, 227 W. Monroe Street, Chicago, IL 60606, (312) 984-7530; and Beth A. Harris and Russell J. Herron, The University of Chicago, 5801 South Ellis Avenue, Chicago, IL 60637, (773) 702-7241.

The case was argued for the Commissioner of Internal Revenue by Kenneth L. Greene, Tax Division, Department of Justice, 950 Pennsylvania Avenue, NW, Room 4433, Washington, DC 20530, (202) 514-8126. With him on the brief was Judith A. Hagley.

10. *Cuomo v. The Clearing House Ass'n L.L.C.*, 129 S. Ct. 2710 (2009). United States Supreme Court; Roberts, C.J., and Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito, JJ. Briefed and argued in 2009.

This case presented issues of substantial significance to national banks, their federal regulator, and state law enforcement authorities, centering on whether investigative activities and/or lawsuits by a state attorney general seeking to enforce state consumer protection laws were preempted, as to federally chartered banks, by the National Bank

Act's preemption of state "visitorial powers" and an implementing regulation promulgated by the Comptroller of the Currency. The Comptroller and the Clearing House Association (an association of major banks) filed suit to enjoin threatened documentary subpoenas and state enforcement actions by the New York Attorney General, and prevailed in the district court and the Second Circuit. When the Supreme Court granted the Attorney General's petition for certiorari, the Clearing House engaged WilmerHale to present its case in the Supreme Court, alongside the Solicitor General representing the Comptroller. I played a substantial role in the framing and final drafting of the Clearing House's brief on the merits, in dealing with government counsel and amici, and in preparation for oral argument. (The case was argued by my colleague, Seth Waxman.) The Court unanimously agreed with the Clearing House's argument that the Comptroller had permissibly interpreted the statute to preclude the enforcement of state administrative subpoenas or similar executive investigative processes, but a 5-4 majority held that the Attorney General was free to invoke ordinary civil litigation procedures in state court if he had appropriate grounds to file and pursue such litigation in a given case.

Co-counsel appearing with me on the brief were Seth P. Waxman, Christopher R. Lipsett, Noah A. Levine, Anne K. Small, Catherine M.A. Carroll, Christopher E. Babbitt, and Lauren E. Baer of the Washington and New York offices of WilmerHale; and H. Rodgin Cohen, Robinson B. Lacy, Michael M. Wiseman, and Adam R. Brebner of Sullivan & Cromwell LLP, 125 Broad Street, New York, NY 10004, (212) 558-4000.

The case was argued for co-respondent the Comptroller of the Currency by Deputy Solicitor General Malcolm L. Stewart. With him on the briefs were Elena Kagan, Solicitor General, and Matthew D. Roberts of the Department of Justice, Washington, DC 20530, (202) 514-2217, and Julie L. Williams, Chief Counsel, Daniel P. Stipano, Horace G. Sneed, and Douglas B. Jordan of the Office of the Comptroller of the Currency.

The case was argued for petitioner the Attorney General of New York by Barbara D. Underwood, Solicitor General of New York, 120 Broadway, 25th Floor, New York, NY 10271, (212) 416-8020. With her on the briefs were Michelle Aronowitz and Richard Dearing.

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.)

As discussed in Item 16, I began my career by clerking for a federal appellate judge (1986-1987). I then spent a year in Thailand as a Luce Scholar (1987-1988), largely observing the commercial practice conducted by a small but active Thai law office. In that capacity, for example, I helped prepare or edit English-language contracts for non-Thai investors with ventures or investments in Thailand.

When I began private practice at a Wall Street firm in 1988, I focused on transactional and tax matters rather than on litigation. That work involved, for example, working on the transactional and disclosure documents for an issuance of corporate debt; analyzing or proposing structures for corporate mergers, acquisitions, or divestitures; reviewing or drafting language for contracts or disclosure documents; analyzing the structures or tax effects of actual or potential financial products or domestic or cross-border financial transactions; and drafting comments reflecting the views of clients or client groups on regulatory or legislative issues. I also recall doing some legal analysis and organizational work for an entity formed to help attract a political convention to the city, and I drafted wills and similar documents for pro bono clients living with HIV or AIDS.

At the Solicitor General's Office (1992-1996, 1997-2001) my practice was almost entirely litigation or litigation-related. I was occasionally asked to provide analysis or advice on legal issues not directly related to pending litigation. I also led the Office's initial efforts to create and maintain a website providing information about the Office and the Supreme Court litigation process and public access to briefs filed by the Office.

When I was detailed to the Deputy Attorney General's Office (July, 2000 - January, 2001), my job as an Associate Deputy Attorney General involved oversight of or interaction with Department components, issue-management, policy and organizational issues, and sometimes working with White House staff, outside groups, or legislative staff. My primary areas of responsibility were computer crime and privacy. I participated, for example, in Justice Department and Administration efforts to propose legislation updating the Electronic Communications Privacy Act; to make progress on an international treaty addressing electronic communications and data privacy; and to respond to controversy generated by the Federal Bureau of Investigation's use of an electronic tool for purposes of capturing certain email information during authorized investigations.

At WilmerHale (2002-date), my practice has again been almost entirely litigation or litigation-related, but has at times had analysis or counseling aspects not directly tied to litigation. During one period, for example, I worked extensively on analysis projects involving issues arising out of major asbestos litigation and settlements, and then on statutory and constitutional issues related to a possible federal legislative overhaul of the asbestos litigation system. Those projects involved working with and on behalf of a client as part of industry groups or coalitions trying to craft legally, practically, and politically workable solutions. I have also helped advise Indian tribal governments, trade associations, and a non-profit corporation on non-litigation projects, such as advice to a Tribe concerning ways to protect its interests in the language of a gaming compact with a State, and advice to the corporation concerning certain obligations under its charter and bylaws and the local law governing its organization.

Finally, one aspect of appellate practice that I particularly enjoy is the opportunity to serve as a "judge" on pre-argument moot courts for other counsel, at my firm or elsewhere. Apart from the active moot docket at WilmerHale, I have periodically served

as a moot panelist for the National Association of Attorneys General (and as a judge in their annual "best brief" competition), for the Georgetown Law School Supreme Court Project, and for lawyers at other firms facing challenging upcoming arguments. I have also served as a volunteer judge in moot court competitions for law students, including ones held at a local law school and ones sponsored by the ABA. The goal of these exercises is to improve advocacy for particular clients and points of view, but the method is to probe and test arguments, seeking the most satisfying or persuasive answers. That method is one of the aspects of legal practice that I find most congenial.

I have not performed reportable lobbying activities on behalf of clients or others. While I have from time to time performed work related to efforts to influence government decisions or public policy, such as drafting comments on proposed regulations or accompanying clients to meetings with public officials, those activities were always related to litigation, fell below reportable thresholds, or were otherwise not reportable as lobbying activities.

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 courses.

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.

    WilmerHale has a defined benefit plan for partners, although as I understand it the plan is structured in a way that will likely make it desirable for me to take a cash payment whenever I cease to be a partner at the firm, at which point that money would become part of my personal retirement funds (similar to a rollover 401(k) account from a previous employer). The current estimated value of my interest in that plan is reflected in the attached net worth statement.

    I believe that I will be entitled, on retirement, to a benefit under the Federal Employees' Retirement System based on my previous government service. I am informed that any future service as an Article III judge would not affect the amount of that benefit.

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.

I have no present plan, commitment, or agreement to pursue outside employment, with or without compensation, during my service with the court.

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.

        I am not aware of any likely conflicts based on family members. I have an investment in EcoFactor, Inc., a small, privately-held start-up company founded by a law school classmate that has some patents or patent applications related to its business. I would recuse myself from any case involving that company or that could reasonably be viewed as directly and predictably affecting its interests. I would anticipate recusing myself, at least for some initial period, from any case being handled by my current law firm; any case involving a former non-government client, if the former relationship was either recent or substantial or might otherwise reasonably give rise to any appearance of impropriety; or any other case where, because of a current or previous professional or personal relationship with a party or attorney involved, my impartiality might reasonably be questioned.

    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 handle all matters involving actual or potential conflicts of interest by paying close attention to these issues and carefully applying the Code of Conduct for United States Judges and any other relevant ethical canons or statutory provisions.

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.

As a young lawyer in New York, I participated in pro bono opportunities sponsored by my firm, including staffing a program that did client interviews and then drafted wills and similar documents for persons with AIDS. During my brief stint back in New York in 1996, I used my acquired Supreme Court expertise to work with two other associates and client representatives on a pro bono amicus brief (on which I was counsel of record) for the Washington State Psychological Association and other groups and mental health professionals in *Washington v. Glucksberg*, 521 U.S. 702 (1997), addressing the constitutionality of a state ban on assisted suicide. The brief expressed the clients' view that mental health professionals could capably assess competency in end-of-life situations, and should be involved in any assisted-suicide decision in order to protect the individuals involved and assure that their decisions were autonomous and well informed.

Since returning to private practice in 2002, I have participated in many pro bono projects. In 2002 and 2003, for example, I was part of a team that represented the congressional sponsors of the Bipartisan Campaign Reform Act of 2002—Senators McCain, Feingold, Snowe, and Jeffords and Representative Shays and Meehan—as intervenors supporting the Department of Justice and the FEC in litigation challenging the constitutionality of many provisions of the Act. I was involved in the extensive legal briefing before the three-judge district court, and heavily involved in the briefing and preparation for oral argument in the Supreme Court—in both instances, focusing on issues under Title II of the Act relating to the "electioneering communications" provisions of the Act, which prohibited the use of corporate or union treasury funds to run certain broadcast advertisements at certain times. I have no readily-accessible record of the amount of time I spent on the litigation in 2002; in 2003, I recorded 508 hours. In relevant portions of the lead opinion in the case, the Court agreed with our analysis of the development and limitations of its previous "express advocacy" standard and rejected the plaintiffs' facial First Amendment challenge. *See McConnell v. FEC*, 540 U.S. 93, 189-194, 202-211 (2003).

In 2005, I joined a team that had been representing an Iraq War veteran in post-trial proceedings after he was convicted of second-degree murder in a shooting that occurred on an Indian reservation. Our appeal resulted in a decision that affirmed the conviction but made clear that our argument that our client had been improperly hampered in presenting his claim of self-defense would have had merit if it had been properly raised by trial counsel. *United States v. Gregg*, 451 F.3d 930, 935-936 (8th Cir. 2006). I remained involved in the briefing of a motion for relief from the conviction on grounds of ineffective assistance of counsel, which resulted in a magistrate judge's recommendation that the verdict be set aside and the case retried. That recommendation remains pending before the district court. Since 2005, I have billed 172 hours to this matter.

In other matters I have, for example, supervised and assisted associates in briefing and arguing criminal appeals for two indigent defendants in the Maryland state courts. (68

hours) I supervised and assisted associates in representing indigent non-citizens on appeal in two immigration matters. (41 hours) I supervised and assisted an associate in drafting a certiorari petition seeking review of a decision rejecting a First Amendment challenge to a state law establishing a "buffer zone" around the entrances to reproductive health care facilities. (44 hours in 2005; likely additional time in 2004) I supervised and assisted an associate in handing a veterans' benefits appeal, leading to a Federal Circuit decision remanding the case for further proceedings. (35 hours) I supervised and assisted an associate representing Christian legal and medical societies as amici in a Montana Supreme Court case raising issues related to physician-assisted suicide. (13 hours) And I have contributed Supreme Court or appellate expertise to many other pro bono projects—for instance, serving on moot courts for colleagues or provided editing or consultation on briefs. Firm records indicate that I billed a total of 180 hours to pro bono matters in 2009; 58 hours in 2008 (when I was on a partial leave of absence from July to December); and 230 hours in 2007.

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.

There is no selection commission in my jurisdiction to recommend candidates for nomination to the United States Court of Appeals for the Federal Circuit.

I am a professional and personal acquaintance of several individuals who now serve in the White House Counsel's Office. I have no record of all social or casual conversations in which the subject of judicial appointments may have arisen. Sometime in October or November, 2009, I was asked by a White House lawyer whether I would be willing to be considered for a possible judicial appointment. On November 5, 2009, I was asked to furnish certain biographical information to the White House Counsel's Office. On January 11, 2010, I was informed by the Counsel's Office that the President would consider nominating me to the Court of Appeals for the Federal Circuit. Later that day I was contacted by staff from the Department of Justice regarding nomination paperwork, and I have had periodic communications with Department staff regarding that paperwork and the process. I was interviewed on February 26, 2010, by attorneys from the White House Counsel's Office and the Department of Justice, and responded to follow-up inquiries. My nomination was submitted to the United States Senate on April 14, 2010.

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.

AFFIDAVIT

I, Edward C. DuMont, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

April 19, 2010
(DATE)

Edward C. DuMont
(NAME)

Marion C. D'Monte
(NOTARY)

My Commission Expires: June 14, 2012

WILMERHALE

Edward C. DuMont

[redacted]

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on April 14, 2010, to be United States Circuit Judge for the Federal Circuit. Incorporating the additional or amended information below, I certify that the information contained in that document remains, to the best of my knowledge, true and accurate.

8 - Honors and Awards

I have been included in the 2011 edition of *Best Lawyers*.

11 - Memberships

Date parentheticals for the following organizations should be updated to include 2010: Yale Club of Washington, DC; Yale GALA; American Film Institute; Cornell Legal Information Institute; Japan-America Student Conference; Treatment Action Group; WAMU; Whitman-Walker Clinic; WPFW. The following are additional organizations to which I gave money after the date of my original questionnaire and which by virtue of that fact might consider me to be a "member": The Montpelier Foundation; Panthera; Through the Kitchen Door.

16 - Legal Career

Item (c) - In September 2010, I argued a case in the D.C. Circuit. (*Patchak v. Salazar*, No. 09-5324; argued Sept. 14, 2010; decision pending.)

Item (d) - In July 2010, we received a final district court decision in another case in which I took a leading role in briefing but did not present oral argument. (In this instance, the decision was a final ruling on a motion to vacate a federal conviction under 28 U.S.C. § 2255.)

Item (e) - In the list of Supreme Court briefs on which my name has appeared as counsel in private practice (Questionnaire pp. 26-28), update as follows:

25. The Supreme Court's decision in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.* was released on April 27, 2010, and may be found at 130 S. Ct. 1758.

26. *Smith v. United States*, No. 10-18 (cert. denied, Nov. 29, 2010): Petition raising question concerning the proper standard of appellate review when a trial judge's restriction on cross-examination in a criminal case is challenged as violation of the Confrontation Clause. Copies of the petition and related reply brief are attached.

17 - Litigation

In the introductory note concerning pending matters, update as follows:

Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S. Ct. 1758 (2010). In late April 2010, the Supreme Court ruled in favor of WilmerHale's client, holding that the Federal Arbitration Act precludes imposing class arbitration on non-consenting parties when a contract's arbitration clause is silent on the issue.

Princo Corp. v. U.S. International Trade Commission, 616 F.3d 1318 (Fed. Cir. 2010) (en banc) (petition for certiorari anticipated in early January, 2011). On August 30, 2010, the en banc Federal Circuit ruled in favor of WilmerHale's client in an opinion that, among other things, discusses the proper scope of the "patent misuse" doctrine.

TiVo Inc. v. EchoStar Corp., No. 2009-1374 (Fed. Cir.) (petition for rehearing en banc granted May 14, 2010; argued en banc November 9, 2010; en banc decision pending). After the Federal Circuit granted en banc review in this case, I was substantially involved in drafting TiVo's en banc briefs responding to questions posed by the court relating primarily to how courts should determine when, after an initial infringement judgment and the entry of an anti-infringement injunction, allegations of continued infringement by a purportedly modified product may be resolved in contempt proceedings and when the patentee must instead file a new infringement suit. My law partner Seth Waxman argued the case before the en banc court.

Xilinx, Inc. v. Commissioner of Internal Revenue, 598 F.3d 1191 (9th Cir. 2010). The government decided not to pursue further review in this case, and the decision is now final.

United States v. Reyes, No. 10-10323 (9th Cir.) (briefing in progress). I and others at WilmerHale represent Mr. Reyes on appeal from convictions obtained by the prosecution at his second trial.

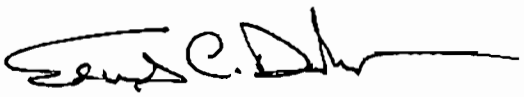
United States v. Lake, 472 F.3d 1247 (10th Cir. 2007). In August 2010, the government dropped all remaining charges against Mr. Lake.

Item 25 - Pro Bono Work

On July 30, 2010, the United States District Court for the District of South Dakota rejected a magistrate judge's recommendation and denied James Gregg's motion to vacate his conviction on grounds of ineffective assistance of original trial counsel. I and others at WilmerHale continue to represent Mr. Gregg in appealing that decision. *United States v. Gregg*, No. 10-3142 (8th Cir.) (briefing in progress). In 2010, as of November 30 I had billed 72 hours to the Gregg matter, and a total of 130 hours to pro bono matters.

I also am forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,



Edward C. DuMont

cc: The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

No. 10- 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause, is the standard of review de novo, as five circuits have held, or abuse of discretion, as six other circuits (and the court of appeals here) have concluded?

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Blank Page

IN THE

Supreme Court of the United States

No. 10-

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

Webster M. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 68 M.J. 445. The opinion of the intermediate appellate court, the Coast Guard Court of Criminal Appeals (App. 23a-58a), is reported at 66 M.J. 556. The order and opinion of the trial judge denying petitioner's request to conduct the cross-examination at issue here (App. 59a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT

This case implicates a deep circuit conflict regarding the standard of review that applies when a trial judge's restriction on the cross-examination of a prosecution witness is challenged on appeal as a violation of the Confrontation Clause. The Court of Appeals for the Armed Forces (CAAF) held here that the standard of review is abuse of discretion rather than de novo. Applying the former standard, the court rejected petitioner's Confrontation Clause claim by a vote of 3-2.

1. In early 2006, officials at the United States Coast Guard Academy filed sixteen specifications (the military equivalent of criminal charges) against petitioner Webster Smith, a cadet who was then a few months from graduation. *See* CAAF J.A. 89-92. Four weeks later, Academy officials lodged an additional five specifications. *Id.* at 93-95. Most of the specifications alleged that Mr. Smith had engaged in some form of sexual misconduct with one of several female cadets.[1]

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[1] At the time these charges were brought, Academy officials, like their counterparts at the other service academies, were facing

Pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 832, an investigation of the charges against Mr. Smith was conducted by an impartial officer. *See* CAAF J.A. 193-195. After completing his investigation (including hearing from all of the accusers), the investigating officer concluded that most of the charges lacked foundation. Specifically, he recommended that twelve of the twenty-one charges be dismissed outright, that two others be resolved administratively by Academy officials, and that just seven be referred for trial by general court-martial. *See* Appellate Ex. 17. As to nine of the twelve charges for which he recommended dismissal, the officer found that there were not even reasonable grounds to conclude that Mr. Smith had committed the offense. *See id.*

Disregarding several of the investigating officer's recommendations, the official overseeing the prosecution (the Academy superintendent) directed that eleven of the twenty-one charges be dismissed and that the other ten be tried by general court-martial. This was the first (and to date only) time in the Academy's 130-year history that a cadet had been court-martialed. *See, e.g.*, Jesse Hamilton, *Coast Guard Admiral Reprimanded: Ex-Academy Superintendent To Retire After Probe Finds Inappropriate Behavior*, Hartford

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intense scrutiny and pressure from the public, the media, and Congress about perceived laxity in their handling of allegations of sexual harassment and sexual assault. *See, e.g.*, David Lightman, *Academy Under Scrutiny; Coast Guard Harassment Issue Gets Attention of Congressional Panels*, Hartford Courant, May 18, 2006, at B1; Patricia Kime, *Academy Takes Heat Over Sex-Assault Cases*, Navy Times, Mar. 27, 2006, at 36; William Yardley, *Coast Guard Addresses Sex Assaults*, N.Y. Times, Feb. 28, 2006, at B7.

Courant, Feb. 27, 2007, at A1. Mr. Smith pleaded not guilty to all ten charges.[2]

2. Prior to trial, the military judge (the military term for the trial judge, *see* 10 U.S.C. § 826) imposed a restriction on the defense's cross-examination of a key prosecution witness, SR.[3] SR, a fellow cadet, accused Mr. Smith of sexually assaulting her and extorting sexual favors from her. The defense maintained that the two cadets' sexual encounter was consensual and that SR was fabricating her accusations because the encounter occurred in Chase Hall, the Academy dormitory, where sexual activity is prohibited by cadet regulations and punishable by expulsion from the Academy, *see* App. 34a, 16a n.3. To support this argument, the defense intended to elicit on cross-examination the fact that SR had previously made a false allegation of sexual assault, telling Mr. Smith (and allowing him to tell others) that a consensual sexual encounter she had had with an enlisted man was not consensual.[4] Like the Chase Hall encounter, the encounter with the enlisted man was prohibited by cadet regulations (and hence the UCMJ, *see* 10 U.S.C. § 892; *see also United States* v. *Cain*, 59 M.J. 285, 292-293 (C.A.A.F. 2004)). The defense thus planned to argue to the jury ("members" in military parlance) that SR was once again falsely accus-

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[2] The general court-martial had original jurisdiction under Article 18 of the UCMJ, 10 U.S.C. § 818. *See, e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 167 (1994).

[3] In their opinions in this case, the appellate courts referred to SR only by her initials. This petition does likewise.

[4] Mr. Smith testified at a pre-trial hearing that SR initially told him the encounter with the enlisted man was not consensual and later acknowledged that it was consensual. *See* App. 4a, 60a.

ing a man of assaulting her in order to evade discipline that she could otherwise face for willingly engaging in sexual activity that was barred by military regulations. *See* App. 27a-28a, 40a, 62a-63a. Noting that the three charges involving SR rested entirely on her testimony—the government offered no other evidence as to any of them—the defense contended that Mr. Smith was constitutionally entitled to inform the jury of facts that bore so directly on her credibility. *See* CAAF J.A. 180-181.

The government sought to exclude the proposed cross-examination of SR pursuant to Military Rule of Evidence 412. *See* CAAF J.A. 183-187. That rule, the nearly identical military counterpart to Federal Rule of Evidence 412, generally bars the admission of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior." M.R.E. 412(a)(1) (2005 ed.).[5] The rule includes an exception, however, for "evidence the exclusion of which would violate the constitutional rights of the accused." M.R.E. 412(b)(1)(C). This exception, which the defense invoked in seeking to conduct the proposed cross-examination of SR, *see* CAAF J.A. 180-181, "addresses an accused's Sixth Amendment right of confrontation," *United States* v. *Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). Hence, the issue for the military judge was whether the Confrontation Clause required that the proposed cross-examination be allowed.

The judge concluded that it did not. *See* App. 59a-64a. He agreed that the defense's theory about SR's

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[5] Minor amendments were made to Military Rule of Evidence 412 in 2008. The version cited herein is the one that was in effect throughout the court-martial proceedings.

prior fabrication of assault "would be a valid reason for admitting this evidence under M.R.E. 412(b)(1)(C)," i.e., pursuant to Mr. Smith's Sixth Amendment rights. App. 63a. He nonetheless prohibited the proposed cross-examination, in part because allowing it could, he believed, "sidetrack[] the member[s'] attention to a collateral issue," App. 64a, and in part because the only evidence of SR's prior false accusation came from Mr. Smith, whose credibility the judge questioned, *see* App. 63a.[6] The judge ultimately allowed defense counsel to reveal to the jury only that SR had lied to Mr. Smith in unspecified ways about unspecified conduct that she believed involved a violation of cadet regulations and possibly the UCMJ (but for which prosecutors had indicated they would not prosecute her). *See* App. 4a-5a, 19a & n.6; CAAF J.A. 145, 148-149.

3. Following a week-long trial, the jury acquitted Mr. Smith on six of the ten charges. *See* CAAF J.A. 173-174. It convicted on the other four, as well as on a lesser-included offense of one of the six counts of acquittal. *See id.*; App. 2a. The three convictions that pertained to sexual conduct (sodomy, indecent assault, and extortion of sexual favors) were all based on the allegations by SR, whose credibility—including motive to lie—the defense was not permitted to explore fully.

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[6] SR, the only other apparent source of evidence on the point, invoked her privilege against self-incrimination and thus did not testify at the pre-trial hearing on the proposed cross-examination. *See* App. 4a, 54a, 59a; CAAF J.A. 177-178. Although she dropped that invocation in order to testify at trial, the military judge did not require her, upon waiving the privilege, to address whether in fact she had made a prior false accusation so that he could revisit his ruling on the proposed cross-examination in the event she corroborated Mr. Smith's testimony by admitting that she had.

By contrast, the jury acquitted Mr. Smith of every sex-related charge on which his accuser was subject to full cross-examination. The verdict also meant that the government had failed to prove even one of the original sex-related charges that Academy officials had leveled against Mr. Smith. All of those charges were either dismissed before trial (many as lacking any foundation, *see supra* p.3) or resulted in acquittal.

The jury sentenced Mr. Smith to six months' confinement, forfeiture of all pay and allowances, and dismissal from the Coast Guard (i.e., expulsion from the Academy). *See* App. 2a; CAAF J.A. 175. Mr. Smith served his period of confinement immediately after trial, earning release a month early for good behavior.[7]

4. After the Coast Guard Court of Criminal Appeals affirmed his convictions and sentence—over a lengthy dissent regarding the restriction on the cross-examination of SR, *see* App. 40a-58a—Mr. Smith petitioned CAAF for further review. CAAF granted review of the Sixth Amendment question, but following briefing and argument it affirmed by a splintered 3-2 vote. *See* App. 1a-21a.

In presenting his Confrontation Clause claim, Mr. Smith argued that because he was raising a constitutional challenge to the military judge's ruling, CAAF should review the ruling de novo rather than for abuse of discretion. In support of that argument, Mr. Smith

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[7] Following his release, Mr. Smith returned to his home state of Texas, where he has completed his undergraduate work, married, become a father, and remained steadily employed. Upon his return, however, Mr. Smith was also forced to register as a sex offender, as Texas law mandates lifelong registration for indecent-assault convictions.

cited cases from several circuits that employ de novo review of Confrontation Clause claims like his. Writing for a two-judge plurality, Judge Stucky rejected that position, holding that under CAAF precedent, review was only for abuse of discretion. *See* App. 5a (citing *United States* v. *Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006), and *United States* v. *Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).[8]

Applying that standard, the plurality concluded that "[t]he military judge did not abuse his discretion." App. 7a. The plurality deemed it significant that the defense had been allowed to show the jury that SR had lied to Mr. Smith about conduct that she believed could have threatened her career. *See id.* The plurality also reasoned that "[w]hile Cadet SR's credibility was in contention, it is unclear why the lurid nuances of her sexual past would have added much to Appellant's extant theory of fabrication." *Id.* Finally, the plurality sought to distinguish cases cited by Mr. Smith, including this Court's decision in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), that held comparable restrictions on the cross-examination of key prosecution witnesses to be unconstitutional. *See* App. 7a-8a; *see also* App. 29a-31a (court of criminal appeals majority seeking to distinguish other CAAF cases with similar holdings).

Judge Baker, also applying the abuse-of-discretion standard, concurred in the result. *See* App. 8a-10a. He

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[8] CAAF has long applied this standard to Confrontation Clause claims. *See, e.g.*, *United States* v. *Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009); *United States* v. *Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997); *United States* v. *Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996).

acknowledged that the military judge's ruling might well have violated the Confrontation Clause on the theory that the jury "needed to know the nature of 'the secret' in order to assess beyond a reasonable doubt whether SR might succumb to pressure to protect the secret." App. 9a. But in his view, Mr. Smith's alternate "theory of admission [wa]s too far-fetched to pass constitutional ... muster." *Id.*[9]

Judge Erdmann, joined by Chief Judge Effron, agreed that CAAF "review[s] a military judge's decision to admit or exclude evidence for an abuse of discretion." App. 13a (citing *United States* v. *Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). But they dissented from the other judges' application of that standard. *See* App. 10a-21a. The fatal problem in their view was that "the military judge prevented the defense from presenting to the panel an explanation of the circumstances that would have provided a motive for the complainant to make a false allegation of" sexual assault. App. 10a; *see also* App. 21a ("Smith had a commonsense explanation

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[9] Two of Judge Baker's articulated bases for this conclusion were factually incorrect. First, Judge Baker stated that "it was SR herself who reported her sexual contact with Appellant; this cuts against Appellant's theory that SR would lie to conceal her own misconduct." App. 9a. In fact, "[t]he record does not disclose whether SR voluntarily came forward or was first approached by" Coast Guard investigators. App. 52a n.8 (court of criminal appeals dissent); *see also* App. 51a-53a. Second, Judge Baker stated that "to support [Mr. Smith's] theory of admission the members needed to know that SR had 'lied' to Appellant about her sexual misconduct," and "[t]his much the military judge permitted." App. 9a. To the contrary, the military judge did not permit the jury to hear that what "SR had 'lied' to Appellant about [was] sexual misconduct." *Id.* Indeed, that prohibition was the crux of Mr. Smith's challenge on appeal.

for SR's claim that the sexual activity was nonconsensual and the military judge's ruling prevented the members from considering this theory."). Emphasizing that "this was a 'he said-she said' case and for the charges at issue in this appeal, the critical question for the members was the credibility of the sole prosecution witness," App. 17a (footnote omitted), the dissenters concluded—relying on this Court's precedent—that a Sixth Amendment violation had occurred because "'[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination,'" App. 14a-15a (alterations in original) (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986)); *accord* App. 41a (court of criminal appeals dissent) ("The excessive restrictions imposed on Appellant's Sixth Amendment confrontation rights allowed SR to testify through non-factual euphemisms on critical issues related to the Government's proof and her own credibility, and allowed the Government to create a substantially different impression of her truthfulness than what the defense had sought to show through the excluded evidence.").

The dissenters also disagreed with the plurality that the cross-examination allowed by the military judge was sufficient, explaining that "[w]ith this limited information about SR's secret, the members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR's motive and credibility." App. 19a-20a; *see also* App. 45a-46a (court of criminal appeals dissent) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974), and *Olden*, 488 U.S. at 232 (per curiam)). As to the plurality's stated doubt about the need for the "lurid nu-

ances" of SR's secret, App. 7a, the dissenters explained that what was important about the proposed cross-examination, and what its focus would have been, was "not the lurid nuances of the victim's sexual past ..., but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances." App. 18a (internal quotation marks omitted).[10]

REASONS FOR GRANTING THE PETITION

CAAF's holding regarding the appropriate standard for appellate review of Confrontation Clause claims like Mr. Smith's conflicts with the holdings of several other courts of appeals. The conflict is established and the issue is both recurring and important. Moreover, this case is a good vehicle for resolving the conflict, both because the issue was raised throughout the case and because CAAF's splintered decision applying abuse-of-discretion review shows that the use of that relatively lax standard may well have determined the outcome here. Finally, CAAF's use of an abuse-of-discretion standard is wrong, as Mr. Smith had a right to plenary appellate review of his constitutional claim raising a mixed question of law and fact. Under these circumstances, this Court's review is warranted.

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[10] In addition to defending the merits of the military judge's ruling, the government raised a jurisdictional objection before CAAF, contending that Mr. Smith's petition for discretionary review by that court was untimely. CAAF unanimously rejected that argument. *See* App. 2a-3a (plurality opinion), 10a (dissent), 8a-10a (Baker, J., concurring in the result) (implicitly rejecting the jurisdictional argument by addressing the merits).

I. CAAF'S STANDARD-OF-REVIEW HOLDING IMPLICATES AN ESTABLISHED CIRCUIT CONFLICT ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

A. The Courts Of Appeals Are Deeply Divided Over What Standard Of Review Applies To Confrontation Clause Claims Like Mr. Smith's

CAAF employed abuse-of-discretion review in resolving Mr. Smith's Sixth Amendment challenge to the military judge's restriction on the defense's cross-examination of SR. *See, e.g.*, App. 5a. That approach conflicts with the holdings of five circuits, which consider comparable Confrontation Clause claims de novo, reserving abuse-of-discretion review for non-constitutional challenges. For example, the Seventh Circuit has stated that "[o]rdinarily, a district court's evidentiary rulings are reviewed for abuse of discretion. However, when the restriction [on cross-examination] implicates the criminal defendant's Sixth Amendment right to confront witnesses against him, ... the standard of review becomes de novo." *United States* v. *Smith*, 308 F.3d 726, 738 (7th Cir. 2002) (citation omitted). The First, Fifth, Eighth, and Tenth Circuits have adopted the same approach. *See, e.g.*, *United States* v. *Vega Molina*, 407 F.3d 511, 522 (1st Cir. 2005); *United States* v. *Jimenez*, 464 F.3d 555, 558-559 (5th Cir. 2006); *United States* v. *Bentley*, 561 F.3d 803, 808 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 1275 (2009); *United States* v. *Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005).[11]

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[11] In *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), the Ninth Circuit stated that it was adopting an approach that "br[ought it] in line with [these five] sister circuits,"

Six other circuits, by contrast—the Second, Third, Fourth, Sixth, Eleventh, and District of Columbia Circuits—take the same approach that CAAF does, applying abuse-of-discretion review even when a restriction on the cross-examination of a prosecution witness is attacked on constitutional grounds.[12] The Sixth Circuit, for example, stated in one case that "[defendant] argues that his right to confrontation was violated when the trial court 'unfairly' limited his cross-examination of [a] government witness .... We review the district court's restriction on a defendant's right to cross-examine witnesses for abuse of discretion." *United States* v. *Franco*, 484 F.3d 347, 353 (6th Cir. 2007). Cases from the other circuits in this group are to the same effect. *See, e.g.*, *United States* v. *Rosa*, 11 F.3d 315, 335 (2d Cir. 1993); *United States* v. *Silveus*, 542 F.3d 993, 1005 (3d Cir. 2008); *United States* v. *Shelton*, 200 F. App'x 219, 221 (4th Cir. 2006) (citing *United States* v. *Scheetz*,

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id. at 1101 n.6 (citing a case from each of the five). The court's actual holding, however, was that abuse-of-discretion review is proper for some constitutional challenges, specifically those addressing "a limitation on the scope of questioning within a given area" rather than "the exclusion of an [entire] area of inquiry." *Id.* at 1101.

[12] The dissenters stated in this case that under the abuse-of-discretion standard, conclusions of law are reviewed de novo. App. 13a. The authority they cited for that statement, however, *United States* v. *Ayala*, involved a suppression ruling rather than a restriction on cross-examination. *See* 43 M.J. at 298. To petitioner's knowledge, no CAAF case states that the abuse-of-discretion standard repeatedly applied by the court when reviewing restrictions on defendants' cross-examination includes de novo review of legal conclusions. Nor did the plurality or the concurring judge here indicate that any aspect of their review was conducted de novo.

293 F.3d 175, 184 (4th Cir. 2002)); *United States* v. *Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007); *United States* v. *Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996).[13]

In short, CAAF's use of an abuse-of-discretion standard in this case perpetuates a clear—and recognized—conflict in the circuits. *See United States* v. *Larson*, 495 F.3d 1094, 1100 & n.5 (9th Cir. 2007) (en banc) (resolving "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination" while acknowledging a parallel "disagreement among the circuits").

B. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle For Deciding It

The circuit conflict at issue here warrants resolution by this Court. As indicated by the cases cited in the previous section, the constitutionality of restrictions on cross-examination arises frequently in criminal

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[13] A few unpublished decisions from some of the circuits in this group have reviewed restrictions on cross-examination de novo, notwithstanding (and without acknowledging) the contrary precedent cited in the text. *See, e.g.*, *United States* v. *Allen*, 353 F. App'x 352, 354 (11th Cir. 2009) (per curiam); *United States* v. *Askanazi*, 14 F. App'x 538, 540 (6th Cir. 2001) (per curiam). Other cases, addressing other types of Confrontation Clause claims, have proclaimed in dicta that all such claims are subject to de novo review—again without confronting the cases cited in the text. *See, e.g.*, *United States* v. *Jass*, 569 F.3d 47, 55 (2d Cir. 2009) (*Bruton* claim: "We review '[a]lleged violations of the Confrontation Clause ... *de novo*[.]'" (alteration and omission in original) (quoting *United States* v. *Vitale*, 459 F.3d 190, 195 (2d Cir. 2006))), *cert. denied*, 130 S. Ct. 2128 (2010); *United States* v. *Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009) (similar for admission of affidavit).

prosecutions, and in every part of the country. Those cases also show that the conflict over the standard for appellate review of such restrictions is established; there is thus no benefit to be gained by giving the lower courts additional time to consider the issue. Moreover, the question presented is important, because the standard of review can determine the outcome of an appeal. *See Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) ("[T]he difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree." (internal quotation marks omitted)); *see also, e.g.*, *News-Press* v. *United States Dep't of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007) ("In even moderately close cases, the standard of review may be dispositive of an appellate court's decision."); 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 1.02, at 1-16 (3d ed. 1999). That is particularly true when one standard is highly deferential: CAAF, for example, has stated that "the abuse of discretion standard is a strict one," satisfied only when "[t]he challenged action [is] arbitrary, fanciful, clearly unreasonable, or clearly erroneous," *United States* v. *McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks omitted). Finally, disuniformity created by the conflict directly affects a fundamental individual right. Some defendants in criminal cases enjoy less protection of the critical right to confront their accusers because of the fortuity of where their trials were held—or, as to cases decided by CAAF, because they have chosen to wear the nation's uniform.

This case presents a good vehicle to resolve the circuit conflict. To begin with, Mr. Smith's standard-of-review argument was both pressed and passed upon in the court of appeals, *see* Pet'r's CAAF Br. 12-13; App.

5a, rendering the issue suitable for review by certiorari. *See, e.g., Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quoting *United States* v. *Williams*, 504 U.S. 36, 41 (1992)). In addition, CAAF's rejection of Mr. Smith's argument may well have determined the ultimate outcome. Even applying highly deferential review, CAAF was narrowly divided as to the constitutionality of the military judge's ruling in this case. If even one of the three judges who deemed that ruling not to be an abuse of discretion were to conclude, upon reviewing without deference, that it was inconsistent with the Sixth Amendment, Mr. Smith would prevail.[14]

II. CAAF'S STANDARD-OF-REVIEW HOLDING IS WRONG

This Court's review is also warranted because CAAF's use of an abuse-of-discretion standard to review Mr. Smith's Confrontation Clause claim was erroneous. The military judge's ruling that Mr. Smith challenged presented a mixed question of law and fact. When a constitutional right is involved, as here, this Court has repeatedly held de novo review of such mixed questions appropriate. The decisions from this Court that CAAF and other courts have relied on to justify abuse-of-discretion review are inapposite.

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[14] The military context in which this case arises does not affect its suitability as a vehicle to answer the question presented. Although servicemembers' constitutional rights can be more circumscribed than those of their civilian counterparts when morale, good order and discipline, or other military interests so require, *see Parker* v. *Levy*, 417 U.S. 733, 758 (1974), that is not the case here. CAAF has never articulated a military-specific rationale for employing abuse-of-discretion review in cases like this (nor did the government offer one below), and in fact no military interest would be undermined if CAAF reviewed constitutional challenges to restrictions on defendants' cross-examination without deference.

A. Under This Court's Precedent, Mixed Questions Of Law And Fact Are Reviewed De Novo When Constitutional Rights Are Involved

The military judge's restriction on the cross-examination of SR involved a quintessential "mixed question[] of law and fact—*i.e.*, [a] question[] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the ... standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982). Under this Court's cases, such questions are reviewed de novo when, as here, they implicate constitutional rights. As a plurality explained in *Lilly* v. *Virginia*, 527 U.S. 116 (1999), the Court's "prior opinions ... indicate that ... with ... fact-intensive, mixed questions of constitutional law, ... '[i]ndependent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights," *id.* at 136 (alteration and last two omissions in original) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996)); *see also United States* v. *Bajakjian*, 524 U.S. 321, 337 n.10 (1998) (employing de novo review because the pertinent issue "calls for the application of a constitutional standard to the facts of a particular case"); *Pullman-Standard*, 456 U.S. at 290 n.19 ("There is also support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court." (citations omitted)); *United States* v. *Frederick*, 182 F.3d 496, 499 (7th Cir. 1999) (Posner, J.) (noting that this Court has embraced de novo review of mixed questions involving "certain constitutional issues"); *United States* v. *McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc) ("The pre-

dominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights." (citing *Ker* v. *California*, 374 U.S. 23 (1963))).[15]

The Court has thus held that de novo review—though with deference typically given to associated factual findings—is appropriate for a wide variety of trial court rulings that implicate constitutional rights. These include rulings on: whether a hearsay statement bears sufficient indicia of "trustworthiness" to satisfy the Confrontation Clause, *see Lilly*, 527 U.S. at 136 (plurality opinion); whether a fine is unconstitutionally excessive, *see Bajakjian*, 524 U.S. at 336 n.10; whether police had probable cause or reasonable suspicion to conduct a search, *see Ornelas*, 517 U.S. at 699; whether a defendant was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *see Thompson* v. *Keohane*, 516 U.S. 99, 112-113 (1995); whether a confession was voluntary, *see Arizona* v. *Fulminante*, 499 U.S. 279, 287 (1991) (citing *Miller* v. *Fenton*, 474 U.S. 104, 110 (1985)); whether defense counsel was constitutionally ineffective, *see Strickland* v. *Washington*, 466 U.S. 668, 698 (1984); whether a pre-trial identification proce-

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[15] Where constitutional rights are not implicated, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll.*, 499 U.S. at 233; *see also Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (adopting deferential review of rulings under Federal Rule of Civil Procedure 11); *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988) (citing other examples); *Pullman-Standard*, 456 U.S. at 290 n.19 (citing examples of both approaches).

dure was unconstitutionally suggestive, *see Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam); whether a defendant waived his right to counsel, *see Brewer* v. *Williams*, 430 U.S. 387, 403-404 (1977); and several First Amendment questions, *see Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 685-686 n.33 (1989) (citing cases).[16]

The Court's rationale for these various holdings supports de novo review here. *First*, the Court has repeatedly observed in these cases that "the [relevant] legal rules ... acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the le-

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[16] Although some of these cases involved review of state-court judgments, their standard-of-review holdings apply equally to federal cases like this one. *See Lilly*, 527 U.S. at 136 (plurality opinion) (relying on *Ornelas*, a federal criminal case, to support its standard-of-review holding in a state criminal case); *see also Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts."). That is true even for decisions from this Court on federal habeas review of a state-court judgment. While those cases' standard-of-review holdings generally do not apply in the habeas context post-AEDPA, *see Williams* v. *Taylor*, 529 U.S. 362, 411 (2000) (citing 28 U.S.C. § 2254(d)(1)), they remain valid and instructive for cases on direct review (state or federal). *See Ornelas*, 517 U.S. at 697 (citing *Miller*, a state-habeas case, to support its standard-of-review holding in a direct-review case); *see also, e.g., United States* v. *LeBrun*, 363 F.3d 715, 719 (8th Cir. 2004) (en banc) ("*Thompson*'s rationale [in the habeas context] requires that on direct appeal we review the district court's custody determination de novo."); *United States* v. *Erving L.*, 147 F.3d 1240, 1245 (10th Cir. 1998) (similar, citing *Derrick* v. *Peterson*, 924 F.2d 813, 818 (9th Cir. 1991)).

gal principles." *Ornelas*, 517 U.S. at 697, *quoted in, e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *accord Miller*, 474 U.S. at 114. The same is true of the Sixth Amendment "rules" that apply to restrictions on the cross-examination of prosecution witnesses. *Second*, the Court has stated in the search-and-seizure context that a

> policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas, 517 U.S. at 697 (alterations in original) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 171 (1949)). Again, the same is true as to the Confrontation Clause.

More generally, this Court has explained that plenary appellate review of constitutional mixed questions "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-511 (1984); *see also id.* at 503 ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance."). That is surely true of a defendant's right to confront the witnesses against him through cross-examination: This Court has labeled cross-examination "the greatest legal engine ever invented for the discovery of truth."

California v. *Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It has also deemed the right of confrontation to be "one of the fundamental guarantees of life and liberty," *Kirby* v. *United States*, 174 U.S. 47, 55 (1899), and so "fundamental and essential to a fair trial" as to be incorporated against the States, *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). And it has stated that an impermissible restriction on a defendant's right of cross-examination is "constitutional error of the first magnitude." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974). Deferential review of trial-court rulings is insufficient to safeguard such a critical constitutional right.[17]

Finally, this Court's cases support the specific approach espoused by Mr. Smith and adopted by several circuits, whereby non-constitutional challenges to restrictions on cross-examination are reviewed for abuse of discretion while constitutional challenges are reviewed de novo. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, the Court adopted the same approach for punitive damages awards. "If no constitutional issue is raised" regarding the excessiveness of such an award, the Court stated, "the role of the appel-

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[17] Decisions outside the mixed-question context reinforce the conclusion that de novo review is appropriate here. For example, in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court construed a statutory provision mandating abuse-of-discretion review of certain individual immigration decisions. *See id.* at 485-486 & n.6 (discussing 8 U.S.C. § 1160(e)). The Court held that the statute did not preclude judicial review of due process challenges to the broader immigration program—and part of its rationale was that "the abuse-of-discretion standard ... does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts." *Id.* at 493.

late court ... is merely to review the trial court's [excessiveness] 'determination under an abuse-of-discretion standard.'" 532 U.S. at 433 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). By contrast, the Court went on to hold (relying on *Ornelas* and *Bajakajian*), "courts of appeals should apply a *de novo* standard of review when passing on ... the constitutionality of punitive damages awards." *Id.* at 436.

What all these cases recognize is the anomaly of employing an abuse-of-discretion standard when the issue is whether or not a particular ruling violated a constitutional right. Such a standard suggests that a district court has "discretion" to commit a constitutional violation, and that appellate judges could uphold a ruling even if they believe that such a violation occurred. *See, e.g., Elcock* v. *Kmart Corp.*, 233 F.3d 734, 743 (3d Cir. 2000) ("Of course, an abuse of discretion means much more than that the appellate court disagrees with the trial court."). That is plainly wrong.

B. The Cases Relied On By Courts That Employ Abuse-Of-Discretion Review Do Not Support That Approach

The circuits that have reviewed Confrontation Clause challenges to restrictions on cross-examination deferentially have not addressed the cases discussed in the previous section. They have instead relied on other decisions by this Court that supposedly endorse abuse-of-discretion review. That reliance is misplaced.

To begin with, several circuits have based their choice of deferential review on language in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). *See, e.g., Rosa*, 11 F.3d at 335; *United States* v. *Mussare*, 450 F.3d 161, 169 (3d Cir. 2005). But what the Court said in the rele-

vant portion of *Van Arsdall* is that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." 475 U.S. at 679. That statement reveals nothing about the proper appellate standard of review. It instead addresses the substance of the Confrontation Clause, and in particular it rejects the notion that that clause, as a substantive matter, proscribes any restrictions on defendants' cross-examination. This is clear from the immediately preceding sentence, in which the Court stated that "[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Id.* It is also clear from the next few paragraphs, where the Court went on to find that a Confrontation Clause violation had occurred—without ever referring to abuse of discretion. *See id.* at 679-680.[18]

The Sixth Circuit has also relied on this Court's statement in *General Electric Co.* v. *Joiner*, 522 U.S. 136, 141 (1997), that "abuse of discretion is the proper

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[18] The Ninth Circuit similarly relied on *Van Arsdall* in holding that the standard of review depends on the details of the defendant's Confrontation Clause challenge, i.e., that de novo review applies when the trial court "exclu[des] ... an [entire] area of inquiry," but not when it limits "the scope of questioning within a given area." *Larson*, 495 F.3d at 1101. As just discussed, however, *Van Arsdall* addressed only the substance of the confrontation guarantee. The Ninth Circuit's holding, moreover, improperly conflates substance with the standard of review.

standard of review of a district court's evidentiary rulings." *See United States* v. *Schreane*, 331 F.3d 548, 564 (6th Cir. 2003) (citing *Joiner* for the proposition that "[a]n appellate court reviews all evidentiary rulings—including constitutional challenges to evidentiary rulings—under the abuse-of-discretion standard"). *Joiner* was not a criminal case, however, and thus did not implicate the Confrontation Clause. Moreover, the relevant ruling in *Joiner* was not a constitutional one but rather a ruling on the exclusion of expert testimony under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Joiner*, 522 U.S. at 138-139. The same is true of the cases *Joiner* cited to support its statement that evidentiary rulings are reviewed for abuse of discretion; each likewise concerned a non-constitutional ruling by the trial judge. *See Old Chief* v. *United States*, 519 U.S. 172, 180 (1997) (balancing under Federal Rule of Evidence 403 in regard to admission of defendant's prior conviction); *United States* v. *Abel*, 469 U.S. 45, 54-55 (1984) (same in regard to admission of government rebuttal testimony); *Spring Co.* v. *Edgar*, 99 U.S. 645, 658 (1879) (admission of expert testimony). In light of the mixed-question precedent from this Court discussed in the previous section, *Joiner*'s reference to "evidentiary rulings" is most sensibly read to refer only to non-constitutional rulings. *Joiner* is thus consistent with Mr. Smith's contention that non-constitutional challenges to restrictions on cross-examination should be reviewed for abuse of discretion while constitutional claims should be reviewed de novo.

CAAF's deferential review in cases like this, meanwhile, traces to *Geders* v. *United States*, 425 U.S. 80 (1976), and *Alford* v. *United States*, 282 U.S. 687 (1931). *See, e.g., United States* v. *Williams*, 37 M.J. 352, 361

(C.M.A. 1993) (citing *Geders*); *United States* v. *Hooper*, 26 C.M.R. 417, 426 (C.M.A. 1958) (citing *Alford*). Neither case supports deferential review of constitutional challenges. The Court in *Alford* did review a restriction on cross-examination for abuse of discretion, *see* 282 U.S. at 694, but nothing in its opinion indicates that the defendant's attack on the restriction was constitutionally based. Indeed, the opinion never mentions either the Sixth Amendment generally or the Confrontation Clause in particular. Not until decades later did this Court state that *Alford*'s holding included a "constitutional dimension," *Davis*, 415 U.S. at 318 n.6 (citing *Smith* v. *Illinois*, 390 U.S. 129, 132-133 (1968))—and in doing so it plainly recognized the inconsistency between that "constitutional dimension" and *Alford*'s use of abuse-of-discretion review, *see id.* ("*Although* ... we reversed [in *Alford*] because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in *Alford* is not in doubt." (emphasis added)).

Geders provides even less support for CAAF's use of deferential review. The Court in *Geders* did not review a restriction on cross-examination, nor say that such restrictions are reviewed for abuse of discretion. It stated that a trial judge's determination regarding "the order in which parties will adduce proof"—a non-constitutional matter—"will be reviewed only for abuse of discretion." 425 U.S. at 86. In the next sentence the Court, citing *Glasser* v. *United States*, 315 U.S. 60, 83 (1942), noted that, "[w]ithin limits, the judge may ... control the scope of examination of witnesses," *Geders*, 425 U.S. at 86-87. But while *Glasser* did review a restriction on cross-examination for abuse of discretion, as with *Alford* there is no indication in *Glasser* (the relevant portion of which totals only three sentences) that the defendant had raised a constitutional challenge.

See Glasser, 315 U.S. at 83.[19] Again, then, this Court's precedent is consistent with the approach used by five courts of appeals and urged by Mr. Smith here. In any event, to the extent these cases reflect any uncertainty on the question presented, that is an additional factor weighing in favor of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[19] The Court in *Geders* also cited *United States* v. *Nobles*, 422 U.S. 225 (1975), but *Nobles* did not involve the Confrontation Clause. The issue there was whether the defense had to disclose certain material in order to permit adequate cross-examination by the *prosecution*. *See Nobles*, 422 U.S. at 227; *see also id.* at 241 (labeling the defendant's invocation of the Sixth Amendment "misconceive[d]").

No. 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent provides no persuasive reason to deny review. The relevant charges against petitioner Webster Smith depended entirely on the credibility of SR's assertion that her sexual encounter with him was non-consensual. The military judge nonetheless restricted the defense's cross-examination of SR about her prior false claim that a consensual sexual encounter was non-consensual. CAAF rejected Mr. Smith's Confrontation Clause challenge to the restriction, 3-2, after reviewing for abuse of discretion. Under this Court's precedent, however, constitutional claims like Mr. Smith's, which present a mixed question of law and fact, are properly reviewed de novo—for reasons respondent itself has

previously articulated before this Court. Respondent's discussion, moreover, confirms the circuit conflict regarding the proper standard of appellate review in cases like this. That conflict warrants resolution, because the confrontation right is fundamental and because the standard applied often determines the outcome. Finally, contrary to respondent's contention this case is a good vehicle to resolve the conflict. In particular, the strength of Mr. Smith's confrontation claim makes it entirely plausible that the outcome of his appeal would have been different had CAAF exercised plenary rather than deferential review.

I. THIS COURT'S PRECEDENT REQUIRES DE NOVO REVIEW OF CONSTITUTIONAL MIXED QUESTIONS

Respondent first argues (Opp. 10-14) that CAAF's use of abuse-of-discretion review was proper. Given the circuit conflict and the issue's importance, certiorari would be warranted even if that assertion were correct. But it is not correct.

Respondent asserts (Opp. 11-12) that deferential appellate review is appropriate in cases like this because the Confrontation Clause gives trial courts "wide latitude" to impose "reasonable" restrictions on cross-examination. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). That simply does not follow. The fact that trial courts may impose a range of restrictions does not mean appellate courts must defer to a trial court's view that a particular restriction is within the permissible range. Discretion to select within a range is different from discretion to determine where the range's boundaries (i.e., the constitutional limits) lie. *Van Arsdall* granted trial courts the former, and thus appellate judges cannot hold a restriction that falls within the permissible range unconstitutional just because they

would not have imposed it. But *Van Arsdall* did not grant trial courts the latter. *See* 475 U.S. at 679-680, *cited in* Pet. 23. To hold otherwise would mean that trial courts can violate the Confrontation Clause so long as the violation is a "reasonable" one. *See* Pet. 22.[1]

Were respondent correct, moreover, that abuse-of-discretion review applies anytime the underlying substantive standard is phrased in "reasonableness" terms (Opp. 14), appellate courts would review Fourth Amendment rulings deferentially. But respondent argued the opposite—and this Court agreed—in *Ornelas* v. *United States*, 517 U.S. 690, 691, 695 n.4 (1995); *see* U.S. Br. 21, *Ornelas* (No. 95-5257), 1996 WL 32744 (espousing de novo review for the "ultimate constitutional question of objective reasonableness").

The Court has likewise mandated de novo review for numerous other mixed questions implicating constitutional rights. *See* Pet. 17-22; U.S. *Ornelas* Br. 20 (citing *Thompson* v. *Keohane*, 516 U.S. 99 (1995)). Ignoring that phalanx of consistent holdings (none of which turned on the underlying substantive standard), respondent cites *Snyder* v. *Louisiana*, 552 U.S. 472 (2008), in arguing (Opp. 12-13) that some constitutional

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[1] Respondent also misstates *Van Arsdall*'s holding. The Court did not hold that the Confrontation Clause is violated "only" if an entire line of cross-examination is prohibited. Opp. 11. It held that a violation occurs when "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility" but for the restriction. 475 U.S. at 680; *see also id.* at 685 (White, J., concurring in the judgment) (describing this as the Court's holding); *Olden* v. *Kentucky*, 488 U.S. 227, 232 (1988) (per curiam) (applying this standard). Respondent's attempt (Opp. 19 n.3) to distinguish two cases cited by amicus NACDL—while ignoring the many others—is therefore unavailing.

questions are reviewed deferentially. *Snyder*, however, involved a question of fact, not a mixed question—hence the Court's review for "clear error." 552 U.S. at 474, 478; *see Ornelas*, 517 U.S. at 694 n.3 ("'Clear error' is a term ... [that] applies when reviewing questions of fact."). Mr. Smith does not contend that factual questions implicating constitutional rights are always reviewed de novo (just the opposite, *see* Pet. 18). He argues, rather, that this Court has consistently required de novo review of mixed questions implicating constitutional rights, and that it should do so again here. *See* U.S. *Ornelas* Br. 29 ("[C]onsiderations favoring de novo review carry special weight where a constitutional right is concerned.").

To be sure, the proper appellate-review standard is determined by the underlying issue. *See* Opp. 12. But that determination is driven not by the substantive standard applied to the issue but by: (1) the nature of the issue itself—whether it is legal, factual, or mixed, and whether it implicates constitutional rights—and (2) the extent to which independent review is necessary to control and clarify the pertinent legal principles. *See, e.g.*, *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Lilly* v. *Virginia*, 527 U.S. 116, 136 (1999) (plurality opinion); Pet. 17-18. Those factors, not the applicable substantive standard, determine which tribunal is better suited to address the issue, and hence whether appellate review is plenary or deferential.

Respondent also cites (Opp. 13-14) cases in which this Court reviewed cross-examination restrictions for abuse of discretion. As explained in the petition, however (at 24-26), nothing in those cases indicates that they involved constitutional challenges. Indeed, when the Court later characterized one case's holding as constitutional, it noted the anomaly of that case's deferen-

tial review. *See* Pet. 25. The cases respondent cites, moreover, long pre-date this Court's established jurisprudence regarding the selection of standards of appellate review. If any tension exists between that recent jurisprudence and the cases respondent cites, resolving it is simply another reason to grant review.

II. THE CIRCUIT CONFLICT WARRANTS RESOLUTION

As Mr. Smith explained (Pet. 12-14), a small majority of circuits always review confrontation claims like his for abuse of discretion, while a substantial minority always review de novo. Respondent does not dispute the former point, and the cases it cites (Opp. 15-16) only confirm the latter. *See, e.g.*, *United States* v. *Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007) ("[W]here the Confrontation Clause is implicated, we consider the matter *de novo*."); *see also* Pet. 12. The circuit conflict is clear. In fact, respondent never asserts that it does not exist. Respondent argues only that there is no conflict "that warrants further review." Opp. 10; *accord* Opp. 14. That argument lacks merit.

This Court has rejected the notion that deferential and independent review are substantively indistinguishable. *See* Pet. 15. Yet respondent contends that resolution of the circuit conflict is unwarranted because in this context, de novo and deferential review *are* "functional equivalent[s]." Opp. 14; *accord* Opp. 16. That contention rests on respondent's view (Opp. 12, 14) that when the underlying substantive standard is phrased in reasonableness terms, de novo and deferential review are essentially the same. As explained above, that is manifestly incorrect. And NACDL's detailed comparative discussion (Br. 8-19)—which respondent ignores—demonstrates clearly that in this context, the appellate-review standard is critical. A

mature circuit conflict concerning the enforcement of a fundamental constitutional right invoked daily in our criminal-justice system surely warrants resolution by this Court. *See* Pet. 15, 20-21; NACDL Br. 3, 11-12.

Respondent next cites *United States* v. *Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc), in which the Ninth Circuit held that confrontation claims like Mr. Smith's are sometimes reviewed de novo and sometimes reviewed for abuse of discretion, depending on the severity of the challenged restriction, *see id.* at 1101.[2] As respondent notes (Opp. 16), *Larson* proclaimed that its approach aligned with the circuits that always review de novo in cases like this. *See* 495 F.3d at 1101 n.6. But that is incorrect. Indeed, after observing that Ninth Circuit panels had taken three approaches with claims like Mr. Smith's—de novo review, abuse-of-discretion review, and the hybrid approach—*Larson* explicitly adopted "the third approach," not the first. 495 F.3d at 1101.[3]

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[2] *Larson* recognized the circuit conflict, *see* Pet. 14, without ever suggesting that it viewed de novo and abuse-of-discretion review as "functionally equivalent," Opp. 14.

[3] If respondent means to endorse *Larson*'s approach, that endorsement is misplaced. *Larson*'s rule is easily manipulated. Simply by defining the relevant "area of inquiry" narrowly (or broadly), litigants or courts can declare that an entire area was (or was not) excluded. Furthermore, *Larson*'s premise, that exclusion of an area of inquiry poses a greater threat to confrontation principles, is infirm. Excluding an entire line of marginally relevant questions is significantly less objectionable than, for example, the limited but critical exclusion here. Finally, under *Larson* the applicable standard improperly depends on the severity of the cross-examination restriction. If that were correct, appellate courts would review de novo a trial court's ruling on a First Amendment challenge to a complete ban on certain expression, but review def-

Respondent nonetheless implies (Opp. 16-17) that, in light of *Larson*, Mr. Smith's confrontation claim would be reviewed deferentially in every circuit. Respondent's basis for that suggestion is its assertion (Opp. 18) that the minority circuits employ a "hybrid" approach like *Larson*'s. That is incorrect. Again, *Larson*'s hybrid approach involves applying two different standards to *Confrontation Clause* claims. Circuits in the minority, by contrast, always review confrontation claims de novo, while reviewing non-constitutional challenges to cross-examination restrictions deferentially. *See* Opp. 14-15; Pet. 12. That use of abuse-of-discretion review is irrelevant to the question presented, which concerns confrontation claims.[4] *Larson* simply cannot change the fact that several circuits would review Mr. Smith's claim de novo (respondent cites no case from any of those circuits reviewing such a constitutional claim deferentially). Indeed, *Larson* only deepens the circuit conflict. It provides no basis to deny review.[5]

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erentially when a less severe limitation—such as a time, manner, or place restriction—was at issue. That is wrong. The degree of restriction affects the substantive analysis, not the appellate-review standard.

[4] Likewise irrelevant is respondent's observation (Opp. 14) that all circuits (not surprisingly) apply the substantive confrontation standard adopted in *Van Arsdall*. As discussed, the substantive standard and appellate-review standard are distinct issues.

[5] The denial of certiorari in *Larson* itself (*see* Opp. 10, 16) does not suggest otherwise. There are many reasons to deny review in a particular case, and this Court often grants review on questions after multiple denials. *See, e.g.*, Br. in Opp. 2 n.1, *Oregon* v. *Ice*, 129 S. Ct. 711 (2009) (No. 07-901), 2008 WL 3200260 (listing eight earlier denials of the question presented). In *Larson*, for example, it may have genuinely appeared that the standard of review could not affect the outcome. *See* Br. in Opp. 18-20, *Larson* v. *United*

III. THIS CASE IS A GOOD VEHICLE

Respondent argues finally (Opp. 18-20) that this case is not a good vehicle to address the question presented. That is also wrong.

The fact that CAAF's review was discretionary (Opp. 19-20) is irrelevant. Courts exercising discretionary review are as obligated to apply the proper standard of review as other courts—certainly where, as here, the proper standard is itself a matter of constitutional significance. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co.* v. *Sullivan* is a rule of federal constitutional law."); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (labeling plenary review a "duty of constitutional adjudication"), *quoted in* U.S. *Ornelas* Br. 29. This Court has repeatedly deemed itself obligated to apply the proper standard when conducting discretionary review. *See Lilly*, 527 U.S. at 136 (plurality opinion) (stating categorically that "courts should independently review" certain Confrontation Clause claims, and applying that instruction itself); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("[T]his Court is under a duty to make an independent evaluation" regarding whether statements were constitutionally voluntary.); *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-568 (1995) (similar).[6] Mr. Smith is not seeking a "right to de novo review by a second appellate court." Opp. 19. He

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States, 552 U.S. 1260 (2008) (No. 07-7481). As explained below, that is not true here.

[6] That these cases arose from state-court judgments confirms that the standard of review for federal constitutional claims is itself of constitutional dimension.

seeks to have CAAF's discretionary review conducted in accordance with constitutional requirements.

Respondent likewise errs in relying on the fact that the military system provides "two appellate tribunals," one that "conducts de novo review" and one that "primarily exercises discretionary jurisdiction." Opp. 19-20. There is nothing "peculiar" about that (Opp. 19); most state-court systems are structured the same way. And this Court regularly reviews judgments from state supreme courts that, like CAAF, exercised discretionary review. *See, e.g.*, *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010). The military setting does not affect the analysis here.

Respondent next questions (Opp. 20) whether CAAF's use of a deferential standard of review was outcome-determinative. Although Mr. Smith need not prove that the standard determined the outcome, *cf. Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001), there is powerful evidence that it did. Applying highly deferential review, *see* Pet. 15, CAAF affirmed by a single vote. Neither the plurality nor the concurrence, moreover, stated that the standard was irrelevant—a notable omission given that the parties hotly disputed what standard applied. The "indications" respondent points to that the standard did not determine the outcome, by contrast (Opp. 20), are far too equivocal. The plurality and the concurring judge should be taken at their word regarding the standard they applied. And if this Court clarifies that they should have reviewed the matter de novo, in a demonstrably close case there is every reason to believe that the result on remand would be different.

Respondent also notes (Opp. 18-19) that the Coast Guard Court of Criminal Appeals (CCA) affirmed after

reviewing de novo. The CCA's 2-1 affirmance does not demonstrate that all three CAAF judges who voted to affirm would do so upon plenary review. Indeed, Mr. Smith respectfully submits that review of the CCA majority's analysis, *see* Pet. App. 23a-28a—particularly compared with the dissent's, *see* Pet. App. 40a-58a—shows clearly the strength of Mr. Smith's Confrontation Clause claim and hence the likelihood that he would prevail before CAAF under de novo review.

As explained in more detail in NACDL's brief (and Mr. Smith's briefs below), the confrontation challenge here is compelling. The prosecution's case on the relevant charges rested *entirely* on SR's credibility. The defense sought to argue that her encounter with Mr. Smith was consensual, that she fabricated her contrary allegation to avoid being disciplined herself for violating cadet regulations, and that she had recently made a similar false claim about another man. That "commonsense" argument (Pet. App. 21a (dissenting opinion)) would have provided a powerful basis for the members to disbelieve SR—as, indeed, they disbelieved the other women who also accused Mr. Smith of misconduct but whom the defense was permitted to cross-examine fully. As to SR, however, the military judge's restriction on cross-examination eviscerated Mr. Smith's ability to present his defense. *See id.*; Pet. App. 56a-57a (dissenting opinion) (defense theory "of an almost spontaneous consensual encounter with SR would be difficult to believe unless the members were informed of SR's prior false claim and were able to understand the depths of her concern for protecting her career"); Pet. 9-10; NACDL Br. 10 (citing *Redmond* v. *Kingston*, 240 F.3d 590 (7th Cir. 2001) (Posner, J)). The military judge's rationales for the exclusion, moreover, were untenable. *See* NACDL Br. 10-16.

Respondent highlights (Opp. 11) the cross-examination that was allowed. But showing that SR had previously lied in unspecified ways about unspecified misconduct was a vastly less effective way of challenging her credibility than showing that she had recently lied about another consensual-but-proscribed sexual encounter being non-consensual. *See* Pet. App. 19a-20a & n.6 (dissenting opinion); Pet. App. 45a (dissenting opinion) (citing *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974)); NACDL Br. 8. Indeed, the nebulous questions and answers that were permitted may only have hurt the defense. *See Davis*, 415 U.S. at 318 ("[With] the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack[.]").[7]

Because SR's credibility—and hence the prosecution's entire case on these charges—would have been significantly diminished by the proposed cross-

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[7] Respondent repeats (Opp. 6, 8) the military judge's and CCA majority's arguments that SR's two assault allegations were significantly different. Those arguments fail. SR did not simply lie to Mr. Smith "*in confidence*." Pet. App. 64a. She knowingly allowed him to repeat her lie to others, thus making her false assault claim public. *See* Pet. App. 3a, 60a. Moreover, there is record evidence that others might have known about SR's encounter with Mr. Smith, giving her a clear motive to make a preemptive false report. *Contra* Opp. 8 (citing Pet. App. 31a). "The record reveals that" law-enforcement interviewed Mr. Smith, "the other person who knew of the [cadets'] encounter," before SR came forward. Pet. App. 52a (dissenting opinion). "Accordingly, the two statements were 'parallel' ... because of the illegality of the encounters and SR's fears that the true facts *could be* discovered." Pet. App. 53a. What weight to give this parallel should have been left to the members. *See* Pet. App. 53a-54a; *Davis*, 415 U.S. at 317.

examination, its exclusion was constitutional error. *See Van Arsdall*, 475 U.S. at 680, *quoted supra* n.1; *Olden*, 488 U.S. at 232 (per curiam); *Davis*, 415 U.S. at 317-318. While review would be warranted in any event to resolve the conflict among the courts of appeals, the strength of Mr. Smith's confrontation claim underscores that this case would be a particularly appropriate vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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