FIFTH CIRCUIT UPDATE

33rd Annual Conference on
State and Federal Appeals

June 9, 2023

THE FIFTH CIRCUIT AT THE SUPREME COURT

The Fifth Circuit at SCOTUS

- *Helix Energy Solutions Group*
- *Hippocratic Medicine (emergency docket)*
- Forthcoming*:*
  - *Brackeen*
  - *US v. Texas*

PERSONAL JURISDICTION

Johnson v. TheHuffingtonPost.com, Inc.,
21 F.4th 314 (5th Cir. 2021)

"Charles Johnson says the Huffington Post … libeled him by calling him a white nationalist and a Holocaust denier. He sued HuffPost in Texas. HuffPost is not a citizen of Texas and has no ties to the state. But ***its website markets ads, merchandise, and ad-free experiences to all comers****.*

We must decide whether those features of HuffPost's site grant Texas specific personal jurisdiction over HuffPost as to Johnson's libel claim. They do not, so we affirm the dismissal and deny jurisdictional discovery."

Johnson v. TheHuffingtonPost.com, Inc.,
21 F.4th 314 (5th Cir. 2021) (Haynes, J., dissenting)

"[T]he Supreme Court [has] articulated two different rules that turned on the nature of the defendant in a libel case. If the defendant alleging lack of personal jurisdiction is a publication (like Hustler Magazine in Keeton), then personal jurisdiction is appropriate when that publication is in 'substantial circulation' and that circulation is not 'random, isolated, or fortuitous.' If the defendant alleging a lack of personal jurisdiction is the author or the individual approving publication (like the employees in Calder), then personal jurisdiction is appropriate when the ***effect of the defendant's conduct is felt in the forum state****."*

Johnson v. TheHuffingtonPost.com, Inc.,
32 F.4th 488 (5th Cir. 2022) (on petition for en banc rehearing)

JUDGES VOTING AGAINST EN BANC REVIEW
(against TX jurisdiction over HuffPo)

Richman
Jones
Smith (panel author)
Stewart
Dennis
Southwick
Graves
Higginson
Ho
Duncan

JUDGES VOTING FOR EN BANC REVIEW AND JOINING DISSENT
(for TX jurisdiction over HuffPo)

Elrod
Haynes (panel dissent)
Engelhardt
Wilson

OTHER JUDGES VOTING FOR EN BANC REVIEW

Costa
Willett
Oldham

CERTIFICATION TO THE TEXAS SUPREME COURT

The Fifth Circuit at SCOTX

- "Because they are gracious in accepting, we should be gracious in the sending"
- *Sanders v. The Boeing Company*
- *Texas Medicine Resources, LLP v. Molina Healthcare of Texas, Inc.*
- *Brown v. City of Houston*
- *Fire Protection Services, Inc. v. Survitec Survival Products, Inc.*

REMOVAL

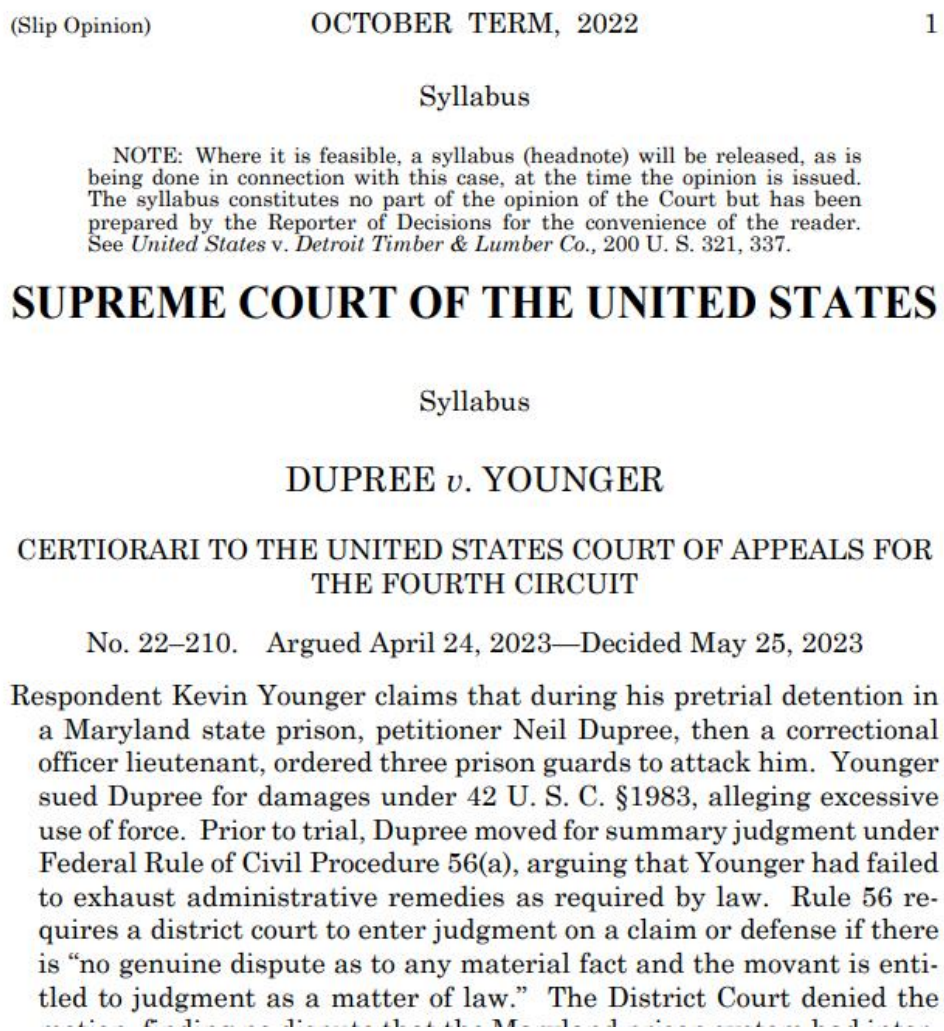
Dynamic CRM Recruiting Solutions LLC v. UMA Education, Inc., 31 F.4th 914 (5th Cir. 2022)

"Any dispute arising out of or under this Agreement ***shall be brought before*** *the district courts of Harris County, Texas, situated in the City of Houston, unless mutually agreed otherwise."*

JMOL MOTIONS AND PRESERVATION

Rule 50(a) and (g)

- SCOTUS has now reversed Fifth Circuit precedent saying that pure legal issue must be preserved in Rule 50 motions.
- But be vigilant! Very unclear what pure legal issues are.
- Expect more litigation on what "purely legal" means.



(Slip Opinion) OCTOBER TERM, 2022 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DUPREE *v.* YOUNGER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22–210. Argued April 24, 2023—Decided May 25, 2023

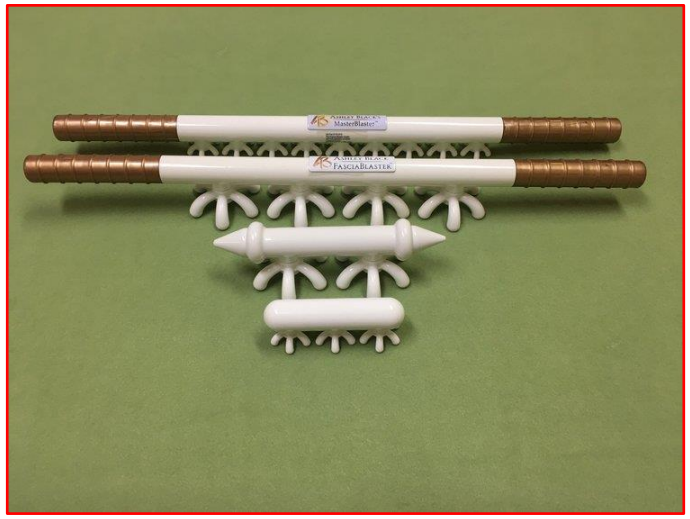
Respondent Kevin Younger claims that during his pretrial detention in a Maryland state prison, petitioner Neil Dupree, then a correctional officer lieutenant, ordered three prison guards to attack him. Younger sued Dupree for damages under 42 U. S. C. §1983, alleging excessive use of force. Prior to trial, Dupree moved for summary judgment under Federal Rule of Civil Procedure 56(a), arguing that Younger had failed to exhaust administrative remedies as required by law. Rule 56 requires a district court to enter judgment on a claim or defense if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The District Court denied the

CLASS ACTIONS

Elson v. Black, 56 F.4th 1002 (5th Cir. 2023)

Law. *"[V[ariations in state law here 'swamp any common issues and defeat predominance'"*

Fact. *"Some are disgruntled because they expected the FasciaBlaster to reduce cellulite. Others are dissatisfied because they expected it to reduce their pain or address certain health concerns. And others are displeased because they expected it to help them lose weight."*



Angell v. GEICO Adv. Ins. Co.,
No. 22-20093 (5th Cir. May 12, 2023)

"GEICO's failure to remit any of the three Purchasing Fees amounts to the same harm—a breach of the Policies."

"The course of conduct here is virtually the same across the alleged deprivations of each Purchasing Fee, i.e., whether GRICO breached the Policies."

Earl v. The Boeing Co., 53 F.4th 897 (5th Cir. 2022)

"[T]he plaintiffs in this suit have not plausibly alleged that they're any worse off financially *because defendants' fraud allowed Southwest and American Airlines to keep flying the MAX 8 during the class period. If anything, plaintiffs are likely better off financially. If the MCAS defect had been widely exposed earlier, the MAX 8 flights plaintiffs chose would have been unavailable and they'd have had to take different, more expensive (or otherwise less desirable) flights instead."*

ANTI-SUIT INJUNCTIONS

Ganpat v. Eastern Pacific Shipping PTE, Limited, 66 F. 4th 578 (5th Cir. 2023).

- When can a federal district court issue an anti-suit injunction against a *foreign* lawsuit?

- Exception that proves the rule?: “The corporation’s attorneys… even manage[d] to convince the foreign court to place him prison.”

FEZ
SAFETY

Foley Bey v. Prator, No 21-30489
(5th Cir. Nov. 17, 2022)

*"Plaintiffs also cannot point to the **1836 United States-Morocco Treaty of Peace and Friendship** as clearly establishing a right for Moorish Americans to enter the courthouse as a port of commerce without any screening."*

DORMANT
COMMERCE CLAUSE

Hignell-Stark v. City of New Orleans, 46 F.4th 317 (5th Cir. 2022)

"The residency requirement discriminates on its face against out-of-state property owners. *The City doesn't just make it more difficult for them to compete in the market for [Short Term Rentals] in residential neighborhoods; it forbids them from participating altogether."*

NextEra Energy Capital Holdings v. Lake, 48 F.4th 306 (5th Cir. 2022)

***”Imagine if Texas—a state that prides itself on promoting free enterprise—passed a law saying that only those with existing oil wells in the state could drill new wells**. …*

A 2019 law says that the ability to build, own, or operate new lines ‘that directly [connect] with an existing utility facility … may be granted only to the owner of that existing facility.’ …

Once we wade through the thicket of electricity regulation, the ban’s interference with interstate commerce becomes as clear as it is for the oil well hypothetical. We thus conclude that the dormant Commerce Clause claims should proceed past the pleading stage.”

FEDERAL PREEMPTION OF STATE LAW

Spano v. Whole Foods, Inc., 65 F. 4th 260 (5th Cir. 2023).

No preemption: Plaintiffs were able to articulate state law claims independent of labelling.

But: "If, as the case develops, it becomes clear there is no independent state duty…."

HEIGHTENED PLEADING

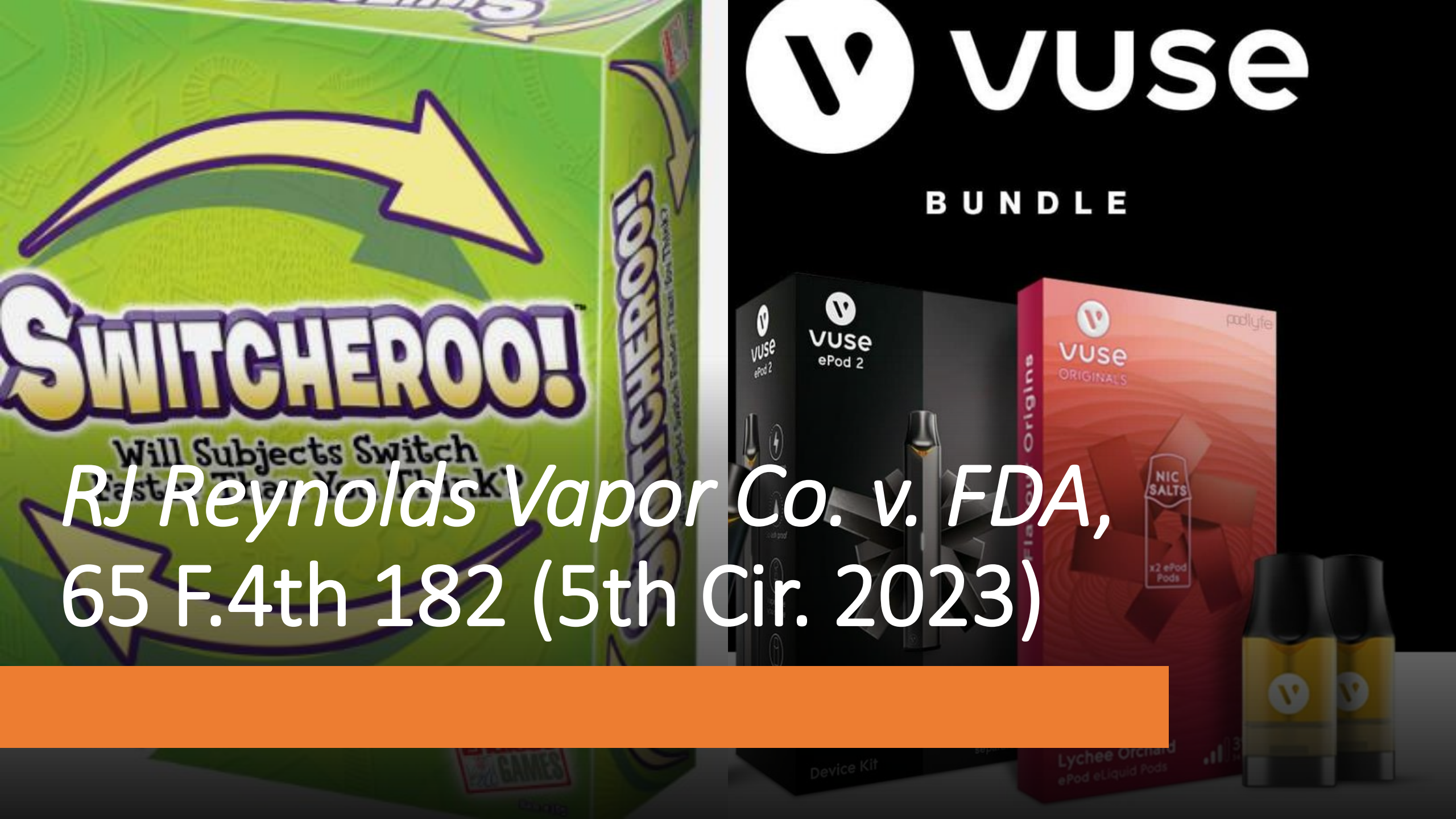
Stringer v. Remington Arms, 52 F.4th 660 (5th Cir. 2022) (majority)

"In [plaintiffs'] complaint, they explain that they have found public resources that contradict Remington's public statements regarding the safety of the XMP trigger. They also allege that Remington had 'actual and/or physical knowledge of manufacturing, and/or, design deficiencies in the XMP Fire Control years before the death of Justin Stringer' and that the company received customer complaints regarding trigger malfunctions as early as 2008. But Plaintiffs do not make the leap to fraudulent concealment. ***They say merely that Remington 'ignored' notice of a safety related problem****."*

Stringer v. Remington Arms, 52 F.4th 660 (5th Cir. 2022) (dissent)

The complaint's allegations indicate that ***Remington knew about problems with the X-Mark Pro trigger before the recall but did not disclose its knowledge*** *of those problems during the limitations period. And, contrary to Defendants' assertion that the complaint allegations relate only to the "Walker" trigger, the deposition testimony cited in the complaint expressly references the "XMP" trigger at issue here."*

ADMINISTRATIVE LAW AND CONSISTENCY

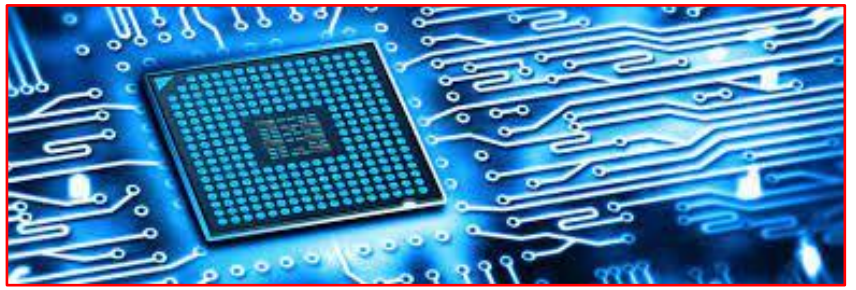


RJ Reynolds Vapor Co. v. FDA, 65 F.4th 182 (5th Cir. 2023)

PRELIMINARY INJUNCTIONS

CAE Integrated, LLC v. Moov Techs., Inc., 44 F.4th 257 (5th Cir. 2022)

- ***Public availability.*** *"CAE has not identified a single contact whose information was not publicly available or ascertainable through proper means. Semiconductor industry participants are available in third-party directories, meet at conventions and trade shows, and can be found through online searches."*



- ***Data use.*** *"[A]s Meissner testified and forensics confirmed, the Google Drive contained no customer lists when he started at Moov. … Without any evidence that Meissner and Moov accessed or used data in the Google Drive the remaining potential sources of customer identities is Meissner's personal knowledge or public sources."*

THE AMERICANS WITH DISABILITIES ACT

EEOC v. Methodist Hospitals of Dallas, 62 F. 4th 938 (5th Cir. 2023).

- When does a "most qualified candidate" policy violate the ADA?
- When does an employee interrupt the "interactive process" such that they cannot be accommodated?

MANDAMUS

Rhone v. City of Texas City,
No. 22-40551, 2022 WL 4310058 (5th Cir. Sept. 19, 2022)

*"[Fed. R. App. P.] 8(a)(1) states that "**[a] party must ordinarily move first in the district court for … (A) a stay** of the judgment or order of a district court pending appeal." Rule 8(a)(2) provides, however that "[a] motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges." That provision is subject to a requirement that '[t]he motion must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.' Rule 8(a)(2)(A)."*

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