



OAD | OFFICE OF THE
APPELLATE
DEFENDER

**27th ANNUAL
FIRST MONDAY IN OCTOBER**

October Term 2020

ALEXANDER L. BAXTER

Petitioner

v.

BRAD BRACEY, ET AL.

Respondents

OFFICE OF THE APPELLATE DEFENDER

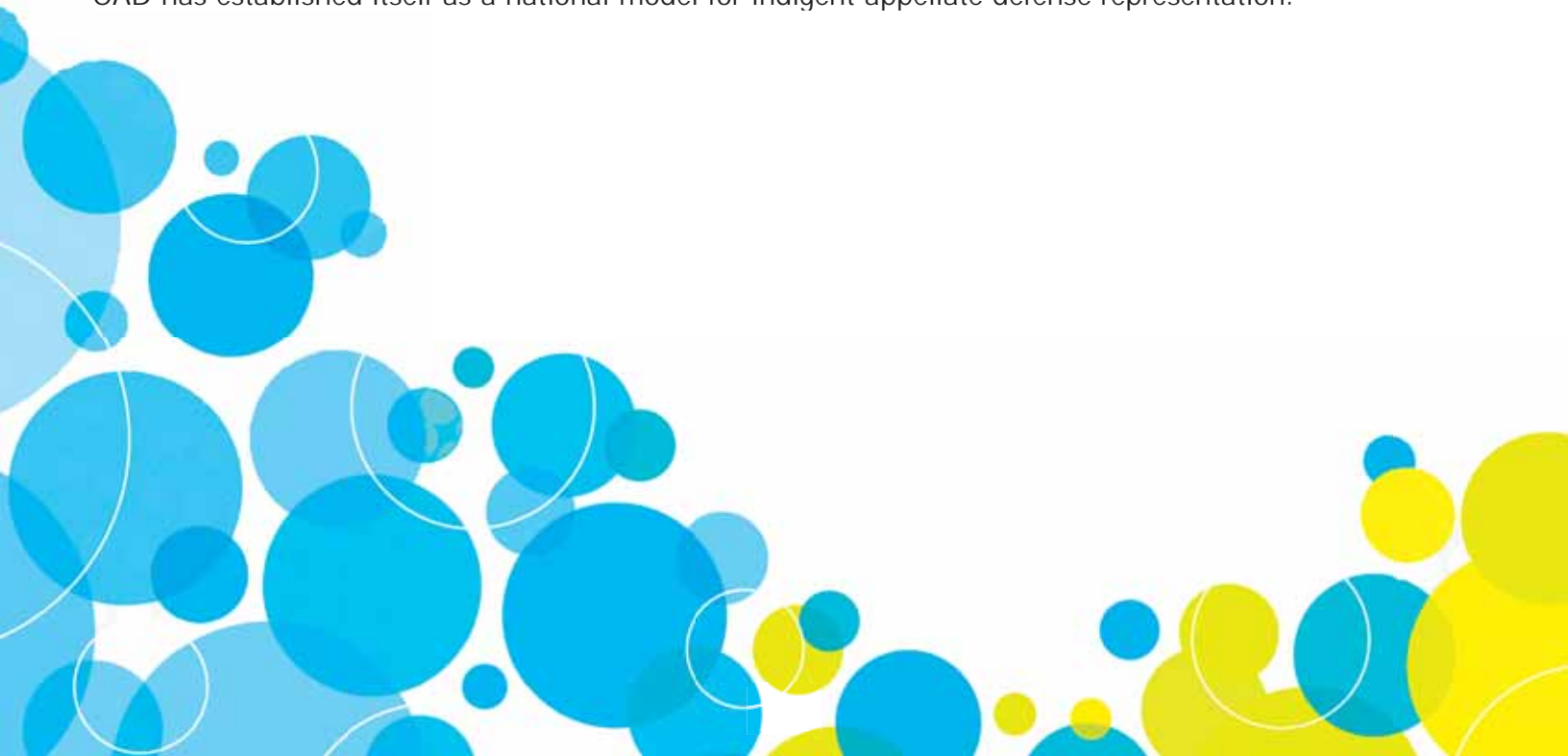
The Office of the Appellate Defender (OAD) strives to ensure that poor people convicted of felonies receive full and equal access to justice by providing exceptional appellate representation, improving the quality of indigent defense through education and training, and advocating for systemic reform of New York City's criminal justice system.

As one of New York City's oldest providers of appellate representation, and the City's second oldest institutional indigent defense office, OAD challenges Manhattan and Bronx convictions and sentences in the New York Supreme Court, the Appellate Division of the Supreme Court, First Judicial Department, the New York State Court of Appeals, and the federal courts. OAD's Reinvestigation Project identifies potential cases of wrongful conviction and, where appropriate, files petitions for relief.

OAD is a training office that not only provides high-quality representation to individual clients, but also educates attorneys that are likely to make a substantial contribution to the representation of poor people charged with and/or convicted of crimes. Thus, OAD's Staff Attorneys serve limited (three-year) terms; OAD maintains a Criminal Appellate Defender Clinic at New York University Law School; and OAD has a Volunteer Appellate Defender (VAD) program that allows attorneys at private law firms to co-counsel appeals with OAD attorneys.

OAD pioneered the integration of social work into indigent appellate defense practice. OAD's Client Services Director supports clients by providing on-side expertise, assistance and referrals in the areas of medical, mental health, substance abuse, housing, employment, public assistance benefits and educational services.

By dedicating itself to innovation and remaining flexible and responsive to emerging criminal justice needs, OAD has established itself as a national model for indigent appellate defense representation.





Office of the Appellate Defender's

27th Annual

FIRST MONDAY IN OCTOBER

A Mock Supreme Court Argument

THE ADVOCATES

Sharon L. Nelles

Counsel for Petitioner

Roberta A. Kaplan

Counsel for Respondents

THE BENCH

Chief Justice

Danielle C. Gray

Associate Justices

Brooke E. Cucinella

Arlo Devlin-Brown

William J. Harrington

Lindsay C. Harrison

Randall Jackson

Parvin Daphne Moyne

Jocelyn E. Strauber

Lisa Zornberg

Court Crier

Myrna Felder

PROGRAM

OPENING REMARKS

Nicolas Bourtin
Chair of the Board, OAD
Partner, Sullivan & Cromwell LLP

Stephen Chu
Interim Attorney-in-Charge
OAD

AWARDS PRESENTATION

OAD Beacon of Hope Award

Marvin Clark

Presented by Gabe Newland, OAD Staff Attorney

OAD Gideon Award

Jones Day

Accepted by Leon DeJulius, Partner-in-Charge, New York
& Meir Feder, Partner & OAD Board Member

Gould Award for Outstanding Oral Advocacy

Roberta A. Kaplan

Partner

Kaplan Hecker & Fink LLP

Sharon L. Nelles

Partner

Sullivan & Cromwell LLP

OAD Counsel for Justice Award

Danielle C. Gray

Senior Vice President, Chief Legal Officer & Corporate Secretary
Blue Cross and Blue Shield of North Carolina

THE ORAL ARGUMENT

Setting: The Supreme Court of the United States Courtroom
Time: Monday, October 5, 2020, 10:00 a.m. sharp

THE SECRET DELIBERATIONS

Setting: The Supreme Court of the United States, Chief Justice's Conference Room
Time: Friday, October 9, 2020, 3:00 p.m.

BEYOND THE COURTROOM

Discussions with OAD Staff on Qualified Immunity, Appellate Litigation,
The Reinvestigation Project, The Parole Advocacy Project, and COVID & Prisons.



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WARMEST THANKS TO OUR GENEROUS SUPPORTERS

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Roy L. Reardon

Host Committee

Antonia M. Apps
Nicolas Bourtin
Sean Hecker
Jeffrey Udell



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As of September 30, 2020



2020 Gould Award for Outstanding Oral Advocacy

ROBERTA A. KAPLAN

Roberta (“Robbie”) Kaplan, the founding partner of Kaplan Hecker & Fink LLP and a formidable litigator with decades of experience in both commercial and civil rights litigation, has consistently been recognized as one of the nation’s top litigators, including as one of *Benchmark Litigation’s* top ten women litigators. In addition to receiving the Gold Medal Award from the New York State Bar Association and a Lifetime Achievement Award from the *New York Law Journal*, she has been named “Litigator of the Year” by *The American Lawyer*, “Lawyer of the Year” by *Above the Law*, and the “Most Innovative Lawyer of The Year” by *The Financial Times*, among numerous other honors. She is also a co-founder of the Time’s Up Legal Defense Fund.

Ms. Kaplan is an expert in cutting-edge areas of law. As the *ABA Journal* has recognized, Ms. Kaplan is “a specialist in emerging law. She litigates cases that shape the legal structure within which Americans live, love, work and hail cabs.” Ms. Kaplan leads a high-stakes commercial litigation practice, representing clients like Airbnb, Uber, Elysium Health, Columbia University, Brown University and Fitch Ratings in their most high-profile and complex legal challenges. Although she is perhaps best known for successfully challenging the constitutionality of the so-called Defense of Marriage Act before the United States Supreme Court in *United States v. Windsor* thereby paving the way to marriage equality nationwide only two years later, Ms. Kaplan has continued her deep-seated commitment to using the law to advance the public interest. From launching a lawsuit against the neo-Nazis and white supremacists who organized the racially-motivated violence that took place in Charlottesville in August 2017 to suing Donald Trump for defamation on behalf of her client E. Jean Carroll, high-profile public interest litigation remains at the center of Ms. Kaplan’s practice.

Ms. Kaplan is a 1991 graduate of Columbia Law School, where she currently serves as an adjunct professor of law. She holds an A.B., *magna cum laude* and *Phi Beta Kappa*, from Harvard College.



2020 Gould Award for Outstanding Oral Advocacy

SHARON L. NELLES

Sharon Nelles is the Managing Partner of Sullivan & Cromwell's Litigation Group and a member of the Firm's Management Committee. She represents global companies, financial institutions, and their boards in every aspect of critical company matters, including civil litigation, regulatory proceedings, congressional and criminal investigations, and enforcement actions. Her diverse practice encompasses acting for leading corporate clients in securities class actions, antitrust litigation and a wide-range of commercial disputes. She is currently active in matters related to the Volkswagen diesel scandal and #MeToo workplace investigations, among others.

Sharon is frequently called upon by clients from a variety of industries to handle their most complex and high-profile matters. Following the subprime mortgage crisis, she managed the fallout for such clients as JPMorgan Chase and Moody's. Sharon advised JPMorgan Chase through its \$13 billion global settlement with the Department of Justice, and Moody's on its \$864 million FIRREA settlement with the Department of Justice and 21 states. She also successfully defeated shareholder class actions and derivative litigation for multiple financial institutions. For Volkswagen, Sharon advised on its \$20 billion resolutions with the Department of Justice, the Federal Trade Commission, state attorneys general, and the multi-district consumer plaintiffs committee, and continues to act as lead counsel and national coordinating counsel for Volkswagen in numerous ongoing federal and state actions and regulatory matters. In the wake of the Department of Justice's antitrust case *United States v. Microsoft*, she handled follow-on litigation for Microsoft, including hundreds of consumer class actions brought around the country by end-users and direct purchases of Microsoft software. Sharon's clients have also included, among others, Diageo, Standard Chartered Bank, and The St. Joe Company.

Sharon has tried cases in state and federal courts on behalf of such clients as Volkswagen, Microsoft, Eastman Kodak Company and General Bank. She has also represented firms and individuals in proceedings before the Department of Justice, the United States Congress, the Securities and Exchange Commission, the Federal Trade Commission, the Department of Financial Services, and the Federal Reserve Bank of New York. She frequently conducts investigations for corporate clients, special committees, and boards of directors.



2020 OAD Counsel for Justice Award

DANIELLE C. GRAY

Danielle C. Gray is Senior Vice President, Chief Legal Officer and Corporate Secretary for Blue Cross and Blue Shield of North Carolina.

Prior to her role at Blue Cross and Blue Shield of North Carolina, Danielle was a partner at O'Melveny & Myers LLP, where she advised health care companies, financial services institutions, universities, and other clients on litigation, internal investigations, and government enforcement actions.

Danielle also served in several leadership roles in the White House and Department of Justice. As Assistant to the President and Cabinet Secretary, Danielle was responsible for policy and communications coordination among all Cabinet-level agencies. As Deputy Director of the National Economic Council, she advised the President and senior staff on key economic policy decisions. As Associate Counsel to the President, Danielle provided legal advice on domestic and economic policy initiatives, and served as one of the principal lawyers advising the Office of Health Reform on the Affordable Care Act. She also played a lead role on judicial selection, including the nomination and confirmation of two justices to the United States Supreme Court. And as Senior Counsel to the Assistant Attorney General for the Civil Division, she helped supervise litigation of high-impact civil cases at the Justice Department on areas ranging from health care to civil rights to labor law.

Danielle earned her bachelor's degree in economics and public policy from Duke University and her law degree from Harvard Law School, where she was an Editor of the *Harvard Law Review*. She served as a law clerk to Chief Judge Merrick Garland on the U.S. Court of Appeals for the D.C. Circuit and to Justice Stephen Breyer on the U.S. Supreme Court.



2020 OAD Beacon of Hope Award

MARVIN CLARK

Marvin Clark, a former OAD client, is an employee of Caputo's Bake Shop in Carroll Gardens, where he's worked for more than a year. Six days a week, Mr. Clark uses Access-A-Ride to commute to Brooklyn from his apartment in the Bronx, a four-hour round trip. In presenting Mr. Clark with this year's Beacon of Hope Award, OAD recognizes his profound resilience.

Mr. Clark has faced numerous personal obstacles in his life. At birth, he was abandoned by his biological mother; and at age four, his adoptive father, William, died from a heart attack. Mr. Clark also suffered two gunshot injuries before the age of twenty-one, and the second left him in a wheelchair for many months.

At age 23, Mr. Clark was arrested for an assault he did not commit, and he spent 15 months at Rikers Island before the prosecution finally dropped the charges. Afterwards, Mr. Clark struggled to find housing and stability, and the combination of traumas led him to a struggle with drug addiction.

In early 2015, Mr. Clark was again arrested, and he later pled guilty to possession of a weapon and of a controlled substance. The trial court sentenced him to four and a half years of prison and two and a half years of post-release supervision.

Despite a life of difficulties, Mr. Clark persevered. A counselor described him as an example of someone who was "motivated to change," and he dedicated himself upon release to establishing a new life. Emphasizing the critical support he would have from OAD's Client Services Program, OAD appealed for a sentence reduction, explaining that Mr. Clark did not need an additional year of supervision—with the looming threat of prison and other restrictions—to stay committed to himself. Given Mr. Clark's many efforts, the Appellate Division agreed and reduced his post-release supervision by a full year.



2020 OAD Gideon Award

JONES DAY

Jones Day is a global law firm with more than 2,500 lawyers in 43 offices across five continents. The firm is distinguished by: a singular tradition of client service; the mutual commitment to, and the seamless collaboration of, a true partnership; formidable legal talent across multiple disciplines and jurisdictions; and shared professional values that focus on client needs.

The Firm is an institutional partner for clients who seek counsel that seeks to understand them and their needs; that communicates with clients about their needs and the different tactics available for addressing those needs; that works seamlessly and impressively across offices and practices and with the client; that provides talent and expertise across subject areas and geographies; and that brings commitment and courage to the relationship and its engagements. We are formidable because every partner and every client has the entire global institution at their command and is a high priority of the Firm as a whole. We are true partners, with each other and, even more importantly, with our clients.

With a history of more than 125 years and a culture of client service and professionalism based on explicit shared values, the Firm is committed to providing pro bono legal services, building diversity in our profession, and supporting outreach efforts around the world.

Jones Day has a long history of, and commitment to, pro bono work, public service, and community involvement in all of our locations around the world. Because of that commitment, pro bono and public service matters undertaken by Jones Day are provided the same level of attention and professional dedication that we provide to matters undertaken on behalf of paying clients.

Lawyers from diverse backgrounds lead client engagements, practice groups, and offices around the world at Jones Day. We are committed to recruiting, retaining and advancing highly qualified diverse lawyers and have set priorities in entry level recruitment, lateral recruitment, development and retention of minority and female lawyers, and diversity mentoring, training and awareness.

PREVIOUS HONOREES

THE MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

is awarded annually to two of the nation's most accomplished lawyers. We have proudly presented the Gould Award to the following individuals since 1994:

ELKAN ABRAMOWITZ
FLOYD ABRAMS
MYRON BELDOCK
BARRY H. BERKE
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LISA S. BLATT
DAVID BOIES
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ALAN VINEGRAD
HERBERT M. WACHTELL
THEODORE V. WELLS, JR.
MARY JO WHITE
DAVID M. ZORNOW

THE OAD COUNSEL FOR JUSTICE AWARD

recognizes a prominent in-house counsel who exemplifies OAD's commitment to justice. We have proudly presented the Counsel for Justice Award to the following individuals since 2014:

STACEY R. FRIEDMAN
ELLEN ORAN KADEN
CHRISTOPHER P. REYNOLDS

TERESA WYNN ROSEBOROUGH
AUDREY STRAUSS
TONY WEST

THE OAD GIDEON AWARD

honors a law firm that has demonstrated exemplary commitment to indigent appellate defense through its participation in OAD's Volunteer Appellate Defender program. We have proudly presented the Gideon Award to the following firms since 2018:

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
WEIL, GOTSHAL & MANGES LLP

THE OAD BEACON OF HOPE AWARD

celebrates a former client whose life stands as a powerful example of the human capacity for resilience and highlights the importance of centering the administration of criminal justice around the inherent potential of every person. We have proudly presented the Beacon of Hope Award to the following individuals since 2018:

KHALIL A. CUMBERBATCH
FAYOLA McINTOSH

THE BENCH

CHIEF JUSTICE

Danielle C. Gray

ASSOCIATE JUSTICES



Brooke Cucinella, a partner at Simpson Thacher & Bartlett LLP, is a former federal securities fraud prosecutor and experienced trial lawyer, described in *Chambers USA* as “a real rising star” and “an experienced, savvy litigator” and recognized by *The Legal 500 in Corporate Investigations and White-Collar Criminal Defense*. She represents companies, boards and executives in government and internal investigations and high-profile disputes. Brooke also counsels clients on crisis response planning and cyber security incidents. Brooke previously served in the DOJ as an Assistant United States Attorney in the U.S. Attorney’s Office for the Southern District of New York, where she was a senior member of the Securities and Commodities Fraud Task Force. As a federal prosecutor, she tried multiple significant cases and oversaw numerous investigations involving federal and state law enforcement and regulatory agencies, including the SEC. Brooke was responsible for investigating and prosecuting a wide range of complex financial crimes, including accounting fraud, insider trading, market manipulation, wire fraud, bank fraud, tax fraud, money laundering and public corruption. She also has significant experience coordinating cross-border investigations.



Arlo Devlin-Brown is a partner in the White Collar and Investigations practice at Covington & Burling LLP in New York City, where he represents companies and individuals in a wide range of governmental investigations. Prior to the joining Covington in 2016 Arlo spent ten years at the U.S. Attorney’s Office for the Southern District of New York, where he served as Chief of the Office’s Public Corruption Unit. Arlo is honored to serve as “Justice Devlin-Brown” in OAD’s Moot Supreme Court of the United States, his last relevant such experience having been to argue before Justice Stephen Breyer of the Ames Moot Court (and also, the U.S. Supreme Court) as a student at Harvard Law School.



Bill Harrington is a partner at Goodwin Procter LLP. He is a seasoned trial lawyer and appellate advocate whose practice focuses on bribery, fraud, antitrust and consumer protection issues in the financial services and healthcare sectors. Mr. Harrington also has extensive experience in foreign bribery and international money laundering matters. He speaks Spanish and works frequently with Spanish-speaking clients. He formerly served as a federal prosecutor in the U.S. Attorney’s Office for the Southern District of New York where he was a member of the Public Corruption Unit and later the office’s Criminal Health Care Fraud Coordinator. Mr. Harrington serves as co-chair of Goodwin’s Pro Bono Committee, and is a member of both the S.D.N.Y. Criminal Justice Act Panel and the Second Circuit’s pro bono panel. He has been recognized for his legal work by *Chambers USA*, *U.S. News Best Lawyers*, *Euromoney’s Expert Guides*, *LMG Life Sciences* and *Benchmark Litigation*. He earned his BA from Yale College and his JD from Yale Law School.



Lindsay Harrison is a partner in Jenner & Block's Appellate and Supreme Court and Complex Commercial Litigation Practices. Ms. Harrison's practice spans a diverse range of matters and clients. Many of her matters involve high-stakes legal challenges under the Administrative Procedure Act, including a recent victory challenging the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program. Ms. Harrison also leads the firm's Hospitality Practice, representing hotel management companies in disputes with owners, partners and consumer class actions. And Ms. Harrison is a leading member of the firm's Education Practice, where she

litigates cases on behalf of colleges and universities and advises them on regulatory issues. Ms. Harrison devotes substantial time to pro bono work, including on behalf of criminal defendants, immigrants, religious minorities, LGBTQ+ persons, and in support of independent science in federal policymaking. *The National Law Journal* has selected her as a "DC Rising Star"—one of 40 "game-changing lawyers age 40 and under" who are "leaders in the law" in the nation's capital. At the age of 30, she argued her first case in any court in the US Supreme Court, where she won an important victory for immigrants seeking asylum in this country.



Randall Jackson is a partner at Willkie Farr & Gallagher LLP. His practice focuses on investigations, white collar criminal defense, civil litigation, and regulatory compliance. He has served as lead or co-lead attorney in over 20 federal trials. He has also briefed and argued numerous appeals.

Randall has spearheaded hearings and trials in a number of complex criminal and civil matters. In 2019, Randall co-led the successful defense of shipbuilding executive Jean Boustani, securing an acquittal on all counts after a two-month long jury trial in the Eastern District of New York. The U.S. Department of Justice had charged Mr. Boustani with orchestrating a \$2 billion securities fraud scheme. In 2016, Randall led the successful jury trial defense of a major international bank in the Southern District of New York against a former executive who sued the bank alleging retaliation.

From 2007 to 2015, Randall served as an Assistant U.S. Attorney in the Southern District of New York, where he led and co-led numerous complex matters, including the trial of five lieutenants of Bernard Madoff and the prosecution of Faisal Shazhad, known as the Times Square Bomber. Randall is a graduate of Morehouse College and Harvard Law School. He was a law clerk to Judge Nina Gershon in the Eastern District of New York and Judge Ann Claire Williams in the U.S. Court of Appeals for the Seventh Circuit.



Parvin Moyne, a partner at Akin Gump Strauss Hauer & Feld LLP, represents financial institutions, corporations and their senior executives in government investigations, white collar criminal and regulatory defense matters, internal investigations and complex commercial litigation matters.

Ms. Moyne has extensive experience in matters arising from allegations of fraud and corruption, including allegations involving securities fraud, market manipulation, insider trading, investment advisor fraud, accounting fraud, public corruption, Foreign Corrupt Practices Act ("FCPA") violations, wire and mail fraud and tax fraud. She also has represented clients in investigations involving international and domestic money laundering and crimes of violence.

Prior to joining Akin Gump in 2015, Ms. Moyne served as a prosecutor in the Securities and Commodities Task Force Unit of the U.S. Attorney's Office for the Southern District of New York. In her nearly decade-long tenure as a prosecutor, Ms. Moyne led over one hundred investigations and prosecutions, tried over 10 criminal jury trials in the U.S. District Court for the Southern District of New York, and briefed and argued

more than 10 appeals before the 2nd Circuit. Prior to her tenure at the U.S. Attorney's Office, Ms. Moyne was law clerk to the Honorable Dennis Jacobs, the then-Chief Judge of the 2nd Circuit.

Ms. Moyne received her B.A. from Yale University and her J.D., *magna cum laude*, from New York University School of Law, where she earned membership in the Order of the Coif and served as Editor-in-Chief of the *New York University Law Review*.



Jocelyn Strauber, a partner at Skadden, Arps, Slate, Meagher & Flom LLP, represents companies and individuals in a wide array of criminal and civil enforcement matters. Prior to joining Skadden in 2013, Ms. Strauber held numerous roles at the U.S. Attorney's Office for the Southern District of New York, including, most recently, co-chief of the Criminal Division's Terrorism & International Narcotics Unit. In this role, she supervised investigations and prosecutions involving terrorism and national security, arms trafficking, money laundering, violations of export controls and economic sanctions, and global narcotics trafficking.

Ms. Strauber supervised the successful prosecution of several high-profile terrorism and national security cases, including Faisal Shahzad (attempted Times Square bomber) and Mansour Arbabsiar (in connection with a conspiracy to assassinate the Saudi Arabian ambassador to the United States). She also was part of the team that secured the guilty plea of Jamaican drug lord Christopher Coke. In 2011, she was the recipient of the Attorney General's Distinguished Service Award.

Earlier in her career, Ms. Strauber clerked for U.S. Supreme Court Chief Justice William H. Rehnquist. She also served as a Bristow Fellow in the Office of the Solicitor General in the U.S. Department of Justice and clerked for the Hon. A. Raymond Randolph in the U.S. Court of Appeals for the District of Columbia Circuit.



Lisa Zornberg is a litigation partner at Debevoise & Plimpton LLP, and a member of its White Collar & Regulatory Defense Group. Her practice focuses on white collar defense, regulatory enforcement actions and internal investigations, and on complex civil litigation. Ms. Zornberg also co-heads associate training for the firm's litigation department.

Prior to joining Debevoise in 2019, Ms. Zornberg was the Chief of the Criminal Division of the United States Attorney's Office in the Southern District of New York, where she supervised approximately 170 federal prosecutors and oversaw the Office's criminal investigations and prosecutions. During her 16 years at SDNY (over two tours of duty), Ms. Zornberg served in both the Civil and Criminal Divisions, rising to supervisory ranks in both. Ms. Zornberg is a recipient of the Department of Justice Marshall Award, the department's highest award given to attorneys for excellence in legal performance, and of the Federal Law Enforcement Foundation's Federal Prosecutor of the Year award.

Ms. Zornberg graduated Harvard College in 1991 and Harvard Law School in 1994. Early in her legal career, Ms. Zornberg clerked for the Hon. Sonia Sotomayor, when Justice Sotomayor served as a United States District Judge for the Southern District of New York.

AWARDS PRESENTERS



Nicolas Bourtin is the Managing Partner of Sullivan & Cromwell's Criminal Defense and Investigations Group and a co-head of the FCPA and Anti-Corruption Group. His practice focuses on white collar criminal defense and internal investigations, regulatory enforcement matters, and securities and complex litigation. He has conducted numerous jury trials and has represented individuals and corporations in high-profile matters. Previously, he served as an Assistant U.S. Attorney in the Eastern District of New York. He has been recognized by *The National Law Journal* as a White Collar, Regulatory and Compliance Trailblazer, and by *Chambers USA* as a leader in White-Collar Crime & Government Investigations. Mr. Bourtin is the Chair of the Board of Directors for the Office of the Appellate Defender and serves on the Criminal Justice Act Panel of the U.S. District Court for the Eastern District of New York.



Sean Hecker, a partner at Kaplan Hecker & Fink LLP, is an experienced trial lawyer, nationally recognized as a go-to litigator for corruption and other white-collar criminal defense matters by *Chambers*, *Benchmark Litigation*, *Best Lawyers*, and *Lawdragon 500*, among others. *Benchmark Litigation* and *Chambers* have also specifically named Sean one of the top trial lawyers in the country, and *Benchmark* also recognized Sean as the 2020 White-Collar Crime/Investigations/Enforcement Attorney of the Year. In one notable matter, Sean's victory in *U.S. v. Bogucki* was honored by *Global Investigations Review* as its "Most Important Court Case of the Year." Sean also maintains an active pro bono practice and is Chair of the Board of Directors of the Federal Defenders of New York, and also chairs the New York City Bar Association's Task Force on Mass Incarceration.

COURT CRIER



Myrna Felder is a matrimonial attorney practicing at both the trial and appellate levels. A former Chair of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction, Ms. Felder organized the State Bar's day-long CLE program on New York appellate practice, and has been a frequent lecturer on appellate practice for the Appellate Division, First Department; the New York State Bar Association; the American Bar Association; the Women's Bar Association of the State of New York; and other bar groups. Ms. Felder serves on the Subcommittee on Appellate Practice of the New York State Office of Court Administration's Advisory Committee on Civil Practice, of which she has been a member since 1983, and authored the chapter, "Special Considerations in Matrimonial Appeals" in Thomas Newman's *New York Appellate Practice*.

A member of the Board of Directors of the Office of the Appellate Defender, Ms. Felder was one of a number of enthusiastic supporters for the creation of the *First Monday in October* program, for which she has served as co-chair since its inception twenty-seven years ago.

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Asa Taylor, IT Administrator

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Luis Vivaldi

FALL 2020 INTERNS

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Mary Harrington	Taylor Stone
Johannes Hoffman	Jaime Hin Hon Wong
Assana Lloyd	



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SCENES FROM FIRST MONDAY IN OCTOBER 2019



Left-to-right: Justices Anirudh Bansal; James J. Benjamin; Carrie H. Cohen; Daniel M. Gitner; Chief Justice Tony West; Katherine R. Goldstein; Sharon Cohen Levin; John A. Nathanson; and Kelly A. Moore; former Attorney-in-Charge Christina Swarns welcomes and thanks the audience.



Christina Swarns with Master of Ceremonies Jeffrey Toobin and OAD Board Chair Nicolas Bourtin.



2019 Honorees Hon. John Gleeson, Tony West, Fayola McIntosh, Faith E. Gay, and Peter L. Simmons of Fried, Frank, Harris, Shriver & Jacobson LLP.



Advocates and Gould Award Recipients Hon. John Gleeson and Faith E. Gay argue the case.



Counsel for Justice Award Recipient Tony West.



**A SPECTATOR'S PRIMER
NO. 18-1827
IN THE MOCK SUPREME COURT OF THE UNITED STATES**

Alexander L. Baxter,
Petitioner,
-v.-
Brad Bracey & Spencer R. Harris,
Respondents.

INTRODUCTION

This hypothetical case is based on an actual case which was denied certiorari to the United States Supreme Court's 2020 Term. This case involves the doctrine of qualified immunity. Qualified immunity is a judicially created doctrine that prevents government officials (including police officers) from being held personally liable for constitutional violations—like the right to be free from excessive force—as long as the officials did not violate “clearly established” law.

Two questions are at issue in this case:

1. If the use of a police dog on someone who has surrendered by lying down on the ground is unconstitutional, is it “clearly established” that the law also applies to the use of a police dog on someone who has surrendered by sitting on the ground with his hands up?
2. Should this Court narrow or abolish the doctrine of qualified immunity?

FACTUAL & PROCEDURAL BACKGROUND

A. The Arrest of Alexander Baxter

On January 8, 2014, Alexander Baxter was spotted while entering an unlocked home to steal electronics. A police helicopter tracked Mr. Baxter to the basement of another house that he had entered previously. He initially hid between a chimney and a water heater and remained silent as police surrounded the house.

Nashville police officers Brad Bracey and Spencer Harris shouted warnings that a K-9 police dog would be sent into the basement if Mr. Baxter did not surrender. When nothing happened, Officer Harris released his K-9 partner, Iwo, who quickly located Mr. Baxter. At this point, the two officers entered the basement, and Officer Harris restrained Iwo by its collar. Officer Harris remained in front of Baxter and ordered him to show his hands, while Officer Bracey circled behind.

The ensuing facts are disputed by the parties. Mr. Baxter claims that he sat on the floor with his hands up for five to ten seconds, after which Officer Harris again released Iwo to attack. Officer Harris claims that Mr. Baxter did not communicate his intention to surrender, nor did Officer Harris see Mr. Baxter raise his hands before Iwo was released the second time.

This time, Iwo bit Mr. Baxter, and the only bite mark appeared underneath Mr. Baxter's armpit. Mr. Baxter was arrested on the charge of aggravated burglary, and he was taken to a hospital for emergency treatment. He was convicted of theft and sentenced to twelve years in prison.

B. Mr. Baxter's Federal Lawsuit

After exhausting administrative remedies, Mr. Baxter filed a pro se complaint under 42 U.S.C. § 1983 in the Middle District of Tennessee. The complaint alleged an excessive force claim against Officer Harris, as Iwo's handler, and a failure-to-intervene claim against Officer Bracey.

1. First Interlocutory Appeal – Officer Bracey's Motion to Dismiss.

Officer Bracey moved for a motion to dismiss, based on the theory that he is entitled to qualified immunity. He claimed that he had no knowledge or opportunity to prevent Officer Harris from releasing Iwo for a second time. As a result, Officer Bracey argued that no constitutional violation had been adequately alleged against him and that no clearly established case law could have placed him on notice that his actions were wrong.

The Magistrate Judge issued a Report and Recommendation denying Officer Bracey's motions because there were three questions of fact that needed to be answered: (1) had Baxter surrendered; (2) did Bracey have opportunity to intervene; and (3) did Bracey mischaracterize the incident in the police report by describing the incident as a "K9 apprehension." The District Court agreed and denied the Motion to Dismiss. *Baxter v. Harris*, No. 3:15-cv-00019, 2015 WL 6873667 (M.D. Tenn. 2015).

The Sixth Circuit affirmed. *Baxter v. Harris*, No. 15-6412, 2016 WL 11517046 (6th Cir. 2016). Using an "objective reasonableness" standard, the court held that the allegations, in a light most favorable to Mr. Baxter, established that the K9 attack was excessive force and that Officer Bracey did nothing but watch. The court held that Officer Bracey was not entitled to qualified immunity "where the officers were in no danger and the suspect was neither resisting nor fleeing." *Id.* at *2.

2. Second Interlocutory Appeal – Officers' Motion for Summary Judgment.

The proceedings continued with a deposition of Mr. Baxter and an affidavit from Officer Harris. The officers jointly filed a motion for summary judgment, claiming that Mr. Baxter was not under police control at the time of Iwo's second attack and that there was no realistic way for Officer Bracey to have prevented Iwo's bite. Again, the District Court denied the motion, finding that Mr. Baxter's testimony corroborates the allegations in his complaint and that there was a genuine dispute regarding the circumstances of the arrest. *Baxter v. Harris*, No. 3:15-CV-00019 (M.D. Tenn. Jan. 19, 2018).

On appeal, a new panel of the Sixth Circuit came to a different conclusion. It reversed, finding that “[t]he officers are entitled to qualified immunity because Harris’s use of the canine to apprehend Baxter did not violate clearly established law.” *Baxter v. Bracey*, 751 F. App’x 869, 871 (6th Cir. 2018). The court found that the use of canine seizures depends on the situation: in *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012), it was excessive force to use a poorly trained dog on two suspects who were not fleeing; but in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the use of a well-trained canine to subdue a fleeing suspect in a dark and unfamiliar location was upheld. The court found that, even if Mr. Baxter had raised his hands, the undisputed facts regarding Iwo’s training and Mr. Baxter’s failure to communicate his surrender were enough to entitle Officer Harris to qualified immunity. *Bracey*, at 872–73 (“Baxter’s case looks closer to *Robinette* than *Campbell*.”).

APPLICABLE LAW

A. Constitutional and Statutory Provisions Involved

U.S. Const., amend. IV, provides, in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

B. Relevant Supreme Court Qualified Immunity Cases

- *Pierson v. Ray*, 386 U.S. 547 (1967).

15 white and Black clergymen were on a prayer pilgrimage when they were arrested for a breach of the peace after attempting to use segregated facilities at a bus terminal in Jackson, Mississippi. They were sentenced to four months in prison, and they brought suit against the arresting officers. The Supreme Court held that, although not explicitly stated in the text, section 1983 preserves immunities in the common law for public officials. Police officers did not have absolute immunity – rather, they are not liable if they act “in good faith and with probable cause in making an arrest under a statute they believe[] to be valid.” *Id.* at 555–57. The Court found that it would be unfair to ask an officer to choose between dereliction of duty for failure to arrest criminals and financial liability for performing the arrest.

- *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Arthur Fitzgerald was fired from his position in the Air Force after he planned on being a whistleblower. Although President Nixon was granted absolute immunity, his aides merited only qualified immunity. The Court explained that the doctrine of qualified immunity was meant to balance citizens’ rights through potential lawsuits with the need to protect officials and their discretion. It found that the costs of unwarranted claims against officials include litigation expenses, diversion of attention from pressing needs, deterrence of public service, and the chilling effect on the exercise of official duties.

The Court found that the “good faith” standard would often lead to trials over whether the official had malicious intent. As a result, the Supreme Court amended the qualified immunity standard to remove this subjective question and provide immunity as long as an official “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818 (emphasis added).

- *Malley v. Briggs*, 475 U.S. 335 (1986).

A police officer sought arrest warrants based on conclusions drawn from wiretap recordings about potential drug use. After the grand jury refused to return an indictment, the arrestees sued the officer for violating their Fourth Amendment rights. The Court explained that qualified immunity should protect “all but the plainly incompetent or those who knowingly violate the law.” *Id.* at 341 (stating that the question should be whether the officer “acted in an objectively reasonable manner”). It also noted that “if officers of reasonable competence could disagree on this issue, immunity should be recognized.” *Id.*

- *Hope v. Pelzer*, 536 U.S. 730 (2002).

An Alabama prisoner handcuffed to a hitching post for seven hours filed suit. The Court found such conduct to violate clearly established Eighth Amendment principles even though it was a “novel factual circumstance.” *Id.* at 741. If the state of the law provides “clear and fair warning,” then qualified immunity should not be used to dismiss a lawsuit, despite the lack of fundamentally or materially similar cases. *Id.* at 741, 746.

- *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

After the September 11th attacks, the FBI detained individuals with suspected ties to terrorist groups as “material witnesses” even though they had insufficient evidence to press criminal charges and no intention to use them as actual witnesses. The Court made clear that qualified immunity is best analyzed under two prongs: “(1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established” at the time of the challenged conduct.” *Id.* at 735. Clearly-established law should not be defined at a high level of generality, and no judicial opinion had ever discussed the constitutionality of pretextual arrests under the material-witness warrant.

- *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

This lawsuit involved claims related to the conditions of confinement for non-citizens who might have connections to terrorism. Among other issues, the Court found that officials in the Justice Department were entitled to qualified immunity because they would not have anticipated their discussions to constitute an unlawful conspiracy. In a concurrence, Justice Thomas wrote that the Court’s qualified immunity analysis is no longer limited to common-law principles of immunity in 1871. As a result, Justice Thomas said that the proper balancing of constitutional rights and the effective exercise of government duties should be left to Congress, rather than the policy preferences of the Court.

- *Kiesla v. Hughes*, 138 S. Ct. 1148 (2018).

Officer Kiesla shot Amy Hughes four times after she refused to drop a kitchen knife. The officer believed Hughes was endangering another woman six feet away who later turned out to be Hughes’s roommate. The Court summarily reversed, finding that qualified immunity is appropriate “unless existing precedent squarely governs the specific facts at issue.” *Id.* at 1153 (quotation marks omitted). Because Officer Kiesla had mere seconds to assess the potential dangerousness of the situation, this is “far from

an obvious case in which any competent officer" would have known that shooting Hughes would violate the Fourth Amendment. *Id.*

In a dissent joined by Justice Ginsburg, Justice Sotomayor argued that the majority's analysis of the clearly-established prong effectively required a factually identical case. Instead, she noted that many cases sufficiently establish the principle that deadly force may only be used if a person "poses a threat of serious physical harm." *Id.* at 1158 (Sotomayor, J., dissenting).

C. Relevant Sixth Circuit Police-Dog Cases

- *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

This case was the first reported incident where a suspect was killed by a police dog. Nashville Police were dispatched to a car dealership after a burglar alarm was activated. The suspect, Mr. Briggs, was in the building and was asked to come out. When there was no response, a K-9 dog was asked to find the man. The police dog found Mr. Briggs in a darkened bay and, despite being regularly trained to attack the arm, inflicted a fatal bite to his neck.

The court held that releasing the dog was not a use of deadly force because there was no intention by the officer to cause death or serious bodily harm, nor does the use of a properly trained police dog regularly carry that risk. The court also held that even if the use of a police dog is deadly force, it was not unreasonable in this situation because Mr. Briggs was hiding in a dark building, thereby threatening the safety of the officers. Thus, the court affirmed the grant of summary judgment for the police officers.

- *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012).

In two separate incidents about a year apart, the same police dog bit suspects who were neither a threat nor in flight. Mr. Campbell was lying on the ground awaiting arrest, while Ms. Gemperline was an intoxicated teenager hiding in a child's playhouse. The dog had gone through periods of missing required certifications, and the officers were not clear on the dog's protocols.

The court held that the jury could find that the officer's improper handling of the police dog was unreasonable and thereby constituted excessive force. As for the clearly-established prong, the court acknowledged *Robinette*, but distinguished that case because the areas here did not expose the officers to an ambush, nor did the suspects present a threat. Instead, the court analogized these cases to *White v. Harmon*, 65 F.3d 169 (6th Cir. 1995), where an improperly trained dog was allowed to bite a suspect in handcuffs.

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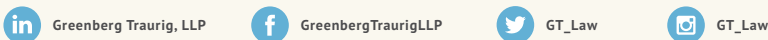
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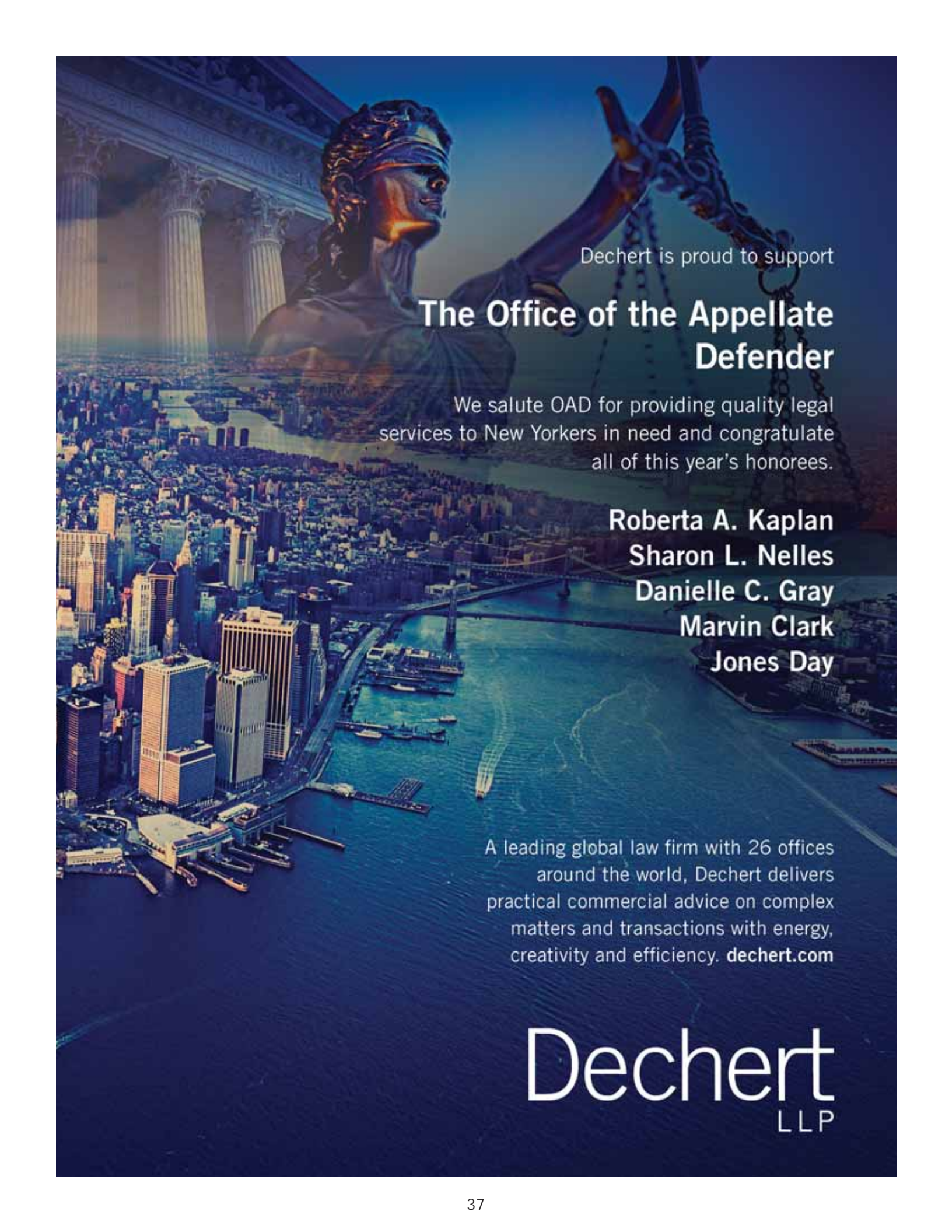
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The entire team at OAD works tirelessly to advocate for fairness, dignity, and humanity in the criminal legal system in New York City.

First Monday in October supports the work that this exceptionally committed team does all year long on behalf of OAD's clients.

Special thanks to

CHRISTINA A. SWARNS

President & Attorney-in-Charge 2017-2020

for her leadership and vision.



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