

OAD | OFFICE OF THE
APPELLATE
DEFENDER

**25th ANNUAL
FIRST MONDAY IN OCTOBER**

October Term 2018

*VERNON MADISON,
Petitioner*

v.

*THE STATE OF ALABAMA,
Respondent.*

Office of the Appellate Defender's 25th Annual FIRST MONDAY IN OCTOBER A Mock Supreme Court Argument

THE ADVOCATES
LISA S. BLATT
DONALD B. VERRILLI, JR.

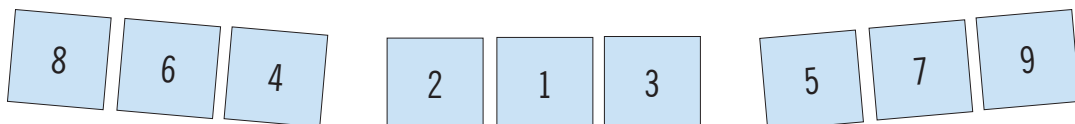
THE BENCH

Chief Justice
TERESA WYNN ROSEBOROUGH

Associate Justices
Former Gould Award Recipients
Evan R. Chesler
Caitlin J. Halligan
Jeh C. Johnson
Andrew J. Levander
Bettina B. Plevan
Samuel W. Seymour
Alan Vinegrad
Mary Jo White

Court Crier
Myrna Felder

Seating



 Advocates' Podium

Associate Justices' seniority was determined alphabetically.

1—Chief Justice Roseborough 2—Evan R. Chesler 3—Caitlin J. Halligan 4—Jeh C. Johnson 5—Andrew J. Levander
6—Bettina B. Plevan 7—Samuel W. Seymour 8—Alan Vinegrad 9—Mary Jo White

PROGRAM

OPENING REMARKS

CHRISTINA A. SWARNS

President & Attorney-in-Charge
Office of the Appellate Defender

AWARDS PRESENTATION

OAD Beacon of Hope Award

KHALIL A. CUMBERBATCH

Associate Vice President of Policy
The Fortune Society

OAD Gideon Award

WEIL, GOTSHAL & MANGES LLP

Accepted by Steven A. Reiss, Partner
Co-Chair, Pro Bono Committee

THE ORAL ARGUMENT

Setting: The Supreme Court of the United States Courtroom

Time: Monday, October 1, 2018, 10:00 a.m. sharp

AWARDS PRESENTATION

Gould Award for Outstanding Oral Advocacy

LISA S. BLATT

Partner & Head, Appellate & Supreme Court Practice
Arnold & Porter Kaye Scholer LLP

DONALD B. VERRILLI, JR.

Partner, Munger, Tolles & Olson LLP
Former Solicitor General of the United States

Counsel for Justice Award

TERESA WYNN ROSEBOROUGH

Executive Vice President, General Counsel & Corporate Secretary
The Home Depot

THE SECRET DELIBERATIONS

Setting: The Supreme Court of the United States

Chief Justice's Conference Room

Time: Wednesday, October 3, 2018, 3:00 p.m.

There will be no intermission.

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2018 Gould Award Recipient

LISA S. BLATT

Lisa S. Blatt, a partner at Arnold & Porter Kaye Scholer LLP, heads the firm's Appellate and Supreme Court practice. She has argued 35 cases before the Supreme Court, prevailing in 33. The National Law Journal called her a "visionary" and one of "the 100 most influential lawyers in America." The Washingtonian has listed her as one of the "Most Powerful Women in Washington" four times, and Chambers USA has noted her "meticulous oral argument preparation and 'great presence before the court.'" Her oral advocacy is cited as exemplary in the Supreme Court Clerk's Guide for Counsel.

Ms. Blatt has an active practice in the federal and state courts of appeals. She has argued and briefed numerous appeals on a wide range of business law issues. The American Lawyer Litigation Daily has twice named her "Litigator of the Week": for her work in *Price v. Philip Morris, Inc.* in overturning reinstatement of \$10 billion verdict against client Philip Morris in a "lights" cigarette case; and *SmithKline Beecham Corp. v. Abbott Laboratories*, a landmark case on behalf of GlaxoSmithKline finding that the Equal Protection Clause bars peremptory challenges of jurors based on sexual orientation. Ms. Blatt also represented the Washington Redskins in the long-running dispute with the government of the Team's trademarks.

Ms. Blatt also brings substantial experience with the pharmaceutical industry. Her Supreme Court arguments include prevailing in *Astra USA, Inc. v. Santa Clara County*, which ruled for private action for alleged violations of drug pricing rules under Section 340B program; and she was lead counsel for Pharmaceutical Research and Manufacturers of America (PhRMA) in *Sorrell v. IMS Health*, a landmark decision granting pharmaceutical manufacturers a First Amendment right to market their drugs. Her Supreme Court cases also addressed broad issues involving healthcare, antitrust, civil procedure, preemption, employment and ERISA, bankruptcy, and national security.

Ms. Blatt assists the US Chamber of Commerce in selecting cases for amicus participation and is on the Advisory Board for Georgetown University Law Center's Supreme Court Institute. She teaches Appellate Advocacy and Procedure at Georgetown.



2018 Gould Award Recipient

DONALD B. VERRILLI, JR.

Donald B. Verrilli, Jr. is a partner with Munger, Tolles & Olson, and the founder of its Washington, D.C., office. In addition to handling matters before the U.S. Supreme Court and the courts of appeals, Mr. Verrilli's practice focuses on representing and counseling clients on multi-dimensional problems, where litigation, regulation and public policy intersect to shape markets and industries in our evolving economy.

Mr. Verrilli is one of the nation's premier Supreme Court and appellate advocates. He served as Solicitor General of the United States from June 2011 to June 2016. During that time he argued dozens of cases before the U.S. Supreme Court, was responsible for representing the United States government in all appellate matters before the High Court and in the courts of appeals, and was a legal advisor to President Barack Obama and the Attorney General.

Mr. Verrilli's landmark victories include his successful advocacy in defense of the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius* and *King v. Burwell*; his successful advocacy for marriage equality in *Obergefell v. Hodges* and *United States v. Windsor*; and his vindication of federal immigration authority in *Arizona v. United States*. He also achieved important victories in two patent cases, *Alice Corp. v. CLS Bank* and *Association for Molecular Pathology v. Myriad Genetics*, in a case vindicating the president's foreign affairs authority in *Zivotofsky v. Kerry*, and in numerous cases involving civil rights, women's rights and other matters of national importance.

In addition to these matters, Mr. Verrilli's U.S. Supreme Court arguments have included cases involving antitrust, copyright, telecommunications, the environment, the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the separation of powers, criminal law and other federal constitutional and statutory matters.

Before serving as Solicitor General, Mr. Verrilli served as Deputy White House Counsel, and previously as Associate Deputy Attorney General in the U.S. Department of Justice. In those positions, he counseled President Obama, Cabinet secretaries and other senior government officials on a wide range of legal issues involving national security, economic regulation, domestic policy and the scope of executive and administrative authority.

Before joining the government, Mr. Verrilli spent two decades in private practice representing companies in their most high stakes matters, particularly in the areas of media and entertainment, telecommunications and First Amendment law. During this time, Mr. Verrilli argued a dozen cases before the U.S. Supreme Court, including *MGM Studios, Inc. v. Grokster*, which established in 2005 that file sharing services were subject to the copyright laws, and *FCC v. NextWave*, which established that the bankruptcy laws allow FCC licensees to keep their licenses while reorganizing. He also achieved a landmark victory before the U.S. Supreme Court in *Wiggins v. Smith*, a case that established the standards for effective assistance of counsel in capital sentencing proceedings.

While in practice previously, he taught First Amendment law for many years at the Georgetown University Law Center.



2018 Counsel for Justice Award Recipient

TERESA WYNN ROSEBOROUGH

Teresa Wynn Roseborough is Executive Vice President, General Counsel and Corporate Secretary of The Home Depot. She is responsible for The Home Depot's legal functions, government relations, corporate communications and external affairs. In addition, as corporate secretary, Teresa serves as a liaison between the board of directors and the company and is responsible for all corporate governance matters.

Teresa and the legal team are responsible for securities, litigation, employment, mergers and acquisitions, real estate, store operations, risk management and intellectual property. She also leads the government relations team as they address legislative issues that impact the business environment, the retail industry and our associates. In her corporate communications and external affairs role, Teresa leads the company's internal and external communications, The Home Depot Foundation, The Homer Fund, branded merchandise and the events team.

Before joining The Home Depot in 2011, Teresa held several positions in the legal department of MetLife, and she was formerly a partner in the firm that is now Eversheds Sutherland. Teresa's more than 30 years of legal experience also includes government service as deputy assistant attorney general for the U.S. Department of Justice; law clerk for Justice John Paul Stevens of the U.S. Supreme Court and Judge James Dickson Phillips of the U.S. Court of Appeals for the Fourth Circuit; and an employee of the Department of Defense in West Germany.

Teresa was named one of 25 Influential Black Women in Business by *The Network Journal* and as one of America's top black attorneys by *Black Enterprise*. Her civic involvements include serving as a public member of the Administrative Conference of the U.S., co-chair of the board of directors of the Lawyers' Committee for Civil Rights and a member of the Board of Overseers of the RAND Corporation Institute for Civil Justice.

Teresa earned a bachelor of arts degree from the University of Virginia, a master's degree in education from Boston University, and a juris doctor with high honors from the University of North Carolina School of Law, where she was editor-in-chief of the *Law Review*.

2018 OAD BEACON OF HOPE AWARD

The Office of the Appellate Defender is proud to introduce its inaugural Beacon of Hope Award, which 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.



2018 Beacon of Hope Award Recipient

KHALIL A. CUMBERBATCH

Khalil A. Cumberbatch is a nationally recognized formerly incarcerated advocate for criminal justice and immigration policy change.

He has worked within the reentry community in NYC since 2010 when he was released after serving almost seven years in the NYS prison system. Since his release, Khalil has worked with various non-profits as a service provider, policy analyst, advisor, board member, collaborator, and consultant.

Khalil currently serves as Associate Vice President of Policy at the Fortune Society, a reentry organization whose goal is to build people and not prisons.

He is also a lecturer at Columbia University School of Social Work, the nation's oldest school of social work, with roots extending back to 1898.

Khalil graduated from CUNY Herbert Lehman College's MSW program in May 2014, where he was awarded the Urban Justice Award for his work with underserved and marginalized communities that are negatively impacted by mass incarceration as well as poverty, high unemployment rates, lack of access to quality education, and other ineffective social "safety nets."

Khalil has served as Manager of Trainings at JustLeadershipUSA, a national non-profit dedicated to cutting the US correctional population in half by year 2030. He also served as Policy Associate at Legal Action Center, the only non-profit law-and-policy organization in the United States whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas.

In December 2014, Khalil was one of two recipients to receive an Executive Pardon from NYS Governor Andrew Cuomo to prevent his deportation from the United States.

2018 OAD GIDEON AWARD

The Office of the Appellate Defender is proud to introduce its inaugural Gideon Award, which honors a law firm that has demonstrated exemplary commitment to indigent appellate defense through its participation in OAD's Volunteer Appellate Defender program.

The logo for Weil, Gotshal & Manges LLP, featuring the word "Weil" in white, bold, sans-serif font on a green rectangular background.

2018 OAD Gideon Award Recipient

WEIL, GOTSHAL & MANGES LLP

Founded in 1931, Weil, Gotshal & Manges LLP has been a preeminent provider of legal services for more than 80 years. With approximately 1,100 lawyers in offices on three continents, Weil has been a pioneer in establishing a geographic footprint that has allowed the Firm to partner with clients wherever they do business. The Firm's four departments – Corporate, Litigation, Business Finance & Restructuring, and Tax, Executive Compensation & Benefits – and more than two dozen practice groups are consistently recognized as leaders in their respective fields.

Weil's commitment to pro bono work is woven into the Firm's culture. Its pro bono practice implements the Firm's deeply-held belief that contributing to the legal representation of society's less fortunate and unjustly treated is among the highest values a law firm can hold. Weil believes that pro bono work is an integral part of every lawyer's professional identity and central to the identity of the firm. Weil's pro bono work has had a significant impact across an array of causes and clients. During the past decade, Weil has performed more than 900,000 hours of pro bono work and has had a meaningful effect on thousands of lives. In 2017, Weil lawyers spent more than 50,000 hours assisting those in need of assistance.

Much of the Firm's pro bono work depends on collaboration with not-for-profit organizations that work to redress legal wrongs and ameliorate humanitarian problems worldwide. Matters span the spectrum of need, including human rights, criminal justice reform, civil and constitutional rights, asylum and refuge, community and economic development and children's welfare. In addition to the Office of the Appellate Defender, Weil's nonprofit and legal services partners include The Innocence Project, The Legal Aid Society, the International Refugee Assistance Program, Sanctuary for Families and many others.

Weil's efforts have led to outcomes that transformed lives. These included winning asylum for those persecuted in their home countries; protecting the rights of thousands of tenants on the brink of homelessness; pressing for the release of those wrongfully convicted of crimes; protecting the right to vote from unwarranted state interference; and supporting the search for solutions to the world's ecological problems.

Weil's proven, demonstrated experience allows the Firm to provide clients with unmatched legal services. Please see www.weil.com for more information, including awards and rankings.

To learn more about OAD's VAD program, please see page 14.

PREVIOUS HONOREES

THE MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

is awarded annually by Office of the Appellate Defender at First Monday in October to two of the nation's most accomplished lawyers. We have proudly presented the Gould Award to the following individuals since 1994:

ELKAN ABRAMOWITZ
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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
AUDREY STRAUSS

THE BENCH



Evan Chesler is a partner in Cravath, Swaine & Moore’s Litigation Department and Chairman of the Firm. He has broad experience in both trial and appellate courts, and has tried numerous cases in federal and state courts all over the country.

Mr. Chesler handles a wide variety of litigation, including securities, shareholder derivative, intellectual property, general commercial, environmental, ERISA, contractual disputes and antitrust. His practice also includes the representation of clients in government and internal investigations. He has represented companies and their management in virtually every industry including technology, media, pharmaceutical, manufacturing and financial services.

Mr. Chesler is Chairman of the Board of Trustees of the New York Public Library, and a trustee of New York University and New York University School of Law. He is also an adjunct professor of law at NYU School of Law, the Chairman of NYU’s Board of Overseers of the Faculty of Arts and Science, a member of the Executive Committee of NYU’s Board of Trustees, and Founder and Chairman of LAMP (the Lawyer Alumni Mentoring Program). Mr. Chesler has received numerous awards for his professional and public service achievements and is a fellow of the American College of Trial Lawyers.

Mr. Chesler received an A.B. in History from NYU in 1970, an M.A. in Russian Area Studies from Hunter College in 1973, and a J.D. from NYU School of Law in 1975. He previously served as the Firm’s Head of Litigation, Deputy Presiding Partner and Presiding Partner.



Caitlin J. Halligan is a litigation partner in the New York office of Gibson, Dunn & Crutcher and Co-Chair of Gibson Dunn’s Appellate and Constitutional Law Practice Group. She has argued six cases and served as counsel of record for a party or *amicus* in more than 45 matters at the *certiorari* or merits stage in the U.S. Supreme Court. Ms. Halligan has argued dozens of cases before the federal appellate courts, the New York Court of Appeals, and New York’s intermediate appellate courts, and participated in numerous litigations at the trial level as well.

Prior to joining Gibson Dunn, Ms. Halligan served as General Counsel to the New York County District Attorney’s Office. From 2001 to 2007, Ms. Halligan served as Solicitor General for the State of New York, where she represented the state in federal and state appellate courts and supervised a team of 45 lawyers. Prior to serving as New York Solicitor General, she was First Deputy Solicitor General. From 1999 to 2000, Ms. Halligan was the first Chief of the New York Attorney General’s Internet Bureau, where she developed law enforcement and policy initiatives regarding online consumer fraud, privacy, online securities trading and other Internet-related issues.

Ms. Halligan is ranked as one of the leading appellate attorneys in the nation by *Chambers USA: America’s Leading Lawyers for Business*. She has also been recognized by *Benchmark Litigation* as a “Litigation Star,” and one of the “Top 250 Women in Litigation.”



Jeh Charles Johnson is a partner with the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP and a member of the firm’s management committee. He has been an associate or partner with that firm off and on since 1984. Johnson served as Secretary of Homeland Security from December 2013 to January 2017. Prior to that, Johnson was General Counsel of the Department of Defense (2009-2012), General Counsel of the Department of the Air Force (1998-2001), and an Assistant United States Attorney in the Southern District of New York (1989-1991).

Secretary Johnson is a member of the board of directors of Lockheed Martin, a Fellow in the American College of Trial Lawyers, a member of the Council on Foreign Relations, and a non-resident Senior Fellow at the Harvard Kennedy School. Secretary Johnson has lectured at Oxford, Westminster College, Harvard and Yale Law Schools, the National Defense University, the National War College, and all four U.S. military academies. He is a regular commentator on MSNBC, CNN, ABC, CBS, FOX and other news outlets.

Secretary Johnson is a graduate of Morehouse College (1979) and Columbia Law School (1982), and the recipient of nine honorary degrees.



Andrew J. Levander is Chair of Dechert’s Policy Committee and a partner in the white collar and securities litigation group. A former Assistant U.S. Attorney for the Southern District of New York in the Securities and Commodities Fraud Unit, Mr. Levander is consistently recognized for excellence in the practice of law.

Mr. Levander is a Fellow in the American College of Trial Lawyers, which is widely considered to be the premier professional trial organization in the United States. Since 2004, he has been cited as a leading lawyer by Chambers USA, a referral guide to leading lawyers in the United States based on the opinions of their peers and clients. In 2017, Mr. Levander was named as a Litigator of the Year by *The American Lawyer* for being a lawyer who has, “reshaped the law, the industries in which their clients operate and the way their colleagues in the bar approach cases.” Mr. Levander received the *Chambers USA* Award for Excellence in White Collar Crime & Government Investigations in both 2013 and 2010. He has also been honored by *Law360*, *The Best Lawyers in America*, *Benchmark Litigation*, and *The Legal 500* for his litigation skills.



Bettina B. (Betsy) Plevan is a partner of Proskauer Rose LLP where she specializes in employment litigation and has served as a member of its Executive Committee.

Betsy graduated from Wellesley College and received her J.D. Magna Cum Laude from Boston University School of Law where she was an Editor of the Law Review. Betsy is a Fellow of the American College of Trial Lawyers, the American Academy of Appellate Lawyers and the College of Labor and Employment Lawyers. Active in many bar association activities, she served as President of the New York City Bar Association, and more recently, she chaired the ABA Standing Committee on the Federal Judiciary.

Betsy represents a diverse group of clients in the fields of financial services, higher education, healthcare and the legal profession, including many large law firms. She is a recipient of many awards including the American Inns of Court Professionalism Award, the Southern District James Duane Award, and The American Lawyer’s Lifetime Achievement Award.



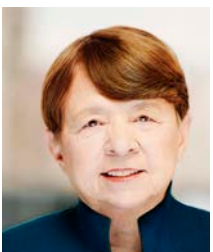
Samuel W. Seymour is a member of Sullivan & Cromwell’s Criminal Defense and Investigations Group. He specializes in white-collar criminal defense, regulatory enforcement matters and internal investigations. Mr. Seymour has represented clients in many high-profile investigations involving allegations of accounting fraud, securities fraud, foreign bribery, price fixing, economic sanctions violations, money laundering and obstruction of justice. He represents individuals and institutions in enforcement matters across a broad range of financial and industrial business sectors worldwide. Mr. Seymour’s practice also encompasses commercial litigation and arbitration matters, including derivative cases, shareholder actions and complex contract disputes.

Widely recognized for his professional achievements, Mr. Seymour has held leadership positions in numerous organizations serving the legal and educational communities. Mr. Seymour served as President of the New York City Bar Association (2010-2012). He is currently Chair of the Board of the Practising Law Institute. Mr. Seymour is a frequent speaker on legal enforcement issues, and authored the chapter “The Interplay Between Commercial Litigation and Criminal Proceedings” in the treatise *Commercial Litigation in New York State Courts, Third Edition*.



Alan Vinegrad is a partner in the New York office of Covington & Burling LLP and a member of the firm’s White Collar Defense and Trial Practice Groups. His practice focuses on representing individuals, corporations and corporate board committees in a wide variety of criminal and regulatory enforcement matters, as well as in complex civil litigation. He has represented numerous clients in connection with investigations and prosecutions by the U.S. Department of Justice, various U.S. Attorney’s Offices around the country, the Securities and Exchange Commission, the New York State Attorney General, and the Manhattan District Attorney’s Office.

Mr. Vinegrad joined Covington after serving as the United States Attorney for the Eastern District of New York. He previously served as the office’s Chief Assistant U.S. Attorney, Chief of the Criminal Division, Deputy Chief of the Criminal Division, Chief of Civil Rights Litigation and Chief of General Crimes. In addition to his executive and supervisory responsibilities, Mr. Vinegrad investigated and prosecuted numerous criminal cases, personally tried over a dozen cases, and argued over 20 cases before the United States Court of Appeals for the Second Circuit.



Mary Jo White is Debevoise & Plimpton’s Senior Chair, litigation partner and leader of the firm’s Strategic Crisis Response and Solutions Group. Her practice focuses on counseling boards of directors and representing clients on significant and sensitive matters, including companies facing crises involving multifaceted government investigations and cases. She has decades of experience prosecuting and defending a wide range of white collar criminal and civil cases, having served as Chair of the United States Securities and Exchange Commission, the United States Attorney for the Southern District of New York and as a well-known private practitioner in high-profile matters.

Ms. White is recognized as an Eminent Practitioner in Securities Enforcement and White Collar-Crime and Government Investigations by *Chambers USA* (2017), which notes that she “draws on market-leading regulatory expertise to advise boards of directors and companies on government investigations and enforcement proceedings.” Ms. White has also been recognized by *The National Law Journal* as one of “50 Most Influential Women Lawyers in America,” and is a recipient of numerous honors, including the Sandra Day O’Connor Award for Distinction in Public Service, the George W. Bush Award for Excellence in Counterterrorism, the Magnificent 7 Award of the Business and Professional Women/USA and the Women of Power and Influence Award from the National Organization of Women. She has also been named to the *Forbes* “Power Women” List.

AWARDS PRESENTER



E. Joshua (Josh) Rosenkranz heads the Supreme Court & Appellate Litigation practice at Orrick, Herrington & Sutcliffe. A former law clerk to U.S. Supreme Court Justice William J. Brennan Jr. and then-Judge Antonin Scalia on the D.C. Circuit, Josh has personally argued more than 190 appeals in state and federal appellate courts across the nation, including 18 before the U.S. Supreme Court. Josh is the only lawyer ever named American Lawyer’s “Litigator of the Year” twice. Both times, the magazine dubbed him “the Defibrillator”—in 2012, for a streak of appellate wins for companies that “appeared to be at death’s door,” and in 2017 for winning cases that seemed doomed. Among his recent clients are Apple, Credit Suisse, DISH Network, Facebook, Genentech, Gilead, JPMorgan Chase, LinkedIn, Microsoft, Oracle, Royal Bank of Scotland, and UBS.

Josh was the founding Attorney-in-Charge of the Office of the Appellate Defender, which he ran for its first eight years. He then was the founding president and CEO of the Brennan Center for Justice at New York University School of Law.

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-five years ago.

VOLUNTEER APPELLATE DEFENDER PROGRAM

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A SPECTATOR'S PRIMER ON

Vernon Madison, Petitioner v. The State of Alabama, Respondent

INTRODUCTION

This is a hypothetical case based on an actual case scheduled for argument during the United States Supreme Court's 2018 Term, *Madison v. Alabama*, Docket No. 17-7505. At issue is the scope of the Eighth Amendment's prohibition against the execution of a person who is incompetent, and, more specifically, whether the constitution prohibits the execution of a person who has no memory of the offense for which s/he has been condemned.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the United States Supreme Court held that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Although the plurality opinion did not offer a definition of insanity, Justice Powell's concurrence stated that he "would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."

Two decades later, in *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007), the Court clarified the competency standard, holding that a "prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." The Court reiterated that the principles of retribution and community vindication are called in question "if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole."

Mr. Madison claims that he is ineligible for execution because he does not remember the crime for which he was convicted and does not have a rational understanding of why the State of Alabama seeks to execute him. He argues that, as a result of multiple strokes, he suffered significant brain damage, leading to vascular dementia and corresponding long-term memory loss, disorientation, and impaired cognitive function. He also has small vessel ischemia, speaks in a slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence.

The State of Alabama argues that the Constitution bars the execution of a prisoner who has lost his sanity but it does not bar the execution of a prisoner who has lost his memory. Furthermore, the State asserts that Mr. Madison understands that his imprisonment and death sentence are the result of his unlawful actions.

PROCEDURAL HISTORY

Vernon Madison was charged with capital murder in the 1985 shooting death of Officer Julius Schulte. He was tried, convicted and sentenced to death three times.

Over two decades, Mr. Madison's attorneys unsuccessfully challenged the constitutionality of his third conviction and death sentence. Ultimately, in January 2016, the Alabama Supreme Court scheduled his execution for May 12, 2016.

In February 2016, Mr. Madison filed a petition in the Mobile County Circuit Court claiming that he is incompetent to be executed. The Mobile County Circuit Court held a hearing on Mr. Madison's claim – at which Dr. Karl Kirkland, a court-appointed expert; Dr. John Goff, an expert for Mr. Madison; and the warden of Mr. Madison's prison testified – and on April 29, 2016, the trial judge found that Mr. Madison is competent to be executed.

Mr. Madison filed a petition for federal habeas corpus relief, which was denied by the Southern District of Alabama. The Eleventh Circuit reversed, holding that the Alabama trial court's decision involved an unreasonable determination of both the facts regarding Mr. Madison's competency and the relevant Supreme Court precedent. The United States Supreme Court reversed the Eleventh Circuit on grounds relating to the standard of review in habeas cases. In a concurrence, Justice Ginsburg wrote:

The issue whether a State may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is a substantial question not yet addressed by the Court. Appropriately presented, the issue would warrant full airing.

Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring).

After the Alabama Supreme Court set a new execution date for January 25, 2018, Mr. Madison filed a second petition challenging his competency to be executed and asserting that the court-appointed expert had used forged prescriptions to obtain narcotics just four days after the 2016 competency hearing. On January 16, 2018, the trial judge again denied Mr. Madison's petition, holding that "[t]he Defendant did not provide a substantial threshold of insanity, a requirement set out by the United States Supreme Court, sufficient to convince this Court to stay the execution."

Mr. Madison filed a petition for writ of certiorari directly to the Supreme Court, explaining that Alabama does not allow any state appellate review of the trial judge's decision. Hours before Mr. Madison's scheduled execution, the United States Supreme Court granted a stay of execution, and one month later, the Supreme Court granted Mr. Madison's petition for a writ of certiorari to the Mobile County Circuit Court. *Madison v. Alabama*, 138 S. Ct. 1172 (Feb. 26, 2018).

FACTUAL BACKGROUND

A. Mr. Madison's Trials & Appellate Litigation

In April 1985, Officer Julius Schulte was called by neighbors to the home of Vernon Madison's ex-girlfriend, Cheryl Green, and her 11-year old daughter while Mr. Madison moved out of their house. Mr. Madison was upset that the police were at the house and repeatedly yelled, "Why did you call the cops?", "Why in the hell did you call the police on me?", and "I can't believe you called the cops." After leaving the apartment, Mr. Madison returned and shot Officer Schulte twice in the back of the head while the Officer sat in his police car. Mr. Madison then shot Ms. Green in the back as she tried to run away. Mr. Madison shot Ms. Green again as she lay in the street while saying, "I'll show you, bitch" and "You bitch, if you want to play this game, I can play it too." Three eyewitnesses, including the 11-year-old girl, witnessed both shootings.

At his capital trial, Mr. Madison pled not guilty by reason of insanity. In September 1985, Mr. Madison was convicted of capital murder, and a jury recommended a death sentence by a vote of 11 to 1. This conviction was reversed on appeal because the trial prosecutor intentionally used his peremptory challenges to exclude black prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

In September 1990, Mr. Madison was again convicted of capital murder, and the jury recommended death by a vote of 10 to 2. This conviction was again reversed because one of the State's experts relied on information not in evidence, in violation of state law.

Mr. Madison was convicted for the third time in April 1994—after raising a self-defense claim—and the trial judge imposed a sentence of death by overriding the jury's 8-to-4 recommendation for life. This time, Mr. Madison's conviction and death sentence were affirmed on direct appeal, state post-conviction, and federal habeas corpus review.

B. Mr. Madison's Initial Competency Hearing

On May 7, 2015, Mr. Madison suffered a stroke. Subsequently, Mr. Madison's speech became slurred and he appeared to suffer from memory loss: he could not remember the names of guards he had known for years, and he asked for his mother to visit even though she had passed away several years earlier.

On January 4, 2016, Mr. Madison was found unresponsive and fecally incontinent in his prison cell after suffering another stroke.

Mr. Madison's initial competency petition asserted that he suffers from both short-term and long-term memory loss, is incapable of effective communication with counsel, can no longer walk independently, and frequently urinates on himself despite having a toilet in his cell. Mr. Madison also told his attorneys he planned to move to Florida after his release. In response to the petition, the Mobile County Circuit Court ordered a competency hearing.

Dr. Karl Kirkland was appointed by the court to examine Mr. Madison. He acknowledged that after his strokes, Mr. Madison suffered significant cognitive decline. However, he concluded that Mr. Madison does not suffer from paranoia or delusions and has a rational understanding of the sentence and that he is to be executed as retribution for killing a police officer. Dr. Kirkland also noted that Mr. Madison had a very specific recollection of numerous details about his childhood and his past arrests and

trials. Dr. Kirkland testified that Mr. Madison spoke specifically about the sentences of death and life without parole.

Dr. John Goff was hired by the defense to examine Mr. Madison. Dr. Goff also concluded that Mr. Madison was not delusional or psychotic. He diagnosed Mr. Madison as suffering from vascular dementia and retrograde amnesia, resulting in an inability to independently recall events over the past 30 years. He testified that, due to his strokes, parts of Mr. Madison's brain contain dead tissue. With regard to the offense, Dr. Goff testified that Mr. Madison understands the meaning of a death sentence, the nature of the pending proceeding and what he was tried for, but could not remember the name of the victim or the sequence of events from the offense to his arrest and trial. Dr. Goff said Mr. Madison even seemed unsure about the crime or the place where it took place. Dr. Goff stated that Mr. Madison understands the State's desire for retribution but not the act for which he is being punished.

The warden at Holman Prison testified that Mr. Madison expressed no confusion when he was informed of the execution date, but instead said that his lawyers would handle that. The warden also said that Mr. Madison was not receiving treatment for any mental condition in prison.

After the competency hearing, the trial court acknowledged that *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), were the controlling cases. The court held that the standard of review was whether Mr. Madison "suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is being executed as a punishment for a crime." Relying on the testimony of Dr. Kirkland, the trial court concluded that Mr. Madison did not meet his burden of showing that "[he] does not rationally understand the punishment he is about to suffer and why he is about to suffer it" and "the evidence does not support [a finding] that Mr. Madison is delusional."

In his federal habeas petition, Mr. Madison contended that the trial court's focus on mental illness prevented it from properly considering the evidence of his strokes and dementia. The District Court of the Southern District of Alabama concluded that the trial court correctly stated the law and its decision relying on Dr. Kirkland's opinion was not unreasonable.

The Eleventh Circuit disagreed, holding that, under *Ford* and *Panetti*, a prisoner "must rationally understand that he is going

to be put to death and the reason why." *Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1184 (11th Cir. 2017). The circuit panel found that the facts established Mr. Madison has a serious mental condition and no memory of his capital offense, and that there was no evidentiary support for the conclusion that Mr. Madison understands the connection between his execution and the murder he committed. The court concluded that "[a] finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." *Id.* at 1189.

The United States Supreme Court reversed. It found that the trial court's decision was not unreasonable because "[n]either Panetti nor Ford 'clearly established' that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." *Dunn v. Madison*, 138 S. Ct. at 56. The Supreme Court also found that the state court's decision was supported by both psychologists' testimony "that Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime." *Id.*

C. Mr. Madison's Second Competency Hearing

In December 2017, Mr. Madison filed a new competency challenge asserting that Dr. Kirkland suffered from a substance abuse disorder and used forged prescriptions to obtain narcotics four days after Mr. Madison's competency hearing and less than two weeks after his evaluation of Mr. Madison. Mr. Madison argued that the new information called into question the credibility, reliability, and validity of Dr. Kirkland's findings. The petition also relied on the evidence presented at the first hearing with an emphasis on the progressive and degenerative nature of vascular dementia, small vessel ischemia, and occipital angioma, which cause headaches and cognitive decline.

In response, the State of Alabama noted that Mr. Madison's petition relied on evidence that did not speak to the question of his sanity. The State also argued that Dr. Kirkland's legal problems did not undermine the methodology he used when evaluating Mr. Madison or the conclusions Dr. Kirkland reached about Mr. Madison's competency.

The Mobile County Circuit Court accepted the allegations against Dr. Kirkland as true but noted that nothing in Dr. Kirkland's testimony or demeanor was significantly different from that of

Dr. Goff. The trial judge concluded that Mr. Madison’s evidence did not “provide a substantial threshold showing of insanity” and denied the new petition.

APPLICABLE LAW

A. Constitutional Provisions

The Eighth Amendment provides in relevant part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment provides in relevant part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

B. Relevant Cases on Competency to be Executed

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the United States Supreme Court held that evolving standards of decency compelled the conclusion that the “Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.”

In 1974, Alvin Ford was convicted of murder and sentenced to death. Although there was no indication that Mr. Ford was incompetent at the time of his offense, in 1982 he slowly began to adopt a delusional belief that he was the target of a complex conspiracy designed to force him to commit suicide. Mr. Ford believed that prison guards were hiding bodies in the concrete enclosures used for beds and that his female relatives were being tortured and sexually abused at the prison. A defense psychiatrist concluded that Mr. Ford suffered a “mental disease” which “closely resembles paranoid schizophrenia.” Mr. Ford told a separate expert that he was ineligible for execution because his case had established all executions were illegal, because he owned the prison, and because he controlled the governor of Florida through mind waves. Three psychiatrists appointed by the governor examined Mr. Ford, and despite findings of psychosis or adaptational disorders, each declared Mr. Ford sane because he had enough cognitive functioning to comprehend his situation.

The Supreme Court began by noting that both the common law and state legislatures prohibit the execution of a person who is insane. *Id.* at 407 10 (“[W]e may seriously question the retributive value

of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”). A plurality of the Court then found that Florida’s procedures to determine sanity were inadequate to “enforce the constitutional restriction upon its execution of sentences.” *Id.* at 413 18 (noting that due process requires opportunity to present evidence and challenge state experts outside executive branch).

Justice Powell’s concurrence addressed the meaning of insanity, which was absent from the plurality opinion. He began by acknowledging that the retributive force of capital punishment “depends on the defendant’s awareness of the penalty’s existence and purpose.” *Id.* at 421 (Powell, J., concurring). He therefore defined “the kind of mental deficiency that should trigger the Eighth Amendment prohibition” as follows:

If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Id. at 422 (Powell, J., concurring). Justice Powell concluded that Mr. Ford’s belief that the death penalty had been invalidated would render him unable to connect his execution to his crime. *Id.* at 422 23 (Powell, J., concurring).

Two decades later, the Court further clarified its standard on competency, holding that a “prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). The Court reiterated that the principles of retribution and community vindication are called in question “if the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.” *Id.* at 958 99.

Scott Panetti was convicted and sentenced to death in Texas after killing his in-laws. Mr. Panetti represented himself, despite the fact that he had a history of mental illness, delusions, and hallucinations. After an execution date was set, Mr. Panetti claimed (through counsel) that he was incompetent to be executed and submitted letters from a psychologist and a law professor to attest that he did not understand the reasons for his execution.

Court-appointed experts, however, concluded that Mr. Panetti knew he was to be executed, understood the reasons, and was deliberately manipulating the interview. The state court found that Mr. Panetti failed to establish his incompetence.

On habeas review, the federal district court held another hearing before denying Mr. Panetti's claim. Defense experts testified that Mr. Panetti's mental problems reflected schizo-affective disorder and a delusion that his impending execution was part of spiritual warfare designed to keep him from preaching. Experts for the State acknowledged his mental impairments but also found that Mr. Panetti had periods of lucidity. On appeal, the Fifth Circuit Court of Appeals held that regardless of Mr. Panetti's delusions, he was aware of his crime, of the death sentence, and that the State's reason for his execution was his commission of the offense.

The Supreme Court relied on Ford to find that a prisoner's delusions are relevant to the question of competency if they impair his ability to rationally understand the reason for his execution. *Id.* at 958. The Court did not define "rational understanding," but stated the following:

[W]e must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Id. at 959 60. The Court concluded that the question of competency is complex and will depend on the conclusions of physicians, psychiatrists, and other experts.

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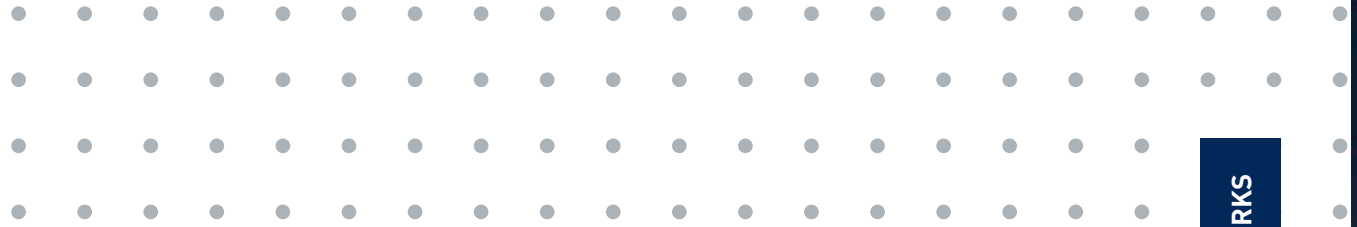
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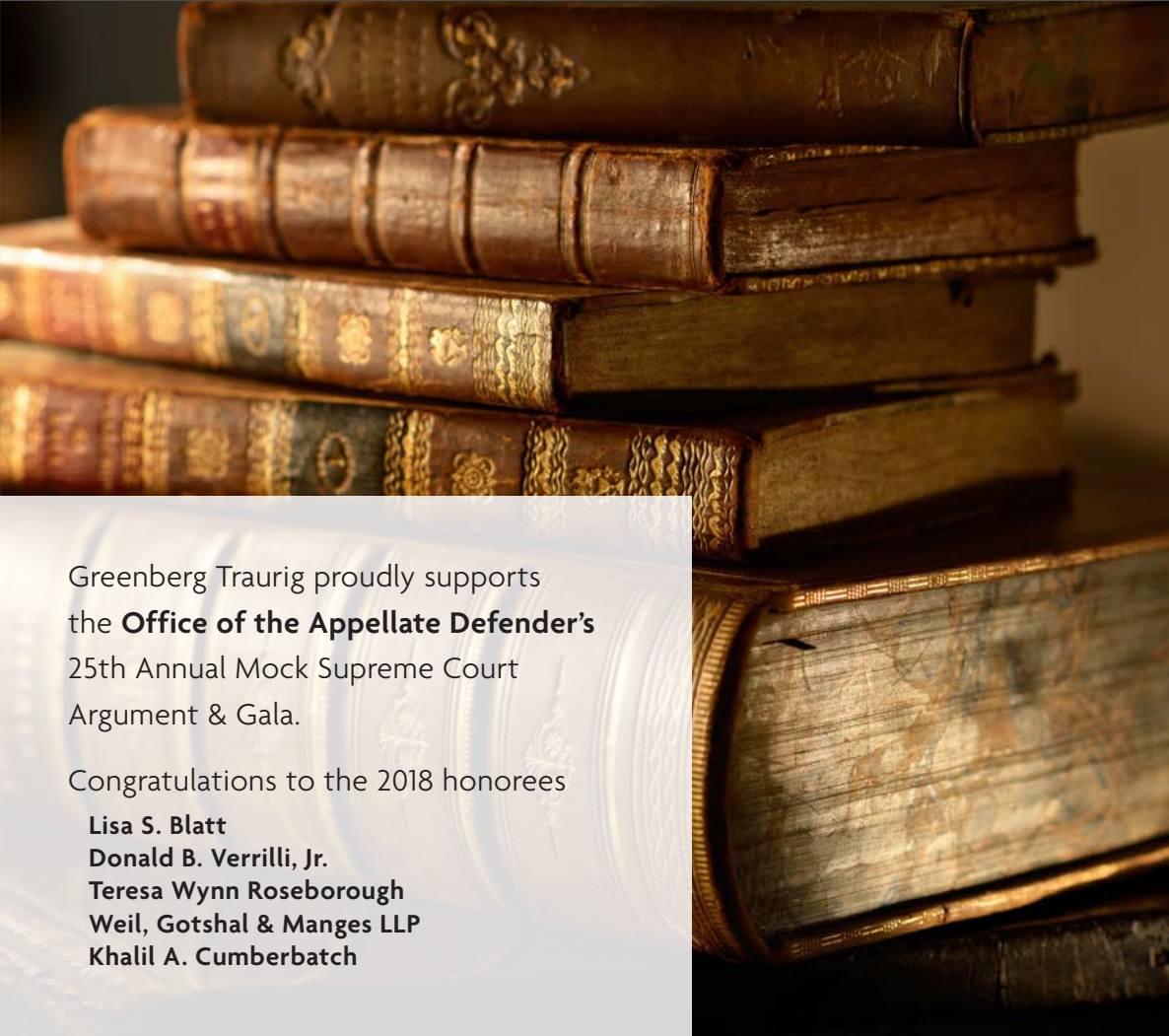
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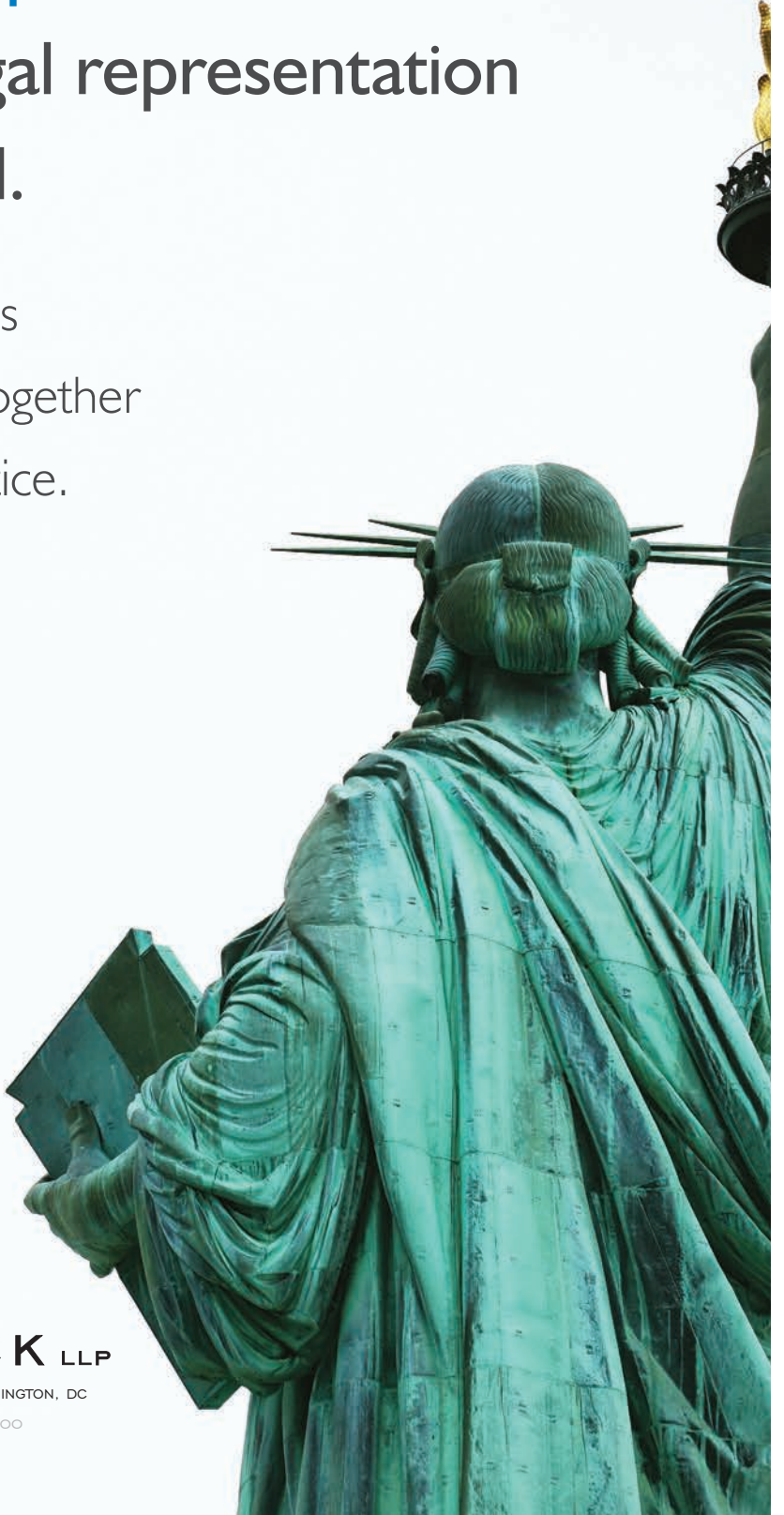
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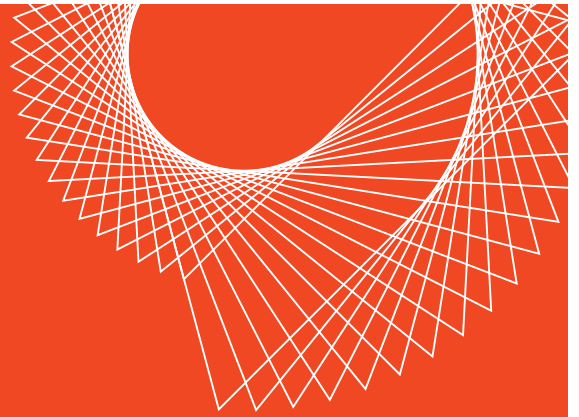
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