early discovery intended to allow it to identify Doe defendants. ***Minnetonka Moccasin Co. v. Does 1-10***, 2022 WL 1055746 (D. Minn. 4/8/2022).

■ **Removal; remand; attorney's fees; 28 U.S.C. §1447(c).** Rejecting the defendant's ERISA preemption argument, Chief Judge Tunheim granted the plaintiff's motion to remand, but denied the plaintiff's request for fees under 28 U.S.C. §1447(c), finding that the removal "was not objectively unreasonable." ***BCBSM, Inc. v. I.B.E.W. 292 Health Care Plan***, 2022 WL 867232 (D. Minn. 3/23/2022).

Finding that the plaintiff's claims did not rely on federal law, and that the defendant had improperly removed a state court action on the basis of a preemption defense, Judge Schiltz granted the plaintiff's motion to remand. ***State ex rel. Elder v. U.S. Bank, N.A.***, 2022 WL 781089 (D. Minn. 3/15/2022).

■ **42 U.S.C. §1988; awards of attorney's fees.** Approving hourly rates as high as $615 per hour, and significantly reducing the more than $163,000 requested to account for the plaintiff's "excessive" billing and "limited degree of success," Judge Montgomery awarded the plaintiff just under $53,000 in attorney's fees in a Section 1983 action. ***Ness v. City of Bloomington***, 2022 WL 1050043 (D. Minn. 4/7/2022).

Judge Tostrud awarded one group of defendants more than $20,000 in attorney's fees incurred in obtaining the dismissal of the plaintiff's "frivolous" Section 1983 claim. ***Nguyen v. Foley***, 2022 WL 1026477 (D. Minn. 4/6/2022).

■ **Fed. R. Civ. P. 11; motion for sanctions denied.** While granting the defendants' motion to dismiss the plaintiff's amended complaint, Judge Davis denied the defendants' related motion for Rule 11 sanctions, finding that the plaintiff's "argument is not so frivolous as to warrant sanctions." ***P Park Mgmt, LLC v. Paisley Park Facility, LLC***, 2022 WL 911950 (D. Minn. 3/29/2022).

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Immigration Law

JUDICIAL LAW

■ **Migrant protection protocols (MPP) ("Remain in Mexico"): The saga continues.** As previously noted in the March 2022 issue of *Bench & Bar*, the Biden administration filed a petition for a writ of *certiorari* on 12/29/2021, seeking Supreme Court review of the 5th Circuit's 12/13/2021 refusal to vacate the injunction issued by U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas. Key issues raised: 1) Whether 8 U.S.C. §1225 requires DHS to continue implementing MPP when it states the Secretary of DHS "may" return noncitizens to Mexico to await their immigration proceedings; and 2) whether the 5th Circuit erred by concluding the DHS secretary's second memorandum terminating MPP had no legal effect. ***Biden, et al. v. Texas, et al.***, No. 21-954 (2021). *https://www.supremecourt.gov/DocketPDF/21/21-954/206810/20211229162636127_Biden%20v.%20Texas%20-%20Cert%20Petition.pdf* On 2/18/2022, the Supreme Court granted the petition and scheduled the case for oral argument on 4/26/2022. *https://www.supremecourt.gov/docket/docketfiles/html/public/21-954.html*

■ **Credibility not an issue here: Asylum claim denied even if testimony had been found to be believable.** The 8th Circuit Court of Appeals denied the petition for review, holding the Board of Immigration Appeals (BIA) correctly determined that the immigration judge's (IJ) decision provided an alternative determination for the failure of the petitioner's claim for Convention Against Torture (CAT), even if his testimony had been believed. "The IJ found that Jama's testimony was not credible [i.e., he would disclose to Somali authorities his conversion from Islam to Christianity], and determined 'furthermore' that his claim of likely torture was based on 'speculation.'" That is, "even if the Somali government could 'make that connection,' (i.e., learn that Jama is a Christian), the IJ could not make 'a supposition upon supposition to hypothesize or speculate that the government would jail and torture him due to being Christian.'" The court, accordingly, rejected the petitioner's argument that the credibility finding was central to the IJ's decision. ***Jama v. Garland***, No. 21-1585, *slip op.* (8th Circuit, 3/30/2022). *https://ecf.ca8.uscourts.gov/opndir/22/03/211585P.pdf*

■ **Salvadoran asylum claim denied for failing to show particularized fear of future persecution.** The 8th Circuit Court of Appeals upheld the BIA's asylum denial, holding the petitioner had failed to show her fear of future persecution to be objectively reasonable, given the fact that her evidence failed to support a claim of a particularized fear based on her religious activities: "Instead, she only presented evidence of general violence." ***Rivera Menjivar v. Garland***, No. 21-1624, *slip op.* (8th Circuit, 3/3/2022). *https://ecf.ca8.uscourts.gov/opndir/22/03/211624P.pdf*

■ **Christian Chinese asylum seeker denied relief for failure to establish past persecution or well-founded fear of persecution.** The 8th Circuit Court of Appeals upheld the denial of asylum, concluding substantial evidence supported the BIA's finding that the Christian Chinese petitioner had failed to establish either past persecution or a well-founded fear of future persecution on account of his religious beliefs. More specifically, the court observed, "Here, the BIA adopted the IJ's finding that the evidence of He's two detentions, taken together and including the initial assault by a policeman, 'does not rise to the level of persecution.' That determination is consistent with our prior past persecution decisions." ***He v. Garland***, No. 20-1328, *slip op.* (8th Circuit, 2/4/2022). *https://ecf.ca8.uscourts.gov/opndir/22/02/201328P.pdf*

ADMINISTRATIVE ACTION

■ **Public health and immigration: Title 42 expulsions at the border.** As previously noted in the March 2022 issue of *Bench & Bar*, the Centers for Disease Control (CDC) on 8/2/2021 issued its third order continuing the policy of President Biden's predecessor, authorizing the expulsion of migrants from entry into the United States from Canada or Mexico, if they had arrived at or near the U.S. land and adjacent coastal borders. This expulsion could include those noncitizens not having proper travel documents, noncitizens whose entry is otherwise contrary to law, and noncitizens who are apprehended at or near the border seeking to unlawfully enter the United States between ports of entry (POE). In one point of divergence from the previous administration, however, the 8/2/2021 order made provision for exemption of unaccompanied noncitizen children. **86 Fed. Register, 42828-41** (8/5/2021). *https://www.govinfo.gov/content/pkg/FR-2021-08-05/pdf/2021-16856.pdf*

It also noted that on 2/3/2022, the CDC extended the order for an additional 60 days. *https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/cdc-keeps-title-42-expulsions-in-place*

On 4/1/2022, the CDC announced termination of the Title 42 Order on 5/23/2022, as the Department of Homeland Security (DHS) begins implementing "appropriate COVID-19 mitigation protocols, such as scaling up a program to provide COVID-19 vaccinations to migrants and prepare[s] for resumption of regular migration under Title 8." Centers for Disease Control, ***"CDC Public Health Determination and Termination of Title 42 Order."*** Media statement (4/1/2022). *https://www.cdc.gov/media/releases/2022/s0401-title-42.html* U.S. Department of Homeland Security. **"DHS Preparations for a Potential Increase in Migration."** Fact sheet (3/30/2022). *https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration*

On 4/3/2022, three states (Missouri, Arizona, and Louisiana) sued the Biden administration in the U.S. District Court of the Western District of Louisiana over its plan to terminate the order, arguing it did not follow the Administrative Procedures Act (APA) (i.e., failing to provide a comment period on the termination while seeking preliminary and permanent injunctive relief, among other things). ***Arizona, et al. v. Centers for Disease Control, et al.***, (6:22-cv-00885-RRS-CBW) (W.D. La. 4/3/2022). *https://www.azag.gov/sites/default/files/docs/press-releases/2022/complaints/1-Complaint.pdf*

On 4/14/2022, an amended complaint, adding 18 more states, was filed with the court. ***Arizona, et al. v. Centers for Disease Control, et al.*** (6:22-cv-00885-RRS-CBW) (W.D. La. 4/14/2022). *https://www.azag.gov/sites/default/files/docs/press-releases/2022/complaints/Title%2042%20FAC%20Filed.pdf*

Temporary protected status (TPS): Shelter from the storm. According to U.S. Citizenship and Immigration Services, "the Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."

Typical scenarios include:

- ongoing armed conflict (such as civil war);
- an environmental disaster (such as an earthquake or hurricane), or an epidemic; or
- other extraordinary and temporary conditions.

The Department of Homeland Security (DHS) has recently designated (or redesignated) the following countries for temporary protected status:

Ukraine: On 4/19/2022, DHS announced that Secretary Alejandro Mayorkas had designated Ukraine for TPS for 18 months, effective 4/19/2022. Those individuals who have continuously resided in the United States since 4/11/2022 (and continuously physically present since 4/19/2022) are eligible to apply. **87 Fed. Reg. 23211-18** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-04-19/pdf/2022-08390.pdf*

Sudan: On 4/19/2022, DHS announced that Secretary Alejandro Mayorkas had designated Sudan for TPS for 18 months, effective 4/19/2022. Those individuals who have continuously resided in the United States since 3/1/2022 (and continuously physically present since 4/19/2022) are eligible to apply. **87 Fed. Reg. 23202-10** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-04-19/pdf/2022-08363.pdf*

Cameroon: On 4/15/2022, DHS Secretary Alejandro Mayorkas announced the designation of Cameroon for TPS for 18 months. Those individuals residing in the United States as of 4/14/2022 will be eligible to apply. The designation will take effect upon publication of a Federal Register notice. *Press release. https://www.dhs.gov/news/2022/04/15/secretary-mayor-*

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kas-designates-cameroon-temporary-protected-status-18-months

Afghanistan: On 3/16/2022, DHS Secretary Alejandro Mayorkas announced the designation of Afghanistan for TPS for 18 months. Those individuals residing in the United States as of 3/15/2022 will be eligible to apply. The designation will take effect upon publication of a Federal Register notice. *Press release. https://www.uscis.gov/newsroom/news-releases/secretary-mayorkas-designates-afghanistan-for-temporary-protected-status*

South Sudan: On 3/3/2022, DHS announced that Secretary Alejandro Mayorkas had both extended the designation of South Sudan for TPS and redesignated it for 18 months, effective 5/3/2022. Those individuals seeking TPS under the redesignation must demonstrate continuous residence in the United States since 3/1/2022 (and continuous physical presence since 3/3/2022). **87 Fed. Reg., 12190-12201** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-03-03/pdf/2022-04573.pdf*

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Intellectual Property

JUDICIAL LAW

Copyright: SCOTUS holds mistakes of law in copyright registrations are eligible for safe harbor. The Supreme Court of the United States recently vacated an appellate court's decision holding that 17 U.S.C. §411(b), a "safe harbor" provision, excused mistakes of law and mistakes of fact in the registration of copyrights. In 2016, Unicolor sued H&M for copyright infringement of Unicolor's fabric designs. A jury found in favor of Unicolor. H&M moved to vacate the verdict, contending the copyright registration was invalid under 37 C.F.R. §202.3(b)(4) because Unicolor had registered 31 independent works within a single application. The district court denied H&M's motion, finding that because Unicolor did not know it failed to meet the "single unit" requirement, the copyright registration was not invalid.

H&M appealed the decision to the United States Court of Appeals for the 9th Circuit, which reversed the district court and held that a) a collection of works did not meet the "single unit" requirement in §202 unless published as a "singular, bundled unit" and b) failure to know of the requirement did not save the copyright. The Supreme Court vacated the 9th Circuit's decision. With a focus on §411(b)'s safe harbor provision, the Supreme Court held that the provision included both mistakes of law and mistakes of fact. The Court first interpreted "knowledge" to be broad enough to cover both knowledge of facts and law through statutory construction principles. Second, the Court cited past cases, prior to the enactment of §411(b), that held inadvertent mistakes in registration certificates were not a means to invalidate a copyright. Finally, the Court reviewed the legislative history to find that §411(b) was added to make obtaining valid copyrights easier and to eliminate loopholes for preventing enforcement of copyrights. H&M argued that "ignorance of the law is no excuse," but the Court rejected the argument, finding that the maxim applied to the *mens rea* element of a crime but not to "civil case[s] concerning the scope of a safe harbor that arises from ignorance." The Court further noted that claims of mistake are not automatically accepted, and circumstantial evidence should be reviewed for instances of willful blindness. ***Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.***, No. 20-915, 2022 U.S. LEXIS 1226 (2/24/2022).

Copyright: Copyright claims based on sovereign nation status dismissed as frivolous. Chief Judge Tunheim recently dismissed a local man's lawsuit for copyright infringement where plaintiff, a man claiming to be a sovereign citizen, alleged that Brown County, Minnesota, owed monetary damages for the wrongful use of his copyrighted name during criminal proceedings against him. The court dismissed the copyright claim as "plainly frivolous" because 37 C.F.R. §202.1(a) prohibits the copyrighting of "[w]ords and short phrases such as names." Accordingly, plaintiff could not seek monetary damages for the use of his name by state courts. The court also found that the criminal proceedings against plaintiff were not invalid due to the supposed copyright violation, because the existence of a copyright or trademark does not prevent a court from exercising jurisdiction over a civil or criminal matter. ***Gould v. Brown Cty.***, No. 21-2762 (JRT/DTS), 2022 U.S. Dist. LEXIS 27505 (D. Minn. 1/5/2022).

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Tax Law

JUDICIAL LAW

Individual income tax: Value of airline tickets provided to retired pilot's family members must be included in retired pilot's gross income. Taxpayers must include in their gross income "all income from whatever source derived." This broad understanding of gross income includes not just salaries, but also benefits unless those benefits are specifically excluded. In this case the taxpayer was a retired airline pilot and his former employer provided free airline tickets to the retired pilot, his daughter, and two of his adult relatives. The pilot argued the value of the tickets should be excluded as either *de minimus* fringe or excluded as "no additional-cost services." The court granted summary judgment to the commissioner, holding that neither exclusion applied, and the pilot was required to include the value of his family's tickets in his gross income. ***Mihalik v. Comm'r***, T.C.M. (RIA) 2022-036 (T.C. 2022).

Conservation easements: "Deemed consent" issue in this dispute cannot be decided as matter of law. Charitable deductions of qualified conservation easements are permitted even though the donation of a conservation easement is less than the taxpayer's entire interest in the property. For the donation to be qualified, however, the conservation easement must be protected in perpetuity. This "protected in perpetuity" requirement has proven vexatious. In this dispute, Pickens, a limited liability company, received a contribution of land from a separate entity; that entity had purchased the land for just shy of half a million dollars in 2015. In 2016, Pickens made a donation of a conservation easement on that land to a land conservancy and claimed a charitable contribution deduction of $24,700,000. The conservation easement recited the conservation purposes and prohibited commercial or residential development. Certain rights were reserved to Pickens, but Pickens did not reserve unconditional rights. The commissioner moved for summary judgment, asserting that the "deemed consent" provision in the easement is inconsistent with the "protected in perpetuity" requirement. In fact, a 6th Circuit case held that a deemed consent provision impaired the conservation purpose where the deemed consent provision meant that the donor could exercise rights in a manner contrary to the conservation purpose. *Hoffman Props. II, LP v. Comm'r*, 956 F.3d 832, 834 (6th Cir. 2020).