

injunctive relief, finding that the defendants were unlikely to succeed on appeal and that the other relevant factors all favored the plaintiff. *Rud v. Johnston*, 2023 WL 2760533 (D. Minn. 4/3/2023).

■ **Motions to amend granted; “delay alone” does not warrant denial of motion.**

In several recent orders granting motions to amend complaints, Magistrate Judge Docherty has found that “delay alone is insufficient justification for denying a motion to amend,” and that the party opposing the motion to amend must also establish prejudice. *Security Bank & Trust Co. v. Cook Inc.*, 2023 WL 3276486 (D. Minn. 5/5/2023); *Berry v. Hennepin Cty.*, 2023 WL 3244827 (D. Minn. 5/4/2023).

■ **28 U.S.C. §1292(b); certifications for interlocutory appeal denied.**

Despite agreeing with the plaintiff that the question on which it sought certification for interlocutory appeal under 28 U.S.C. §1292(b) involved a “controlling question of law,” Judge Tunheim found no substantial grounds for a difference of opinion, and that an interlocutory appeal would not advance the ultimate termination of the litigation. Accordingly, the motion was denied. *Fed. Ins. Co. v. 3M Co.*, 2023 WL 3686814 (D. Minn. 5/26/2023).

Judge Frank also rejected defendants’ certification request pursuant to 28 U.S.C. §1292(b) in a patent case, finding that they met none of the elements of the controlling three-part test. *Corning Inc. v. Wilson Wolf Mfg. Corp.*, 2023 WL 3306506 (D. Minn. 5/8/2023).

■ **Trial subpoena to corporation quashed.** Judge Brasel granted a non-party corporation’s motion to quash a trial subpoena directed to

it, finding that a corporation’s obligation to designate a witness to testify on its behalf under Fed. R. Civ. P. 30(b)(6) extends to depositions, but not to trial testimony. *Ferrin v. Experian Info. Sols., Inc.*, 2023 WL 3588351 (D. Minn. 4/27/2023).

■ **Sanctions, sanctions and more sanctions.** While describing the plaintiff’s complaint, amended complaint, and opposition to the defendant’s motion to dismiss as “frivolous,” Chief Judge Schiltz acknowledged that 28 U.S.C. §1927 does not reach the mere “filing” of a complaint, but awarded the defendant almost \$5,000 in fees it incurred in moving to dismiss the amended complaint. *Towle v. TD Bank USA, N.A.*, 2023 WL 3018665 (D. Minn. 4/20/2023).

Granting plaintiff’s motion for a sanctions-related default judgment against two defendants, Judge Wright found that the defendants had “repeatedly engaged in willful violations of this Court’s order,” had twice been held in contempt, and had refused to pay their contempt fines or the attorney’s fees they had been ordered to pay. *Powerlift Door Consults., Inc. v. Shepard*, 2023 WL 3012037 (D. Minn. 4/18/2023).

Where the plaintiff failed to respond to discovery requests and also failed to respond to defendants’ motion to compel, Magistrate Judge Leung granted the motion to compel and awarded the defendants their attorney’s fees incurred in association with that motion pursuant to Fed. R. Civ. P. 37(a). *Kruse v. City of Elk River*, 2023 WL 3144317 (D. Minn. 4/29/2023).



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## Immigration Law JUDICIAL LAW

■ **No jurisdiction to review BIA discretionary decision; cancellation of removal.**

In March the 8th Circuit Court of Appeals held that it lacked jurisdiction to review the Board of Immigration Appeals’ (BIA) discretionary decision that the petitioner failed to establish his qualifying relatives would suffer “exceptional and extreme hardship” if he were removed to Mexico, deeming him ineligible for cancellation of removal. As in previous cases, the court noted and rejected the petitioner’s attempt to circumvent the jurisdictional bar through an argument that the agency applied an incorrect legal standard by failing to account for the cumulative effect of the hardships presented.

*Garcia-Pascual v. Garland*, No. 20-2529, slip op. (8th Circuit, 3/14/2023). <http://media.ca8.uscourts.gov/opndir/23/03/202529P.pdf>

■ **No political opinion here, actual or imputed.**

In February the 8th Circuit Court of Appeals found the record supported the Board of Immigration Appeals’ (BIA) determination that the petitioner never expressed a political opinion or anti-corruption sentiment, nor did the MS-13 gang ever impute such a position to him when threatening him. The court further added that any error in the BIA’s failure to address the indictment of the brother of the president of Honduras on drug charges was harmless since that information would not cure the deficiency in the petitioner’s asylum request; i.e., the lack of evidence that his resistance to the gang had anything to do with an actual or imputed political opinion. *Aguilar Montecinos v. Garland*, No. 21-2333, slip op.

(8th Circuit, 2/10/2023). <https://ecf.ca8.uscourts.gov/opndir/23/02/212333P.pdf>

## ADMINISTRATIVE ACTION

■ **Asylum: Additional protocols on safe third country agreement between United States and Canada.**

On 3/28/2023, the Department of Homeland Security and Department of Justice announced modifications to their regulations implementing the additional protocols of 2022 to the Safe Third Country Agreement (STCA) between the United States and Canada. Under STCA and its implementing regulations, a foreign national seeking asylum or other protection from persecution or torture must apply in the first country of entry (i.e., United States or Canada) unless (s)he qualifies through an exception. Thus, an asylum seeker arriving at a land border port of entry (POE) in the United States from Canada (or in transit through the United States during removal by Canada) would be barred from pursuing asylum or other protection claim relating to fear of persecution or torture in the United States. As a result, if that individual fails to qualify through an exception, (s)he would be returned to Canada to pursue the asylum claim. In like fashion, an asylum seeker from the United States arriving at a land border POE in Canada would be turned back to the United States. Under the regulations implementing the additional protocols of 2022 to the STCA, coverage is expanded to those asylum seekers who enter in areas located between POEs on the U.S.-Canada land border, including certain bodies of water as determined by the United States and Canada, and make a claim for asylum or other protection relating to

fear of persecution or torture within 14 days after such crossing. **88 Fed. Reg. 18227-41** (2023). <https://www.govinfo.gov/content/pkg/FR-2023-03-28/pdf/2023-06351.pdf>

■ **TPS extension and re-designation: Somalia.** On 3/13/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Somalia for temporary protected status (TPS) for 18 months, from 3/18/2023 through 9/17/2024. Those wishing to extend their TPS must re-register during the 60-day period running from 3/13/2023 through 5/12/2023. The secretary also redesignated Somalia for TPS, allowing additional Somalis to apply who had continuously resided in the United States since 1/11/2023 and were continuously physically present in the United States since 3/18/2023. The registration period for these new applicants runs from 3/13/2023 through 9/17/2023. **88 Fed. Reg. 15434-43** (2023). <https://www.govinfo.gov/content/pkg/FR-2023-03-13/pdf/2023-04735.pdf>

■ **Implementation of parole process changes for Haitians and Cubans.** On 4/28/2023, the Department of Homeland Security announced that Secretary Alejandro Mayorkas had authorized a change in the parole process for Haitians and Cubans. In short, those who have been interdicted at sea after 4/27/2023 will be ineligible for the parole process introduced on 1/9/2023. That process involved certain steps for certain nationals of those two countries and their immediate family members “to be considered on a case-by-case basis for parole and, if granted, lawfully enter the United States in a safe and orderly manner.” That is: (1) have a supporter in the United States who

agrees to provide financial support for the duration of the beneficiary’s parole period; (2) pass national security and public safety vetting; (3) fly at their own expense to an interior POE (port of entry), rather than entering at a land POE; and (4) possess a valid, unexpired passport. Those who failed to avail themselves of this parole process, and instead enter the United States without authorization between POEs, are generally subject to return or removal. Individuals deemed ineligible for the parole process include those who were ordered removed from the United States within the previous five years; entered unauthorized into Mexico or Panama after 1/9/2023; entered the United States without authorization between POEs after 1/9/2023 (except those individuals permitted a single instance of voluntary departure or withdrawal of their application for admission in order to maintain their eligibility for the parole process); or otherwise deemed ineligible for a favorable exercise of discretion. According to DHS, this action is “intended to enhance border security by responding to and protecting against a significant increase of irregular migration... to the United States via dangerous routes that pose serious risks to migrants’ lives and safety, while also providing a process for certain such nationals to lawfully enter the United States in a safe and orderly manner.”

*Haiti:* **88 Fed. Reg. 26327-29** (2023) <https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-09014.pdf>

*Cuba:* **88 Fed. Reg. 26329-31** (2023) <https://www.govinfo.gov/content/pkg/FR-2023-04-28/pdf/2023-09013.pdf>

■ **FY2024 H-1B registration numbers announced by USCIS.** USCIS recently announced that it received

758,994 eligible registrations for FY2024 (474,421 registrations in FY2023) and 110,791 applications were selected. <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>

■ **DHS and DOS develop regionally focused approach to western hemisphere migration following end of Title 42.** On 4/27/2023, the Department of Homeland Security (DHS) and Department of State (DOS) announced a new round of measures seeking through a more regionally based approach to reduce unlawful migration across the western hemisphere (while partnering with Mexico, Canada, Spain, Colombia, and Guatemala) by expanding lawful pathways for protection, creating stiffer consequences for failing to use those lawful pathways, and opening regional processing centers in Colombia and Guatemala—all the while facilitating “a safe, orderly, and humane processing of migrants.”

The Centers for Disease Control’s temporary Title 42 public health order expired at

11:59pm on 5/11/2023 and the U.S. government returned to U.S.C. Title 8 (Aliens and Nationality) to “expeditiously process and remove individuals who arrive at the U.S. border unlawfully.”

In sum, individuals crossing into the United States at the southwest border without authorization or using a lawful pathway—and without scheduling a time to arrive at a port of entry—are presumed ineligible for asylum under a new proposed regulation, unless an exception applies in any specific case.

Highlights of this new policy include:

- expanded access to the CBPOne app to appear at a U.S. port of entry;
- new family reunification parole processes;
- doubling the number of refugees from the western hemisphere;
- opening regional processing centers across the western hemisphere to facilitate access to lawful pathways;
- launching an aggressive anti-smuggling campaign targeting criminal networks in the Darien Corridor;
- increasing the removal of those without a lawful basis to stay;

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- combatting smuggler misinformation; and
- expeditiously processing and removing individuals who arrive at the southwest border and have no legal basis to remain.



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## Intellectual Property JUDICIAL LAW

### ■ Patent: Rejection of infringement claims absent a showing of “enablement.”

The Supreme Court unanimously affirmed a Federal Circuit decision invalidating patent claims for lack of enablement. Amgen produces and holds patents for antibodies that help reduce forms of cholesterol that lead to cardiovascular disease, heart attack, and stroke. Amgen was subsequently granted additional patents that purported to claim “the entire genus” of such antibodies. Accompanying the patents was the disclosure of amino acid sequences for 26 different antibodies and two methods of making undisclosed antibodies—“roadmap” and “conservative substitution” methods. Soon after receiving these patents, Amgen sued Sanofi, a direct competitor, for infringement. Sanofi counterclaimed that the asserted claims were invalid under the Patent’s Act’s enablement requirement. Patents must describe the claimed invention “in such full, clear, concise, and exact terms as to enable any person skilled in the art... to make and use the [invention].” 35 U. S. C. §112(a). The Supreme Court held that Amgen’s claims for making the undisclosed antibodies were not sufficiently enabled. Neither party disputed that the 26 disclosed antibodies were enabled. The Supreme Court, however, held that

the roadmap and conservative substitution methods did not enable the full scope of the claimed genus. Even accepting the allowance for a reasonable degree of experimentation, Amgen’s claims exceeded the Court’s most broad precedent involving patent claims. The Court analogized the methods to mere “research assignments” and upheld the Federal Circuit’s invalidation of Amgen’s patent claims. *Amgen Inc. v. Sanofi*, No. 21-757 (U.S. 5/18/2023).

### ■ Copyright: Narrowing of the first factor of fair use.

The Supreme Court in a 7-2 decision affirmed the 2nd Circuit’s ruling reversing summary judgment against defendant Lynn Goldsmith. Goldsmith was originally commissioned by Newsweek magazine to take a photo of Prince, the musician, for an article. Years later, Goldsmith granted a one-time limited license of the photograph to Vanity Fair for artist illustration. Andy Warhol used the photo for his reference, resulting in a series of derivative Prince illustrations. After Prince’s death, Vanity Fair’s parent company contacted the Andy Warhol Foundation for the Visual Arts, Inc., resulting in the use of a photo. Goldsmith saw the photo on the cover of a magazine and notified Warhol of potential copyright infringement. In response, Warhol sued Goldsmith for declaratory judgment of noninfringement and alternatively fair use. Warhol sought this judgment to continue commercial licensing of the photo of Prince. The district court granted summary judgment in favor of Warhol but was reversed by the 2nd Circuit, which held that the fair use factors favored Goldsmith. Warhol petitioned the Court seeking reversal on the first fair use factor, as the Warhol foundation believed

his work was sufficiently transformative. The Supreme Court held that the “purpose and character” of the original work and Warhol’s rendition substantially share the same commercial purpose—which weighs against fair use. While the commercial purpose of Warhol’s work was not dispositive, the Court weighed this against Warhol’s claims of transformation. The Court reasoned that reading §107(1) so broadly as to include mere additions of subjective expression would interfere with the original creator’s bundle of rights, which includes the rights to reproduce and to prepare derivative works. Thus, given that the pictures would be used for the same purposes commercially (depiction of Prince on a magazine cover), the Court affirmed the 2nd Circuit and rejected the claim of fair use. Chief Justice Roberts and Justice Kagan dissented, stating that this doctrinal shift does not serve copyright’s core purposes of fostering creativity, and that this overly stringent regime “stifle[s] creativity by preventing artists from building on the work of others.” *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, No. 21-869 (U.S. 5/18/2023).



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## Probate & Trust JUDICIAL LAW

■ **Civil lawsuit properly dismissed when probate court first obtains jurisdiction.** The personal representative of an estate initiated a probate proceeding and filed an inventory that included firearms and ammunition. The decedent’s son notified the personal

representative’s attorney that he owned the firearms listed on the inventory. Two days later, the personal representative transferred the firearms to Pheasants Forever. The next year, the decedent’s son initiated a civil lawsuit against the personal representative and alleged that the transfer of the firearms constituted fraud and conversion. The district court dismissed the son’s complaint. The district court found that the probate court and district court had concurrent jurisdiction over the firearms at issue and, because the probate court was the first to obtain jurisdiction, all claims relating to the firearms were required to be decided in the probate proceeding. The Minnesota Court of Appeals affirmed, finding that the civil action and the probate proceeding involved the same parties, concerned the same subject, and tested the same rights. The court of appeals further found that the ownership of the firearms could be addressed in the probate proceeding because the district court in a probate proceeding has the power to hear and dispose of all matters relevant to the determination of the extent of the decedent’s estate and the claims against it. *Randy Hook v. Brenda Hook, et al.*, A22-1140, 2023 WL 2467808 (Minn. Ct. App. 3/13/2023).

■ **Attorney-in-fact has no affirmative duty to act.** The decedent amended her estate plan to exclude her grandson. The decedent informed her attorney that her plan was to deposit \$30,000 into a payable-on-death account and to make her grandson the beneficiary. The decedent’s attorney-in-fact knew of the decedent’s intention but took no action to set up the account. There was no evidence that the decedent instructed her attorney-in-fact to open the account. The grandson filed suit and, among other things,