

FEDERAL QUESTION JURISDICTION

1. General Considerations

- a. [2:300] **“Federal question jurisdiction” defined:** This term refers to the subject matter jurisdiction of federal courts for claims “*arising under*” the U.S. Constitution, treaties, federal statutes, administrative regulations or common law (*see* ¶[2:320 *ff.*]).
- b. [2:301] **Purpose:** Federal question jurisdiction provides litigants with a forum that offers more “experience, solicitude,” and “uniform[]” interpretation of federal law. [*Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.* (2005) 545 US 308, 312, 125 S.Ct. 2363, 2367; *see also Shanks v. Dressel* (9th Cir. 2008) 540 F3d 1082, 1093—“need for federal expertise or uniformity”]
- c. [2:302] **No amount in controversy limitation:** Unlike diversity cases, there is no minimum monetary amount in controversy required in most federal question cases. [See *Mims v. Arrow Fin'l Services, LLC* (2012) 565 US 368, 377, 132 S.Ct. 740, 747]
 - (1) [2:303] **Exceptions:** Despite the absence of any minimum under the “general” federal question statute, there are still minimum jurisdiction limits on claims under certain federal statutes:
 - (a) [2:304] In actions against an interstate carrier for damage to goods shipped interstate (under 49 USC §11707), the amount in controversy must exceed \$10,000. [28 USC §1337(a); *see Hunter v. United Van Lines* (9th Cir. 1984) 746 F2d 635, 648]
 - (b) [2:305] In an injured person’s action under the Consumer Products Safety Act, the claim must exceed \$10,000. [15 USC §2072(a)]
 - (c) [2:306] Under the Magnuson-Moss Warranty Act, individual breach of warranty claims must exceed \$25. If separate claims are aggregated, the claims must total at least \$50,000. If brought as a class action, the class must have at least 100 members. [15 USC §2310(d); *Kelly v. Fleetwood Enterprises, Inc.* (9th Cir. 2004) 377 F3d 1034, 1037; *see Schultz v. General R.V. Ctr.* (6th Cir. 2008) 512 F3d 754, 756-757—jurisdiction satisfied absent proof to legal certainty plaintiff would be unable to recover at least \$50,000]
 - (d) [2:307] *Compare:* Claims against the U.S. founded on federal law or “upon an express or implied contract” *not exceeding \$10,000* may be heard in *either* the district court or the U.S. Court of Federal Claims. Claims *over*

[2:308 — 2:312]

that amount can be heard only in the Court of Federal Claims. [28 USC §§1346(a)(2), 1491; *see discussion at ¶1:27.1 ff., 2:355 ff.*]

- d. [2:308] **Possible disadvantages of federal question jurisdiction:** As discussed, state courts often have concurrent jurisdiction in federal question cases (*see ¶2:117*). Before filing in federal court, plaintiffs should consider the advantages and disadvantages of federal actions generally (*see ¶1:880 ff.*), as well as certain special considerations in federal question cases:

- (1) [2:309] **Special jurisdictional limitations:** There are special limitations on federal question jurisdiction: e.g., the “arising under” requirement (*see ¶2:585*); and the “well-pleaded complaint” rule (*see ¶2:730 ff.*).

These limitations affect the power of the federal court to adjudicate, and raise the potential of jurisdictional challenges to any judgment obtained. Filing in state court may avoid this risk.

- (2) [2:310] **Risk to related nonfederal claims:** If an action involves both state and federal claims for relief, filing in federal court may make the state law claims vulnerable to dismissal. The federal court may find the state law claims not sufficiently related to the federal claims for “supplemental jurisdiction” (*see ¶2:825 ff.*); or it may decline to exercise this jurisdiction even if it exists (*see ¶2:905 ff.*). In either case, the state law claims might be dismissed.

In such cases, a plaintiff who wishes to pursue both state and federal claims will have to file a separate lawsuit in state court—at additional expense, and with a risk of inconsistent results.

Again, filing in state court can avoid these risks. State courts generally may adjudicate both state and federal claims (*see ¶2:117*). (Many states do not require any subject matter relationship between or among claims asserted in the complaint; *see Calif. CCP §427.10.*)

- (3) [2:311] **Risk of limited recovery:** If the federal court permits both state and federal claims (under supplemental jurisdiction, *see ¶2:825*), plaintiff may be forced to carry the federal claim to trial to avoid any risk that the state law claim will be dismissed (albeit without prejudice, *see ¶2:921*). Where the federal claim is “weaker” in terms of jury appeal, plaintiff risks a negative “carryover impact” as to the state law claims.

- ➡ [2:312] **PRACTICE POINTER FOR PLAINTIFFS:** If there is a concern that the federal court may decline to exercise supplemental jurisdiction to hear state law claims, you could file a parallel action in state court. This is not necessary, however, to avoid the statute of limitations because any dismissal of state law claims is *without prejudice* (*see ¶2:965*)

and any statute of limitations is *tolled* “while the claim is pending and for a period of 30 days after it is dismissed unless State law provides a longer tolling period.” [28 USC §1367(d)]

Be aware, however, that if the parallel action is filed in state court first, it may raise a “first to file” abstention issue for the federal action, but this will not necessarily be dispositive. Courts must still consider whether a party engaged in improper forum shopping and whether the “exceptional circumstances” required for deference are present. [See *Seneca Ins. Co., Inc. v. Strange Land, Inc.* (9th Cir. 2017) 862 F3d 835, 846-847 (noting “strong presumption against abstention” based on *Colorado River* factors, see ¶2:4527 ff.)]

[2:313-319] *Reserved.*

2. Sources of Federal Question Jurisdiction

- a. [2:320] **Constitution:** Article III, §2 extends the federal judicial power to:

“ . . . Cases, in Law and Equity, *arising under* this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ” (emphasis added; see *discussion at* ¶2:3 ff.)

“Controversies to which the United States shall be a party”

- b. [2:321] **Treaties:** Federal courts have jurisdiction over actions arising under treaties of the United States. For jurisdiction to lie, such suits must be brought in accordance with the terms of the treaty. [*Pflug v. Egyptair Corp.* (2nd Cir. 1992) 961 F2d 26, 28; *In re Letter Rogatory* (ND IL 1994) 154 FRD 196, 199]
- [2:322] For example, the “United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (known as the “New York Convention” and reprinted at 9 USC §201 et seq.) confers federal subject matter jurisdiction over disputes between U.S. citizens and foreign entities that are subject to arbitration, and for enforcement of foreign arbitral awards. A “proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.” [9 USC §203; see *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (5th Cir. 2003) 335 F3d 357, 364-365]
- c. [2:323] **Statutes:** Congress has conferred a large measure of this power on the federal district courts:
- (1) [2:324] **“General” federal question jurisdiction (28 USC §1331):** Federal district courts have original jurisdiction in actions “arising under the Constitution, laws, or treaties of the United States.” [28 USC §1331 (the so-called “general” federal question jurisdiction statute)]

[2:325 — 2:329]

- (a) [2:325] **Narrowly construed:** This statute is *narrowly* construed: It is not enough that a case merely “arise under” federal law (which is all that Article III, §2 requires). Rather, for jurisdiction under 28 USC §1331, courts insist that there be a “substantial” question of federal law involved (see ¶2:646), and that the federal question appear in a “well-pleaded complaint” (see ¶2:730).

In short, statutory federal question jurisdiction is not as broad as the Constitution would permit. [See *Verlinden, B.V. v. Central Bank of Nigeria* (1983) 461 US 480, 495, 103 S.Ct. 1962, 1972]

- (2) [2:326] **“Specific” federal question statutes:** The following are examples of federal statutes that confer jurisdiction on federal courts to hear specific types of controversies:

- (a) [2:327] **Patent and copyright laws:** District courts have *exclusive* jurisdiction over claims “arising under” federal laws relating to patents, copyrights, trademarks and plant variety protection, and related claims of unfair competition. [28 USC §1338(a), (b); see *Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.* (9th Cir. 2003) 336 F3d 982, 986]

Compare—state law claims raising federal question: Although a complaint may not state a Copyright Act claim on its face, the claim is subject to *exclusive* federal jurisdiction if its resolution depends on application of the Copyright Act. [*Just-Med, Inc. v. Byce* (9th Cir. 2010) 600 F3d 1118, 1124; see *detailed discussion at* ¶2:665 *ff. and* 2:2751 *ff.*]

- [2:328] Claims regarding the validity of a patent and/or its infringement “arise under” the patent laws, because a right or privilege depends upon construction of those laws. [*Christianson v. Colt Indus. Operating Corp.* (1988) 486 US 800, 807-808, 108 S.Ct. 2166, 2173; see *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S* (2012) 566 US 399, 412, 132 S.Ct. 1670, 1680, fn. 5—federal court has jurisdiction over issues regarding what counts as act of infringement; *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.* (Fed. Cir. 2011) 631 F3d 1367, 1369—claim that attorney mismanaged prosecution of patent application and ensuing litigation arose under patent law]
- [2:329] Copyright infringement claims that seek a remedy under the Copyright Act “arise under” federal law, even if the infringement results from a breach of contract. (E.g., a licensee of copyrighted material breaches the terms of its license, thereby forfeiting its license, so that any further use of the copyrighted

material constitutes an infringement.) [*Bassett v. Mashantucket Pequot Tribe* (2nd Cir. 2000) 204 F3d 343, 355; *1mage Software, Inc. v. Reynolds & Reynolds Co.* (10th Cir. 2006) 459 F3d 1044, 1051—federal jurisdiction exists if the complaint *seeks a remedy* provided by the Copyright Act or asserts a claim *requiring interpretation* of the Act]

- [2:330] *Includes unregistered copyrights*: Although the Copyright Act (17 USC §411(a)) requires copyright holders to register their works before suing for infringement, this precondition to suit does *not* affect a federal court’s subject matter jurisdiction. [*Reed Elsevier, Inc. v. Muchnick* (2010) 559 US 154, 166, 130 S.Ct. 1237, 1247]

— [2:330.1] *Effect of failure to register copyright?*
The U.S. Supreme Court has declined to address whether the Copyright Act registration requirement is a mandatory precondition to bringing suit—i.e., whether a district court should permit late registration and allow the infringement action to proceed, or enforce the registration requirement *sua sponte* by dismissing copyright infringement claims involving unregistered works. [*Reed Elsevier, Inc. v. Muchnick* (2010) 559 US 154, 170-171, 130 S.Ct. 1237, 1249]

Comment: If the case is allowed to proceed despite late copyright registration, *statutory* damages (as distinct from actual damages) are not recoverable where the first act of infringement occurred prior to registration. [*Fischer v. Forrest* (SD NY 2018) 286 F.Supp.3d 590, 602, 606, *aff’d* (2nd Cir. 2020) 968 F3d 216]

- [2:331] *Authorship of work*: Disputes involving *authorship* require application of the Copyright Act and thus present a federal question. [*Severe Records, LLC v. Rich* (6th Cir. 2011) 658 F3d 571, 582]
- [2:332] *Compare*: On the other hand, claims involving patent *ownership* do *not* “arise under” the patent laws: “[T]he question of who owns the patent rights and on what terms typically is a question exclusively for state courts.” [*Jim Arnold Corp. v. Hydrotech Systems, Inc.* (Fed. Cir. 1997) 109 F3d 1567, 1572; *Prize Frize, Inc. v. Matrix (U.S.) Inc.* (9th Cir. 1999) 167 F3d 1261, 1264 (superseded by statute on other grounds)—fact that trade secret infringement suit involved issues of patent ownership did *not* convert state law claims into federal claims; see also *Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.*

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(9th Cir. 2003) 336 F3d 982, 986-987 (same rule in copyright cases)]

[2:333-339] *Reserved.*

- (b) [2:340] **Commerce and antitrust laws:** District courts have original jurisdiction of civil actions “arising under” federal laws regulating commerce or protecting trade and commerce against restraints and monopolies. [28 USC §1337]
- (c) [2:341] **Securities laws:** Federal question jurisdiction may be based on violation of federal securities laws. [15 USC §78aa; *Securities Investor Protection Corp. v. Vigman* (9th Cir. 1985) 764 F2d 1309, 1314; see *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning* (2016) 578 US 374, 376-377, 136 S.Ct. 1562, 1566—the “arising under” test applies in cases pertaining to section 27 of the Securities Exchange Act of 1934, conferring federal jurisdiction on all actions to “enforce” the Act]
- (d) [2:342] **Postal laws:** Similarly, the district courts are vested with jurisdiction of actions “arising under” federal postal laws. [28 USC §1339; 39 USC §409 (actions by or against U.S. Postal Service); see *Continental Cablevision, Inc. v. United States Postal Service* (8th Cir. 1991) 945 F2d 1434, 1436]
- (e) [2:343] **United States as plaintiff:** Any action commenced by the United States, or any agency or officer authorized to sue on its behalf. [28 USC §1345]
- (f) [2:344] **United States as defendant:** *Certain* specific types of actions against the U.S. (much more limited than where the U.S. is plaintiff). [28 USC §§1346(a), (d) & 1491]

The United States, as sovereign, is immune from suit except as it consents to be sued. Sovereign immunity is jurisdictional in nature. Thus, unless the United States consents to be sued, the court *lacks subject matter jurisdiction*. [*Mills v. United States* (9th Cir. 2014) 742 F3d 400, 405; compare *Campbell-Ewald Co. v. Gomez* (2016) 577 US 153, 166, 136 S.Ct. 663, 672—*third parties* acting on behalf of government not entitled to derivative blanket sovereign immunity]

Waiver of sovereign immunity is “strictly construed, in terms of its scope, in favor of the sovereign.” [*Department of the Army v. Blue Fox, Inc.* (1999) 525 US 255, 261, 119 S.Ct. 687, 691; see also *Hajro v. United States Citizenship & Immigration Services* (9th Cir. 2016) 811 F3d 1086, 1101—waiver must be “unequivocally expressed” in text of the statute]

The following are actions in which the United States has, by statute, *consented* to be sued. Otherwise, such actions

would be barred in federal court. [*Price v. United States General Services Admin.* (9th Cir. 1990) 894 F2d 323, 324]

- 1) [2:345] **Tort claims against U.S.:** Federal courts have exclusive jurisdiction over claims against the U.S. for torts committed by governmental employees in the course and scope of their employment. [28 USC §1346(b)]

Moreover, the Federal Tort Claims Act (FTCA, 28 USC §2671 et seq.) provides the *exclusive remedy* for such claims; no action may be maintained against the employees individually. [28 USC §2679(b)(1); see ¶2:2909]

This protection extends only to natural persons employed by the government—i.e., corporations and partnerships cannot be “government employees.” [*Adams v. United States* (9th Cir. 2005) 420 F3d 1049, 1053]

- a) [2:346] **Where suit filed against employee:** A federal employee who is sued in a tort action is required to notify the Attorney General (28 USC §2679(c)). If the Attorney General *certifies* that the employee was acting within the scope of employment at the time of the conduct on which the suit is based, the United States is *substituted* as the defendant and the only remedy is against the United States. [28 USC §2679(b)(1), (d)(1) (Westfall Act)]

The Westfall Act gives federal employees *absolute immunity* from tort claims arising from acts or omissions in performing official duties. [*Osborn v. Haley* (2007) 549 US 225, 229, 127 S.Ct. 881, 887; see ¶7:18.1]

That certification is *conclusive* for purposes of federal *removal jurisdiction*; see ¶2:2909 ff.

But it is subject to judicial review for purposes of substitution (e.g., whether the federal employee was acting within the scope of employment); see ¶7:18.1 ff.

➡ [2:347] **PRACTICE POINTER:** Tort claims against the United States *must be presented to the appropriate federal agency* before filing suit; see ¶2:366. Thus, where the United States is substituted as defendant, the action may be subject to dismissal (for lack of subject matter juris-

diction) if no claim is filed with the appropriate federal agency. [*Sameena Inc. v. United States Air Force* (9th Cir. 1998) 147 F3d 1148, 1152; *Munns v. Kerry* (9th Cir. 2015) 782 F3d 402, 413—plaintiffs’ failure to provide evidence they first presented their claim to the responsible federal agency under FTCA means “they cannot rely on that statute’s waiver of sovereign immunity for jurisdiction”]

- b) [2:348] **Exceptions to tort liability:** The FTCA provides various exceptions to the government’s waiver of sovereign immunity (28 USC §2680(a)-(h)), including:
- claims based upon “the exercise or performance or the failure to exercise or perform a *discretionary function* or duty” (28 USC §2680(a) (emphasis added));
 - claims arising out of the “*detention of any goods*” by any law enforcement officer (28 USC §2680(c) (emphasis added));
 - designated *intentional tort* claims, including assault, battery, libel, defamation and deceit (28 USC §2680(h)).

Where these exceptions apply, there is no federal jurisdiction under 28 USC §1346(b). [*United States v. Gaubert* (1991) 499 US 315, 322-323, 111 S.Ct. 1267, 1273-1274; *Sabow v. United States* (9th Cir. 1996) 93 F3d 1445, 1451; *DaVinci Aircraft, Inc. v. United States* (9th Cir. 2019) 926 F3d 1117, 1125-1126—no jurisdiction to hear conversion claim under FTCA because detention of goods exception applied; see also *Steinle v. City & County of San Francisco* (ND CA 2017) 230 F.Supp.3d 994, 1026—in FTCA cases, government bears burden of demonstrating discretionary function exception applies]

Application of discretionary function exception

- [2:349] Army Corps of Engineers’ decisions regarding a guardrail near a river bank were shielded by the discretionary function exception. [*Metter v. United States* (8th Cir. 2015) 785 F3d 1227, 1231-1233]
- [2:349.1] The exception barred an investor’s suit alleging the SEC was negligent in approving the registration of an investment firm operating a Ponzi scheme. [*Zelaya v. United States* (11th Cir. 2015) 781 F3d 1315, 1329]

[2:349.2 — 2:349.7]

- [2:349.2] Suit against the government for the death of plaintiff's husband and sinking of his fishing boat during a NATO counter-piracy mission was barred by the discretionary function exception. [*Wu Tien Li-Shou v. United States* (4th Cir. 2015) 777 F3d 175, 184-185—engagement involved series of discretionary decisions made by military personnel]
- [2:349.3] The discretionary function exception applied to a National Park's decision to use nonlethal methods to manage a mountain goat that later killed a park visitor. [*Chadd v. United States* (9th Cir. 2015) 794 F3d 1104, 1108-1110]
- [2:349.4] The discretionary function exception applied where Immigration and Customs Enforcement (ICE) had discretion to determine what methods it would use to pursue an illegal immigrant (who while at large shot and killed victim with stolen government handgun); therefore, the FTCA did not waive U.S. sovereign immunity for claims by representatives of victim. [*Steinle v. City & County of San Francisco* (ND CA 2017) 230 F.Supp.3d 994, 1029]
- [2:349.5] The discretionary function exception applied when a worker filed an FTCA suit alleging federal mine inspectors failed to perform their duties properly. [*Buckler v. United States* (8th Cir. 2019) 919 F3d 1038, 1043]
- [2:349.6] The discretionary function exception barred government's liability for claims that the Air Force failed to supervise, discover and prevent its hired private contractors from dumping hazardous waste on plaintiff's property, but question of fact existed whether government's reasons for delay in remediating, once government discovered the pollution, was an exercise of its discretion. [*Nanouk v. United States* (9th Cir. 2020) 974 F3d 941, 945-946, 949-950]
- [2:349.7] The discretionary function exception did not apply to claim by national park visitor injured by stepping in a hole in park's grassy recreational area. The government's failure to maintain the hole did not involve em-

employees balancing public policy but was a matter of routine maintenance. [*Chang v. United States* (9th Cir. 2025) 139 F4th 1087, 1094-1095]

[2:350-354] *Reserved.*

2) [2:355] **Contract claims; Court of Federal Claims jurisdiction:** The Court of Federal Claims, not the district court, has *exclusive jurisdiction* on “express or implied” contract claims against the U.S. for *more than \$10,000*. [28 USC §1491(a) (Tucker Act); see *Tritz v. United States Postal Service* (9th Cir. 2013) 721 F3d 1133, 1137; *Friedman v. United States* (11th Cir. 2004) 391 F3d 1313, 1315—includes state law tort claims stemming from breach of contract; and further discussion at ¶1:27.1]

a) [2:356] **Compare—claims not exceeding \$10,000:** But district courts have jurisdiction *concurrent* with the Court of Federal Claims on contract claims against the U.S. *not exceeding \$10,000*. [See 28 USC §1346(a)(2) (Little Tucker Act)]

Other statutes give district courts concurrent jurisdiction even as to claims over \$10,000; e.g., claims against the Small Business Administration (see 15 USC §634(b)(1)); claims against the Postal Service (39 USC §409(a)); claims against the FDIC (12 USC §1819(b)(2)). [See *Kim v. Kang* (9th Cir. 1998) 154 F3d 996, 999; *Wright v. U.S. Postal Service* (9th Cir. 1994) 29 F3d 1426, 1430]

Similarly, the Bankruptcy Code gives federal district courts concurrent jurisdiction where the government contractor ends up in bankruptcy. [*Quality Tooling, Inc. v. United States* (Fed. Cir. 1995) 47 F3d 1569, 1578—discretionary with district court whether to defer to Claims Court jurisdiction]

b) [2:357] **Compare—preaward equitable relief:** The Court of Federal Claims and the district courts also have concurrent jurisdiction over actions “by an interested party objecting to a . . . proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement . . .” [28 USC §1491(b)(1) (emphasis added)]

In such cases, the court may award *equitable and declaratory relief*; e.g., voiding award, ordering