

# GIBSON DUNN Supreme Court Round-Up

## Overview

The Supreme Court Round-Up previews upcoming cases, summarizes opinions, and tracks the actions of the Office of the Solicitor General. Each entry contains a description of the case, as well as a substantive analysis of the Court's actions.

## October Term 2020

### Cases Scheduled for Argument



Theodore B. Olson

202.955.8500

[tolson@gibsondunn.com](mailto:tolson@gibsondunn.com)



Amir C. Tayrani

202.887.3692

[atayrani@gibsondunn.com](mailto:atayrani@gibsondunn.com)



Jacob T. Spencer

202.887.3792

[jspencer@gibsondunn.com](mailto:jspencer@gibsondunn.com)



Joshua M. Wesneski

202.887.3598

[jwesneski@gibsondunn.com](mailto:jwesneski@gibsondunn.com)

1. ***Carney v. Adams*, No. 19-309** (3d Cir., 922 F.3d 166; cert. granted Dec. 6, 2019, with Question 3 directed by the Court; argument scheduled Oct. 5, 2020). The Questions Presented are: (1) Whether the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a “bare majority” on the State’s three highest courts, with the other seats reserved for judges affiliated with the “other major political party.” (2) Whether the Third Circuit erred in holding that a provision of the Delaware Constitution requiring that no more than a “bare majority” of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other “major political party,” when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts. (3) Whether respondent has demonstrated Article III standing.
2. ***Texas v. New Mexico*, No. 22O65** (Original Jurisdiction; CVSG June 3, 2019; motion for review opposed Dec. 9, 2019; motion for review set for oral argument in due course Jan. 27, 2020; argument scheduled Oct. 5, 2020). The Questions Presented are: (1) Whether the River Master clearly erred in retroactively amending the River Master Manual and his final accounting for 2015 without Texas’s consent and contrary to this Court’s decree that governs modification of the manual and the period for review of the River Master’s final determinations. (2) Whether the River Master clearly erred by charging Texas for evaporative losses without authority under the Pecos River Compact.



Gibson Dunn

Counsel for Amicus U.S.  
Chamber of Commerce  
Partner  
Helgi Walker



Gibson Dunn

Counsel for Amicus  
Rimini Street, Inc.

Partners

Mark Perry  
Blaine Evanson



Gibson Dunn

Counsel for Amici  
Members of Congress  
Partner  
Allyson Ho

3. *Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argument scheduled Oct. 6, 2020). Whether Arkansas's statute regulating pharmacy benefit managers' drug-reimbursement rates, which is similar to laws enacted by a substantial majority of States, is preempted by ERISA.
4. *FNU Tanzin v. Tanvir*, No. 19-71 (2d Cir., 894 F.3d 449; cert. granted Nov. 22, 2019; argument scheduled Oct. 6, 2020). Whether RFRA, 42 U.S.C. § 2000bb *et seq.*, permits suits seeking money damages against individual federal employees.
5. *Google LLC v. Oracle Am., Inc.*, No. 18-956 (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argument scheduled Oct. 7, 2020). The Questions Presented are: (1) Whether copyright protection extends to a software interface. (2) Whether petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.
6. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, No. 19-368 (Mont., 443 P.3d 407; cert. granted Jan. 17, 2020, consolidated with *Ford Motor Co. v. Bandemer*, No. 19-369 (Minn., 931 N.W.2d 744); argument scheduled Oct. 7, 2020). Whether the "arise out of or relate to" requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.
7. *United States v. Briggs*, No. 19-108 (C.A.A.F., 78 M.J. 289; cert. granted Nov. 15, 2019, consolidated with *United States v. Collins*, No. 19-184 (C.A.A.F., 78 M.J. 415 & 79 M.J. 150); argument scheduled Oct. 13, 2020). Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.
8. *City of Chicago v. Fulton*, No. 19-357 (7th Cir., 926 F.3d 916; cert. granted Dec. 18, 2019; argument scheduled Oct. 13, 2020). Whether an entity that is passively retaining possession of property in which a bankruptcy estate has an interest has an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, to return that property to the debtor or trustee immediately upon the filing of the bankruptcy petition.
9. *Torres v. Madrid*, No. 19-292 (10th Cir., 769 F. App'x 654; cert. granted Dec. 18, 2019; argument scheduled Oct. 14, 2020). Whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh



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**Gibson Dunn**  
Counsel for Amicus  
Families Against  
Mandatory Minimums

**Partners**  
David Debolt  
Avi Weitzman

Circuits, and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a “seizure,” as the Tenth Circuit and the D.C. Court of Appeals hold.

10. *Pereida v. Barr*, No. 19-438 (8th Cir., 916 F.3d 1128; cert. granted Dec. 18, 2019; argument scheduled Oct. 14, 2020). Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.
11. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, No. 19-547 (9th Cir., 925 F.3d 1000; cert. granted Mar. 2, 2020; argument scheduled Nov. 2, 2020). Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), by incorporating the deliberative process privilege, protects against compelled disclosure a federal agency’s draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536, and that concerned a proposed agency action that was later modified in the consultation process.
12. *Salinas v. U.S. R.R. Ret. Bd.*, No. 19-199 (5th Cir., 765 F. App’x 79; cert. granted Jan. 10, 2020; argument scheduled Nov. 2, 2020). Whether, under Section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f), and Section 8 of the Railroad Retirement Act, 45 U.S.C. § 231g, the Railroad Retirement Board’s denial of a request to reopen a prior benefits determination is a “final decision” subject to judicial review.
13. *Jones v. Mississippi*, No. 18-1259 (Miss. Ct. App., 285 So. 3d 626; cert. granted Mar. 9, 2020; argument scheduled Nov. 3, 2020). Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.
14. *Borden v. United States*, No. 19-5410 (6th Cir., 769 F. App’x 266; cert. granted Mar. 2, 2020, limited to Question 1; argument scheduled Nov. 3, 2020). Whether the “use of force” clause in the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), encompasses crimes with a *mens rea* of mere recklessness.
15. *Fulton v. City of Philadelphia*, No. 19-123 (3d Cir., 922 F.3d 140; cert. granted Feb. 24, 2020; argument scheduled Nov. 4, 2020). The Questions Presented are: (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held. (2) Whether *Employment Division v. Smith*, 494 U.S. 872 (1990), should be revisited. (3) Whether a government violates the First Amendment by conditioning a religious agency’s ability to participate in the foster care system on taking actions and making statements that directly contradict the agency’s religious beliefs.



Gibson Dunn  
Counsel for *Amici*  
Thirty-Three Former  
Immigration Judges and  
Members of the Board of  
Immigration Appeals

Partners  
Richard Mark  
Amer Ahmed



Gibson Dunn  
Counsel for *Amici* First  
Focus on Children and  
the Children's Partnership

Partner  
Stuart Delery

16. *Niz-Chavez v. Barr*, No. 19-863 (6th Cir., 789 F. App'x 523; cert. granted June 8, 2020; argument scheduled Nov. 9, 2020). Whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.
17. *Brownback v. King*, No. 19-546 (6th Cir., 917 F.3d 409; cert. granted Mar. 30, 2020; argument scheduled Nov. 9, 2020). Whether a final judgment in favor of the United States in an action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.
18. *California v. Texas*, No. 19-840, consolidated with *Texas v. California*, No. 19-1019 (5th Cir., 945 F.3d 355; cert. granted Mar. 2, 2020; argument scheduled Nov. 10, 2020). The Questions Presented are: (1) Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in 26 U.S.C. § 5000A(a). (2) Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional. (3) Whether the minimum coverage provision is severable from the rest of the ACA. (4) Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

## Cases Awaiting An Argument Date

19. *Van Buren v. United States*, No. 19-783 (11th Cir., 940 F.3d 1192; cert. granted Apr. 20, 2020). Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.
20. *CIC Servs., LLC v. IRS*, No. 19-930 (6th Cir., 925 F.3d 247; cert. granted May 4, 2020). Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.
21. *Edwards v. Vannoy*, No. 19-5807 (5th Cir., No. 18-31095; cert. granted May 4, 2020, with the Question Presented directed by the Court). Whether the



Court's decision in *Ramos v. Louisiana*, 590 U.S. \_\_\_ (2020), applies retroactively to cases on federal collateral review.

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**Gibson Dunn**  
Co-counsel for Petitioner  
Nestlé USA, Inc.

**Partners**  
Theodore Boutrous, Jr.  
Perlette Jura

22. *Albence v. Guzman Chavez*, No. 19-897 (4th Cir., 940 F.3d 867; cert. granted June 15, 2020). Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. § 1231, or instead by 8 U.S.C. § 1226.
23. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963 (5th Cir., 935 F.3d 274; cert. granted June 15, 2020). Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.
24. *Republic of Hungary v. Simon*, No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.
25. *Fed. Republic of Germany v. Philipp*, No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020). The Questions Presented are: (1) Whether the “expropriation exception” of the FSIA, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when “rights in property taken in violation of international law are in issue,” provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States’ responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany’s instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.
26. *Nestlé USA, Inc. v. Doe I*, No. 19-416, consolidated with *Cargill, Inc. v. Doe I*, No. 19-453 (9th Cir., 929 F.3d 623; CVSG Jan. 13, 2020; cert. supported May 26, 2020, limited to No. 19-453, with a Question 3 proposed by the SG; cert. granted July 2, 2020). The Questions Presented are: (1) Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1330, may overcome the extraterritoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the



alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity. (2) Whether the Judiciary has the authority under the ATS to impose liability on domestic corporations.

27. *Dep’t of Justice v. House Comm. on the Judiciary*, No. 19-1328 (D.C. Cir., 951 F.3d 589; cert. granted July 2, 2020). Whether an impeachment trial before a legislative body is a “judicial proceeding” under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure.
28. *Collins v. Mnuchin*, No. 19-422, consolidated with *Mnuchin v. Collins*, No. 19-563 (5th Cir., 938 F.3d 553; cert. granted July 9, 2020). The Questions Presented are: (1) Whether the Federal Housing Finance Agency’s (“FHFA”) structure violates the separation of powers. (2) Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent. (3) Whether the statute’s anti-injunction clause, which precludes courts from taking any action that would “restrain or affect the exercise of powers or functions of the Agency as a conservator,” 12 U.S.C. § 4617(f), precludes a federal court from setting aside the Third Amendment to agreements between FHFA and the Department of the Treasury. (4) Whether the statute’s succession clause—under which FHFA, as conservator, inherits the shareholders’ rights to bring derivative actions on behalf of the enterprises—precludes the shareholders from challenging the Third Amendment.
29. *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (9th Cir., 910 F.3d 417; cert. granted July 9, 2020, consolidated with *FTC v. Credit Bureau Ctr.*, No. 19-825 (7th Cir., 937 F.3d 764)). The Questions Presented are: (1) Whether § 13(b) of the Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), by authorizing “injunction[s],” also authorizes the Commission to demand monetary relief such as restitution—and if so, the scope of the limits or requirements for such relief. (2) Whether § 13(b) authorizes district courts to enter an injunction that orders the return of unlawfully obtained funds.
30. *Facebook, Inc. v. Duguid*, No. 19-511 (9th Cir., 926 F.3d 1146; cert. granted July 9, 2020, limited to Question 2). Whether the definition of “automatic telephone dialing system” in the TCPA encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not “us[e] a random or sequential number generator.”
31. *Uzuegbunam v. Preczewski*, No. 19-968 (11th Cir., 781 F. App’x 824; cert. granted July 9, 2020). Whether a government’s post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government’s past, completed violation of a plaintiff’s constitutional right.



Gibson Dunn  
Counsel for Amicus  
salesforce.com, inc.

Partners  
Mark Perry  
Kristin Linsley



## Pending Cases Calling For The Views Of The Solicitor General (“CVSG”)

1. *Ams. for Prosperity Found. v. Becerra*, No. 19-251, consolidated with *Thomas More Law Ctr. v. Becerra*, No. 19-255 (9th Cir., 903 F.3d 1000; CVSG Feb. 24, 2020). The Questions Presented are: (1) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights. (2) Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest. (3) Whether California’s disclosure requirement violates charities’ and their donors’ freedom of association and speech facially or as applied to the Law Center.
2. *Texas v. California*, No. 22O153 (Original Jurisdiction; CVSG June 15, 2020). The Questions Presented are: (1) Whether California’s economic sanctions against Texas and Texans are unconstitutional. (2) Whether California must remove Texas from its travel ban list.
3. *PennEast Pipeline Co. v. New Jersey*, No. 19-1039 (3d Cir., 938 F.3d 96; CVSG June 29, 2020). Whether the Natural Gas Act, 15 U.S.C. § 717f(h), delegates to Federal Energy Regulatory Commission certificate holders the authority to exercise the federal government’s eminent domain power to condemn land in which a State claims an interest.
4. *FMC Corp. v. Shoshone-Bannock Tribes*, No. 19-1143 (9th Cir., 942 F.3d 916; CVSG June 29, 2020). The Questions Presented are: (1) Whether the Ninth Circuit correctly holds that tribal jurisdiction over nonmembers is established whenever a *Montana v. United States*, 450 U.S. 544 (1981), exception is met, or whether, as the Seventh and Eighth Circuits have held, a court must also determine that the exercise of such jurisdiction stems from the Tribe’s inherent authority to set conditions on entry, preserve tribal self-government, or control internal relations. (2) Whether the Ninth Circuit has construed the *Montana* exceptions to swallow the general rule that Tribes lack jurisdiction over nonmembers.

## CVSG Cases In Which The Solicitor General Supported Certiorari

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1. *Rutledge v. Pharm. Care Mgmt. Ass’n*, No. 18-540 (8th Cir., 891 F.3d 1109; CVSG Apr. 15, 2019; cert. supported Dec. 4, 2019; cert. granted Jan. 10, 2020; argument scheduled Oct. 6, 2020). Whether Arkansas’s statute regulating pharmacy benefit managers’ drug-reimbursement rates, which is

Gibson Dunn  
Counsel for Amicus U.S.  
Chamber of Commerce

Partner  
Helgi Walker



similar to laws enacted by a substantial majority of States, is preempted by ERISA.

2. *Republic of Hungary v. Simon*, No. 18-1447 (D.C. Cir., 911 F.3d 1172; CVSG Jan. 21, 2020; cert. supported May 26, 2020, limited to Question 1; cert. granted July 2, 2020, limited to Question 1). Whether the district court may abstain from exercising jurisdiction under the FSIA for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II and plaintiffs made no attempt to exhaust local Hungarian remedies.
3. *Fed. Republic of Germany v. Philipp*, No. 19-351, consolidated with *Philipp v. Fed. Republic of Germany*, No. 19-520 (D.C. Cir., 894 F.3d 406; CVSG Jan. 21, 2020; cert. supported May 26, 2020; cert. granted July 2, 2020). The Questions Presented are: (1) Whether the “expropriation exception” of the FSIA, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when “rights in property taken in violation of international law are in issue,” provides jurisdiction over claims that a foreign sovereign has violated international human rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing States’ responsibility for takings of property. (2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. (3) Whether the Federal Republic of Germany is subject to jurisdiction under the expropriation exception of the FSIA because Germany’s instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz is engaged in commercial activity in the United States.
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5. *CACI Premier Tech., Inc. v. Al Shimari*, No. 19-648 (4th Cir., 775 F. App’x 758; CVSG Jan. 27, 2020; cert. supported Aug. 26, 2020, provided the Court’s disposition of *Nestlé USA, Inc. v. Doe I*, No. 19-416, and *Cargill, Inc. v. Doe I*, No. 19-453 does not effectively eliminate respondents’ substantive claims). Whether an order denying a federal contractor’s claim of derivative sovereign immunity is an immediately appealable final order under the collateral-order doctrine.



Gibson Dunn

Co-counsel for Petitioner  
Nestlé USA, Inc.

Partners

Theodore Boutros, Jr.  
Perlette Jura



Gibson Dunn

Counsel for Petitioner

Partners

Theodore Olson  
Amir Tayrani



## CVSG Cases In Which The Solicitor General Opposed Certiorari



Gibson Dunn  
Counsel for Amicus  
Rimini Street, Inc.

Partners  
Mark Perry  
Blaine Evanson

1. ***Google LLC v. Oracle Am., Inc., No. 18-956* (Fed. Cir., 886 F.3d 1179 & 750 F.3d 1339; CVSG Apr. 29, 2019; cert. opposed Sept. 27, 2019; cert. granted Nov. 15, 2019; argument scheduled Oct. 7, 2020).** The Questions Presented are: (1) Whether copyright protection extends to a software interface. (2) Whether petitioner's use of a software interface in the context of creating a new computer program constitutes fair use.

### Supreme Court Statistics:

Gibson Dunn has a longstanding, high-profile presence before the Supreme Court of the United States, appearing numerous times in the past decade in a variety of cases. During the Supreme Court's 5 most recent Terms, 9 different Gibson Dunn partners have presented oral argument; the firm has argued a total of 16 cases in the Supreme Court during that period, including closely watched cases with far-reaching significance in the areas of intellectual property, separation of powers, and federalism. Moreover, although the grant rate for petitions for certiorari is below 1%, Gibson Dunn's petitions have captured the Court's attention: Gibson Dunn has persuaded the Court to grant 29 petitions for certiorari since 2006.

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