

# GIBSON DUNN

## Supreme Court Round-Up

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### 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 2021

### Argued Cases



Theodore B. Olson  
202.955.8500  
tolson@gibsondunn.com



Amir C. Tayrani  
202.887.3692  
atayrani@gibsondunn.com



Jacob T. Spencer  
202.887.3792  
jspencer@gibsondunn.com



Joshua M. Wesneski  
202.887.3598  
jwesneski@gibsondunn.com

1. ***Mississippi v. Tennessee*, No. 22O143 (Original Jurisdiction; exceptions to the Report of the Special Master filed Feb. 22, 2021; exceptions opposed Apr. 23, 2021; case set for oral argument in due course July 2, 2021; argued Oct. 4, 2021). The Questions Presented are: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high-quality groundwater. (2) Whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's borders. (3) Whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.**

**Decided Nov. 22, 2021 (595 U.S. ).** Exceptions overruled in part and sustained in part; case dismissed without leave to amend. Chief Justice Roberts for a unanimous Court. The Court held that interstate aquifers are subject to the doctrine of equitable apportionment. The City of Memphis, Tennessee, sources drinking water from the Middle Claiborne Aquifer, which underlies multiple States, including Mississippi. To resolve disputes about interstate surface water, the Supreme Court applies the doctrine of equitable apportionment, which "aims to produce a fair allocation of a shared water resource between two or more States." The Court concluded that the same doctrine should apply to interstate aquifers, since water in the aquifers is a transboundary resource that flows naturally between different States. Mississippi does not have sovereign ownership of all groundwater beneath its surface, because each State into which the water could naturally flow shares an interest in that water. Nor does Tennessee invade Mississippi land to draw water—its wells are drilled straight down and do not cross state lines. And because Mississippi neither sought leave

to amend nor offered a proposed amended complaint seeking equitable apportionment, the Court dismissed without leave to amend.

2. ***Wooden v. United States*, No. 20-5279 (6th Cir., 945 F.3d 498; cert. granted Feb. 22, 2021; argued Oct. 4, 2021).** Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were “committed on occasions different from one another” for purposes of a sentencing enhancement under the Armed Career Criminal Act.
3. ***Hemphill v. New York*, No. 20-637 (N.Y., 150 N.E. 3d 356; cert. granted Apr. 19, 2021; argued Oct. 5, 2021).** Whether, or under what circumstances, a criminal defendant, whose argumentation or instruction of evidence at trial “opens the door” to the admission of responsive evidence that would otherwise be barred by the rules of evidence, also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.
4. ***Brown v. Davenport*, No. 20-826 (6th Cir., 975 F.3d 537; cert. granted Apr. 5, 2021; argued Oct. 5, 2021).** Whether a federal habeas court may grant relief based solely on its conclusion that the test from *Brecht v. Abrahamson* is satisfied, as the U.S. Court of Appeals for the 6th Circuit held, or whether the court must also find that the state court’s application of *Chapman v. California* was unreasonable under 28 U.S.C. § 2254(d)(1), as the U.S. Courts of Appeals for the 2nd, 3rd, 7th, 9th and 10th Circuits have held.
5. ***United States v. Zubaydah*, No. 20-827 (9th Cir., 938 F.3d 1123; cert. granted Apr. 26, 2021; argued Oct. 6, 2021).** Whether the U.S. Court of Appeals for the 9th Circuit erred when it rejected the United States’ assertion of the state-secrets privilege based on the court’s own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. § 1782(a) against former Central Intelligence Agency contractors on matters concerning alleged clandestine CIA activities.
6. ***Cameron v. EMW Women’s Surgical Center, P.S.C.*, No. 20-601 (6th Cir., 831 F. App’x 748; cert. granted Mar. 29, 2021; argued Oct. 12, 2021).** Whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.
7. ***Thompson v. Clark*, No. 20-659 (2d Cir., 794 F. App’x 140; cert. granted Mar. 11, 2021; argued Oct. 12, 2021).** Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has “formally ended in a manner not inconsistent with his innocence,” as the U.S. Court of Appeals for the 11th Circuit held, or that the proceeding “ended in a manner that affirmatively indicates his innocence,” as the U.S. Court of Appeals for the 2d Circuit held.



**Gibson Dunn**  
Counsel for *Amici* The  
Bronx Defenders, *et al.*  
**Partner**  
David Debold

8. *United States v. Tsarnaev*, No. 20-443 (1st Cir., 968 F.3d 24; cert. granted Mar. 22, 2021; argued Oct. 13, 2021). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the 1st Circuit erred in concluding that the defendant’s capital sentence must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about the case. (2) Whether the district court committed reversible error at the penalty phase of the trial by excluding evidence that the defendant’s older brother was allegedly involved in different crimes two years before the offenses for which the defendant was convicted.
9. *Babcock v. Kijakazi*, No. 20-480 (6th Cir., 959 F.3d 210; cert. granted Mar. 1, 2021; argued Oct. 13, 2021). Whether a civil service pension received for federal civilian employment as a “military technician (dual status)” is “a payment based wholly on service as a member of a uniformed service” for the purposes of the Social Security Act’s windfall elimination provision.
10. *Whole Woman’s Health v. Jackson*, No. 21-463 (5th Cir.; cert. before judgment granted Oct. 22, 2021; argued Nov. 1, 2021). Whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.
11. *United States v. Texas*, No. 21-588 (5th Cir.; cert. before judgment granted Oct. 22, 2021; argued Nov. 1, 2021). Whether the United States may bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced.
12. *Houston Community College System v. Wilson*, No. 20-804 (5th Cir., 955 F.3d 490; cert. granted Apr. 26, 2021; argued Nov. 2, 2021). Whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member’s speech.
13. *Badgerow v. Walters*, No. 20-1143 (5th Cir., 975 F.3d 469; cert. granted May 17, 2021; argued Nov. 2, 2021). Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question.
14. *New York State Rifle & Pistol Association Inc. v. Corlett*, No. 20-843 (2d Cir., 818 F. App’x 99; cert. granted Apr. 26, 2021; argued Nov. 3, 2021). Whether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.
15. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, No. 20-915 (9th Cir., 959 F.3d 1194; cert. granted June 1, 2021; argued Nov. 8, 2021). Whether the U.S.



**Gibson Dunn**  
Counsel for *Amici*  
Members of the Business  
Community  
**Partners**  
Scott A. Edelman  
Avi Weitzman



Court of Appeals for the 9th Circuit erred in breaking with its own prior precedent and the findings of other circuits and the Copyright Office in holding that 17 U.S.C. § 411 requires referral to the Copyright Office where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration.



**Gibson Dunn**  
Counsel for *Amici*  
Constitutional Law  
Professors  
**Partner**  
Akiva Shapiro

16. *Federal Bureau of Investigation v. Fazaga*, No. 20-828 (9th Cir., 965 F.3d 1015; cert. granted June 7, 2021; argued Nov. 8, 2021). Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 displaces the state-secrets privilege and authorizes a district court to resolve, in camera and ex parte, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.
17. *United States v. Vaello-Madero*, No. 20-303 (1st Cir., 956 F.3d 12; cert. granted Mar. 1, 2021; argued Nov. 9, 2021). Whether Congress violated the equal-protection component of the due process clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind and disabled individuals—in the 50 states and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico.



**Gibson Dunn**  
Counsel for *Amici*  
Jonathan F. Mitchell and  
Adam K. Mortara  
**Partner**  
Allyson N. Ho

18. *Ramirez v. Collier*, No. 21-5592 (5th Cir.; cert. granted Sept. 8, 2021; argued Nov. 9, 2021). The Questions Presented are: (1) Whether Texas’s decision to forbid a pastor from laying his hands on the defendant during execution substantially burdens the defendant’s exercise of religion. (2) Whether Texas’s decision to forbid a pastor from saying prayers or scripture during the defendant’s execution substantially burdens the defendant’s exercise of religion.

19. *City of Austin v. Reagan National Advertising of Texas Inc.*, No. 20-1029 (5th Cir., 972 F.3d 696; cert. granted June 28, 2021; argued Nov. 10, 2021). Whether the Austin city code’s distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.

Gibson Dunn Named  
Appellate Firm of the Year



Gibson Dunn named  
Appellate Firm of the Year

20. *Becerra v. Empire Health Foundation*, No. 20-1312 (9th Cir., 958 F.3d 873; cert. granted July 2, 2021; argued Nov. 29, 2021). Whether, for purposes of calculating additional payments for hospitals that serve a “significantly disproportionate number of low-income patients,” the Secretary of Health and Human Services has permissibly included in a hospital’s Medicare fraction all of the hospital’s patient days of individuals who satisfy the requirements to be entitled to Medicare Part A benefits, regardless of whether Medicare paid the hospital for those particular days.

21. *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (5th Cir., 948 F.3d 673; CVSG Nov. 2, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021; argued Nov. 30, 2021). Whether the compensatory damages





available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and the Affordable Care Act, include compensation for emotional distress.

22. *American Hospital Association v. Becerra*, No. 20-1114 (D.C. Cir., 967 F.3d 818; cert. granted July 2, 2021; argued Nov. 30, 2021). The Questions Presented are: (1) Whether deference under *Chevron U.S.A. v. Natural Resources Defense Council* permits the Department of Health and Human Services to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data. (2) Whether petitioners' suit challenging HHS's adjustments is precluded by 42 U.S.C. § 1395l(t)(12).

## Cases Scheduled For Argument

23. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (5th Cir., 945 F.3d 265; cert. granted May 17, 2021; argument scheduled Dec. 1, 2021). Whether all pre-viability prohibitions on elective abortions are unconstitutional.

24. *Hughes v. Northwestern University*, No. 19-1401 (7th Cir., 953 F.3d 980; CVSG Oct. 5, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021; argument scheduled Dec. 6, 2021). Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1)(B).

25. *Patel v. Garland*, No. 20-979 (11th Cir., 971 F.3d 1258; cert. granted June 28, 2021; argument scheduled Dec. 6, 2021). Whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a nondiscretionary determination that a noncitizen is ineligible for certain types of discretionary relief.

26. *United States v. Taylor*, No. 20-1459 (4th Cir., 979 F.3d 203; cert. granted July 2, 2021; argument scheduled Dec. 7, 2021). Whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).



**Gibson Dunn**

Counsel for *Amici*  
Constitutional Law  
Scholars

**Partners**

Orin Snyder  
Joshua S. Lipshutz  
Katherine Marquart

Counsel for *Amicus*  
California Women's Law  
Center

**Partners**

Theane D. Evangelis  
Lauren M. Blas



**Gibson Dunn**

Counsel for *Amici* Former  
Executive Office for  
Immigration Review  
Judges

**Partners**

Richard W. Mark  
Amer S. Ahmed

27. *Shinn v. Ramirez*, No. 20-1009 (9th Cir., 937 F.3d 1230; cert. granted May 17, 2021; argument scheduled Dec. 8, 2021). Whether application of the equitable rule the Supreme Court announced in *Martinez v. Ryan* renders the Antiterrorism and Effective Death Penalty Act, which precludes a federal court from considering evidence outside the state-court record when reviewing the merits of a claim for habeas relief if a prisoner or his attorney has failed to diligently develop the claim’s factual basis in state court, inapplicable to a federal court’s merits review of a claim for habeas relief.
28. *Carson v. Makin*, No. 20-1088 (1st Cir., 979 F.3d 21; cert. granted July 2, 2021; argument scheduled Dec. 8, 2021). Whether a state violates the religion clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or “sectarian,” instruction.
29. *Gallardo v. Marsteller*, No. 20-1263 (11th Cir., 963 F.3d 1167; cert. granted July 2, 2021; argument scheduled Jan. 10, 2022). Whether the federal Medicaid Act provides for a state Medicaid program to recover reimbursement for Medicaid’s payment of a beneficiary’s past medical expenses by taking funds from the portion of the beneficiary’s tort recovery that compensates for future medical expenses.
30. *Johnson v. Arteaga-Martinez*, No. 19-896 (3d Cir.; cert. granted Aug. 23, 2021; argument scheduled Jan. 11, 2022). Whether an alien who is detained under 8 U.S.C. § 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge by clear and convincing evidence that the alien is a flight risk or a danger to the community.
31. *Garland v. Gonzalez*, No. 20-322 (9th Cir., 955 F.3d 762; cert. granted Aug. 23, 2021; argument scheduled Jan. 11, 2022). The Questions Presented are: (1) Whether an alien who is detained under 8 U.S.C. § 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the alien is a flight risk or a danger to the community. (2) Whether, under 8 U.S.C. § 1252(f)(1), the courts below had jurisdiction to grant classwide injunctive relief.
32. *Boechler, P.C. v. CIR*, No. 20-1472 (8th Cir., 967 F.3d 760; cert. granted Sept. 30, 2021; argument scheduled Jan. 12, 2022). Whether the 30-day time limit to file a petition for review in the Tax Court of a notice of determination from the commissioner of internal revenue in 26 U.S.C. § 6330(d)(1) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling.
33. *Shurtleff v. Boston*, No. 20-1800 (1st Cir., 986 F.3d 78; cert. granted Sept. 30, 2021; argument scheduled Jan. 18, 2022). The Questions Presented are:

(1) Whether the First Circuit’s application of the “forum doctrine” under the First Amendment conflicts with Supreme Court precedent. (2) Whether the First Circuit’s classification of the speech at issue as government speech conflicts with Supreme Court precedent. (3) Whether the First Circuit’s finding that government approval of the proposed display transformed private speech into government speech conflicts with Supreme Court precedent.

34. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566 (9th Cir., 824 F. App’x 452, 862 F.3d 951; cert. granted Sept. 30, 2021; argument scheduled Jan. 18, 2022). Whether a federal court hearing state law claims brought under the Foreign Sovereign Immunities Act must apply the forum state’s choice-of-law rules to determine what substantive law governs the claims at issue, or whether it may apply federal common law.
35. *Concepcion v. United States*, No. 20-1650 (1st Cir., 991 F.3d 279; cert. granted Sept. 30, 2021; argument scheduled Jan. 19, 2022). Whether, when deciding if it should “impose a reduced sentence” on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal and factual developments.
36. *FEC v. Cruz*, No. 21-12 (D.D.C.; jurisdiction postponed Sept. 30, 2021; argument scheduled Jan. 19, 2022). The Questions Presented are: (1) Whether appellees have standing to challenge the statutory loan-repayment limit of 52 U.S.C. § 30116(j). (2) Whether the loan-repayment limit violates the Free Speech clause of the First Amendment.

## Cases Awaiting An Argument Date

37. *Becerra v. Gresham*, No. 20-37 (D.C. Cir., 950 F.3d 93; cert. granted Dec. 4, 2020, consolidated with *Arkansas v. Greshman*, No. 20-38 (D.C. Cir., 950 F.3d 93); argument scheduled Mar. 29, 2021; argument date vacated Mar. 11, 2021; held in abeyance Apr. 5, 2021). Whether the D.C. Circuit in erred in concluding that the Secretary of Health and Human Services may not authorize demonstration projects to test requirements that are designed to promote the provision of health-care coverage by means of facilitating the transition of Medicaid beneficiaries to commercial coverage and improving their health.
38. *Pivotal Software, Inc. v. Tran*, No. 20-1541 (Cal. Super. Ct.; cert. granted July 2, 2021). Whether the Private Securities Litigation Reform Act’s discovery-stay provision applies to a private action under the Securities Act of 1933 in state or federal court, or solely to a private action in federal court.
39. *Ysleta del Sur Pueblo v. Texas*, No. 20-493 (5th Cir., 955 F.3d 408; cert. granted Oct. 18, 2021). Whether the Ysleta del Sur Pueblo and Alabama-

Coushatta Indian Tribes of Texas Restoration Act provides the Ysleta del Sur Pueblo with sovereign authority to regulate non-prohibited gaming activities on its lands.

40. *Denezpi v. United States*, No. 20-7622 (10th Cir., 979 F.3d 777; cert. granted Oct. 28, 2021). Whether the Court of Indian Offenses of Ute Mountain Ute Agency is a federal agency such that petitioner’s conviction in that court barred his subsequent prosecution in a United States District Court for a crime arising out of the same incident.
41. *West Virginia v. Environmental Protection Agency*, No. 21-1530 (D.C. Cir., 985 F.3d 914; cert. granted Oct. 29, 2021, consolidated with *N. Am. Coal Corp. v. EPA*, No. 20-1531 (D.C. Cir., 985 F.3d 914), *North Dakota v. EPA*, No. 20-1780 (D.C. Cir., 985 F.3d 914), and *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (D.C. Cir., 985 F.3d 914)). Whether, in 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, Congress constitutionally authorized the Environmental Protection Agency to issue significant rules — including those capable of reshaping the nation’s electricity grids and unilaterally decarbonizing virtually any sector of the economy — without any limits on what the agency can require so long as it considers cost, nonair impacts and energy requirements.
42. *Arizona v. City and County of San Francisco*, No. 20-1775 (9th Cir., 992 F.3d 742; cert. granted Oct. 29, 2021). Whether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend.
43. *Ruan v. United States*, No. 20-1410 (11th Cir., 966 F.3d 1101; cert. granted Nov. 5, 2021, consolidated with *Kahn v. United States*, No. 21-5261 (10th Cir., 989 F.3d 806)). Whether a physician alleged to have prescribed controlled substances outside the usual course of professional practice may be convicted under 21 U.S.C. § 841(a)(1) without regard to whether, in good faith, he “reasonably believed” or “subjectively intended” that his prescriptions fall within that course of professional practice.
44. *Marietta Memorial Hospital Employee Health Benefit Plan v. Davita*, No. 20-1641 (6th Cir., 978 F.3d 326; cert. granted Nov. 5, 2021). The Questions Presented are: (1) Whether a group health plan that provides uniform reimbursement of all dialysis treatments observe the prohibition provided by the Medicare Secondary Payer Act (“MSPA”) that group health plans may not “take into account” the fact that a plan participant with end stage renal disease is eligible for Medicare benefits. (2) Whether a plan that provides the same dialysis benefits to all plan participants, and reimburses dialysis providers uniformly regardless of whether the patient has end stage renal disease, observe the prohibition under the MSPA that a group health plan also may not “differentiate” between individuals with end stage renal disease and others “in the benefits it provides.” (3) Whether the MSPA is a coordination-of-benefits measure designed to protect Medicare, not an



antidiscrimination law designed to protect certain providers from alleged disparate impact of uniform treatment.

45. *Egbert v. Boule*, No. 21-147 (9th Cir., 998 F.3d 370; cert. granted Nov. 5, 2021). The Questions Presented are: (1) Whether a cause of action exists under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for First Amendment retaliation claims. (2) Whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff’s Fourth Amendment rights.
46. *Morgan v. Sundance, Inc.*, No. 21-328 (8th Cir., 992 F.3d 711; cert. granted Nov. 15, 2021). Whether the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court’s instruction in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), that lower courts must “place arbitration agreements on an equal footing with other contracts.”

## Cases Decided Without Argument

1. *Rivas-Villegas v. Cortesluna*, No. 20-1539 (9th Cir., 979 F.3d 645; Reversed Oct. 18, 2021). **Per Curiam.** The Court held that the Ninth Circuit erred in denying qualified immunity to petitioner on respondent’s excessive force claim. Petitioner briefly placed his knee on respondent’s back while removing his knife and handcuffing him after responding to a domestic violence report. In denying qualified immunity, the Court reasoned, the Ninth Circuit relied on a materially distinguishable precedent, *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2002). There, the officer responded to a mere noise complaint, the suspect was not armed, and the officer caused significant injury when he deliberately dug his knee into the suspect’s back. Because those facts were not sufficiently similar to put petitioner on notice that his conduct qualified as excessive force—even under Ninth Circuit precedent—the Court reversed.
2. *City of Tahlequah v. Bond*, No. 20-1688 (10th Cir., 981 F.3d 808; Reversed Oct. 18, 2021). **Per Curiam.** The Court held that the Tenth Circuit erred in denying qualified immunity to defendant police officers on respondent’s excessive force claim. Defendants shot and killed Dominic Rollice after he refused to drop a hammer and instead appeared poised to throw it at them. The Tenth Circuit erred, the Court concluded, by relying on a series of decisions, none of which came “close to establishing that the officers’ conduct was unlawful.” The Court thus reversed the denial of qualified immunity.

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

1. *American Axle & Manufacturing Inc. v. Neapco Holdings LLC*, No. 20-891 (Fed. Cir., 966 F.3d 1294; CVSG May 3, 2021). The Questions Presented are:

- (1) What standard determines whether a patent claim is “directed to” a patent-ineligible concept under step 1 of the Supreme Court’s two-step framework for determining whether an invention is eligible for patenting under 35 U.S.C. § 101. (2) Whether patent eligibility (at each step of the Supreme Court’s two-step framework) is a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of art at the time of the patent.
2. *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (1st Cir., 980 F.3d 157; CVSG June 14, 2021). The Questions Presented are: (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions. (2) Whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives.
  3. *Robertson v. Intratek Computer, Inc.*, No. 20-1229 (5th Cir., 976 F.3d 575; CVSG Oct. 4, 2021). The Questions Presented are: (1) Whether mandatory compelled arbitration of claims under 41 U.S.C. § 4712 disrupts the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712. (2) Whether Congress intended to prohibit enforcement of mandatory employment arbitration agreements in 41 U.S.C. § 4712 when it (a) expressly provided for a federal trial in the remedy and enforcement section and (b) expressly prohibited waiver of any rights and remedies provided as a condition of employment.
  4. *Personalweb Technologies, LLC v. Patreon, Inc.*, No. 20-1394 (Fed. Cir., 961 F.3d 1365; CVSG Oct. 4, 2021). The Questions Presented are: (1) Whether the U.S. Court of Appeals for the Federal Circuit correctly interpreted *Kessler v. Eldred* to create a freestanding preclusion doctrine that may apply even when claim and issue preclusion do not. (2) Whether the Federal Circuit properly extended its *Kessler* doctrine to cases in which the prior judgment was a voluntary dismissal.
  5. *C.H. Robinson Worldwide, Inc. v. Miller*, No. 20-1425 (9th Cir., 976 F.3d 1016; CVSG Oct. 4, 2021). Whether a common-law negligence claim against a freight broker is preempted because it does not constitute an exercise of the “safety regulatory authority of a State with respect to motor vehicles” within the meaning of the Federal Aviation Administration Authorization Act’s safety exception.
  6. *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, No. 20-1426 (7th Cir., 980 F.3d 1117; CVSG Oct. 12, 2021). Whether a state statute that expressly caps punitive damages at two times compensatory damages satisfies the notice requirement of the due process clause such that a punitive damages award that complies with the statute is constitutionally sound under the due process clause.

7. ***Virgin America, Inc. v. Bernstein*, No. 21-260 (9th Cir., 3 F.4th 1127; CVSG Nov. 15, 2021).** Whether the Airline Deregulation Act preempts generally applicable state laws that have a significant impact on airline prices, routes, and services, or whether it preempts such laws only if they bind an airline to a particular price, route, or service.
8. ***California Trucking Ass’n v. Bonta*, No. 21-194 (9th Cir., 996 F.3d 664; CVSG Nov. 15, 2021).** Whether the Federal Aviation Administration Authorization Act preempts the application to motor carriers of a state worker-classification law that effectively precludes motor carriers from using independent owner-operators to provide trucking services.

## CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***Hughes v. Northwestern University*, No. 19-1401 (7th Cir., 953 F.3d 980; CVSG Oct. 5, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021).** Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B).
2. ***Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (5th Cir., 948 F.3d 673; CVSG Nov. 2, 2020; cert. supported May 25, 2021; cert. granted July 2, 2021).** Whether the compensatory damages available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and the ACA, include compensation for emotional distress.
3. ***Ysleta del Sur Pueblo v. Texas*, No. 20-493 (5th Cir., 918 F.3d 440; CVSG Feb. 22, 2021; cert. supported Aug. 25, 2021; cert. granted Oct. 18, 2021).** Whether the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act provides the Ysleta del Sur Pueblo with sovereign authority to regulate non-prohibited gaming activities on its lands (including bingo), as set forth in the plain language of Section 107(b), the act’s legislative history and the Supreme Court’s holding in *California v. Cabazon Band of Mission Indians*, or whether the U.S. Court of Appeals for the 5th Circuit’s decision affirming *Ysleta del Sur Pueblo v. Texas (Ysleta I)* correctly subjects the pueblo to all Texas gaming regulations.
4. ***Golan v. Saada*, No. 20-1034 (2d Cir., 833 F. App’x 829; CVSG Apr. 5, 2021; cert. supported Oct. 27, 2021).** Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding.
5. ***LeDure v. Union Pacific Railroad Co.*, No. 20-807 (7th Cir., 962 F.3d 907; CVSG May 17, 2021; cert. supported Nov. 9, 2021).** The Questions Presented



are: (1) Whether a locomotive is “in use” on a railroad’s line and subject to the Locomotive Inspection Act when its train makes a temporary stop in a railyard as part of its unitary journey in interstate commerce, or whether such use does not resume until the locomotive has left the yard as part of a fully assembled train. (2) Whether the Federal Employers’ Liability Act allows a jury determination on the issue of foreseeability of harm from oil on a locomotive passageway when the railroad failed to conduct federally mandated daily safety inspections intended to discover and cure such hazards in the days before the injury.

## CVSG Cases In Which The Solicitor General Opposed Certiorari

1. *Volkswagen Group of America Inc. v. Environmental Protection Commission of Hillsborough County, Florida*, No. 20-994 (9th Cir., 959 F.3d 1201; CVSG Apr. 26, 2021; cert. opposed Sept. 27, 2021; cert. denied Nov. 15, 2021). Whether the Clean Air Act preempts state and local governments from regulating manufacturers’ post-sale, nationwide updates to vehicle emission systems.
2. *Independent School District No. 283 v. E.M.D.H. ex rel. L.H. and S.D.*, No. 20-905 (8th Cir., 960 F.3d 1073; CVSG May 3, 2021; cert. opposed Aug. 23, 2021; cert. denied Oct. 4, 2021). Whether the continuing-violation doctrine applies to the two-year statutory time limit to file an administrative complaint under the Individuals with Disabilities Education Act.
3. *Waterfront Commission of New York Harbor v. Murphy*, No. 20-772 (3d Cir., 961 F.3d 234; CVSG Apr. 5, 2021; cert. opposed Oct. 19, 2021; cert. denied Nov. 22, 2021). Whether, under the doctrine of *Ex parte Young*, an interstate compact agency may sue a state official to prevent that official from implementing a state law that would be preempted under a congressionally approved interstate compact.
4. *Torres v. Texas Dep’t of Public Safety*, No. 20-603 (Tex. App., 583 S.W.3d 221; CVSG Mar. 1, 2021; cert. opposed Nov. 9, 2021). Whether Congress has the power to authorize suits against nonconsenting states pursuant to its constitutional war powers.
5. *Gannett Co. v. Quatrone*, No. 20-609 (4th Cir., 970 F.3d 465; CVSG Apr. 19, 2021; cert. opposed Nov. 9, 2021). Whether a plaintiff adequately pleads breach of the duties of prudence and diversification solely by alleging that fiduciaries permitted participants in a defined contribution plan to choose, from an adequately diversified menu of investment options, to invest in an undiversified single-stock fund.
6. *Marin Housing Authority v. Reilly*, No. 20-1046 (Cal., 472 P.3d 472; CVSG June 21, 2021; cert. opposed Nov. 9, 2021). Whether a public housing authority, in calculating a family’s annual income, is required by 24 C.F.R. § 5.609(c)(16) to exclude Medicaid-funded payments made to a family by a

**State agency to allow the Section 8 tenant to provide personal caregiving services in order to keep a developmentally disabled family member at home.**





## 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 15 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 32 petitions for certiorari since 2006.

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