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# 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

1. ***Biden v. Texas*, No. 21-954 (5th Cir. 20 F.4th 928; cert. granted Feb. 18, 2022; argued Apr. 26, 2022). The Questions Presented are: (1) Whether 8 U.S.C. § 1225 requires the Department of Homeland Security to continue implementing the Migrant Protection Protocols, a former policy under which certain noncitizens arriving at the southwest border were returned to Mexico during their immigration proceedings. (2) Whether the Fifth Circuit erred by concluding that the secretary of homeland security's new decision terminating the Migrant Protection Protocols ("MPP") had no legal effect. The supplemental issues are: (1) Whether 8 U.S.C. § 1252(f)(1) imposes any jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. § 706. (2) Whether such limitations are subject to forfeiture. (3) Whether the Court has jurisdiction to consider the merits of the questions presented.**

   **Decided June 30, 2022 (597 U.S. ).** Fifth Circuit/Reversed and remanded. Chief Justice Roberts for a 5–4 Court (Kavanaugh, J., concurring; Alito, J., joined by Thomas and Gorsuch, J., dissenting; Barrett, J., joined in part by Thomas, Alito, and Gorsuch, J.J., dissenting). The Court held that terminating the MPP did not violate the INA and that DHS's second attempt to do so constituted final agency action. Under MPP, some non-Mexican nationals arriving from Mexico were returned to Mexico to await removal proceedings. When President Biden assumed office, he announced that the program would be terminated, which DHS did in June 2021. The district court enjoined DHS's June decision as unlawful under the INA and as arbitrary and capricious. While the government's appeal was pending, DHS issued a memorandum on October 29, again announcing the termination of MPP and explaining its reasoning. The Court first concluded that, although the district court had lacked jurisdiction to enter its injunction, the Court had jurisdiction to consider the merits of the government's appeal. Turning to those merits, the Court next concluded that DHS's decision to rescind MPP did

not violate the INA. Section 1225(b)(2)(C) provides that DHS "may return the alien" to a contiguous foreign territory, which "plainly confers a *discretionary* authority to return aliens to Mexico." Although another provision of the INA makes detention mandatory, that does not transform the otherwise-discretionary authority in Section 1225 into a mandate where detention is not feasible. If Congress had intended to make return authority "a mandatory cure of any non-compliance with the Government's detention obligations," it would not have used "discretionary language." Moreover, Congress added the return authority nearly a century after it enacted the mandatory detention language, in response to a decision from the Board of Immigration Appeals decision that questioned the lawfulness of the return practice. That history "suggests a more humble role for section 1225(b)(2)(C) than as a mandatory 'safety valve' for any alien who is not detained." In addition, every presidential administration since that provision was enacted has interpreted it as discretionary. And interpreting it as mandatory would interfere with the Executive's foreign-affairs power to negotiate with Mexico. Finally, the Court concluded that DHS's October 29 memorandum constituted final agency action. DHS was allowed to—and did—simultaneously appeal the district court's decision and reconsider termination of MPP by taking new agency action. Thus, the Court reversed and remanded for consideration whether the October 29 memorandum was arbitrary and capricious.

2. ***West Virginia v. Environmental Protection Agency*, No. 20-1530 (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); argued Feb. 28, 2022). Whether, in 42 U.S.C. § 7411(d) ("Section 111(d)"), an ancillary provision of the Clean Air Act ("CAA"), Congress constitutionally authorized the Environmental Protection Agency ("EPA") 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.**

**Decided June 30, 2022 (597 U.S. ).** D.C. Circuit/Reversed and remanded. Chief Justice Roberts for a 6–3 Court (Gorsuch, J., joined by Alito, J., concurring; Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that Congress in Section 111(d) did not grant EPA authority to promulgate the Clean Power Plan ("CPP"). Section 111(d) authorizes EPA to decide the amount of pollution reduction that must be achieved at existing sources of emissions. EPA does so by determining "the best system of emissions reduction" that "has been adequately demonstrated" for existing covered facilities. 40 C.F.R. § 60.22(b)(5); *see* 42 U.S.C. § 4711(a)(1). During the Obama Administration, EPA adopted the CPP pursuant to Section 111(d). Generally, CPP combines burning coal more efficiently with "a sector-wide shift in electricity production from coal to natural gas and renewables," including through a cap-and-trade approach. During the Trump Administration, EPA repealed CPP and replaced it with the Affordable Clean Energy ("ACE") Rule, concluding that Section 111(d) did not authorize it

to adopt the generation-shifting approach promulgated in CPP. The D.C. Circuit vacated EPA's repeal of CPP and the ACE Rule. The new Biden Administration sought a stay of the mandate with respect to CPP, explaining that it was considering whether to adopt a replacement. The Court first concluded that state petitioners had Article III standing to seek review: They were injured by the D.C. Circuit's holding, which purported to subject them to regulation under the CPP. And the case was not moot, even if EPA had no intention of enforcing the CPP, because EPA had not suggested that it would not "reimpose emissions limits predicated on generation shifting." Turning to the merits, the Court next concluded that this was a "major questions" case. The Court's "precedent teaches that there are 'extraordinary cases,'" where history, the breadth of the agency's asserted authority, and the political and economic significance of that assertion counsel hesitation before concluding that Congress "meant to confer such authority." Here, EPA had never previously attempted to use Section 111(d) to reduce pollution by shifting polluting activity to cleaner sources, and on its new "view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get there energy." But Congress has "not conferred a like authority upon EPA anywhere else in the [CAA]." And "[t]he last place one would expect to find it is in the previously little-used backwater of Section 111(d)." Nor could the Court "ignore" that CPP included a cap-and-trade approach that Congress had considered and rejected multiple times. For all of these reasons, EPA was required to point to "clear congressional authorization" to justify CPP. But it could not. Generation shifting could be a "system" capable of reducing emissions. "But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel." Thus, Section 111(d) was far too vague to constitute clear statutory authorization for CPP.

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3. ***Oklahoma v. Castro-Huerta*, No. 21-429 (Okla. Crim. App.; cert. granted Jan. 21, 2022; argued Apr. 27, 2022). Whether a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country.**

**Decided June 29, 2022 (597 U.S. ).** Oklahoma Court of Criminal Appeals/Reversed and remanded. Justice Kavanaugh for a 5–4 Court (Gorsuch, J., joined by Breyer, Sotomayor, and Kagan, J.J., dissenting). The Court held that the "Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country." The dispute in this case arose after the Supreme Court held in *McGirt v. Oklahoma*, 591 U.S. ___ (2020), that much of Oklahoma remains Indian country, raising the question whether Oklahoma has jurisdiction to prosecute crimes committed by non-Indians against Indians in much of the State. The Court explained that although it and the "Federal Government sometimes treated Indian country as separate from state territory" in "the early years of the Republic," *see Worcester v. Georgia*, 6 Pet. 515 (1832), the Court had subsequently held that Indian reservations are part of the surrounding State and presumptive subject to that State's jurisdiction, unless preempted. Thus, the Court had held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. The Court concluded that federal law did not preempt state jurisdiction over crimes

committed by non-Indians against Indians in Indian country. The General Crimes Act extends federal law applying to federal enclaves to Indian country, but does not transform Indian country into an exclusive federal enclave. And Public Law 280 "affirmatively grants certain States broad jurisdiction to prosecute state-law offense committed by or against Indians in Indian country," but does not preempt preexisting state jurisdiction. Nor does state jurisdiction in this circumstance infringe upon tribal self-government. It would not harm tribal interests, because "Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians," and no Indian or tribe would be a party to any criminal suit. It would not harm federal interests, because state jurisdiction supplements, rather than supplants, federal jurisdiction. And it would advance the State's "strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims." As a result, Oklahoma had jurisdiction to prosecute respondent.

4. ***Torres v. Texas Department of Public Safety*, No. 20-603 (Tex. App., 583 S.W.3d 221; cert. granted Dec. 15, 2021; argued Mar. 29, 2022). Whether Congress has the power to authorize suits against nonconsenting states pursuant to its constitutional war powers.**

**Decided June 29, 2022 (597 U.S. ).** Court of Appeals of Texas/Reversed and remanded. Justice Gorsuch for a 5–4 Court (Kagan, J., concurring; Thomas, J., joined by Alito, Gorsuch, and Barrett, J.J., dissenting). The Court held that, "as part of the plan of the Convention, the States waived their immunity under Congress' Article I" war powers. Pursuant to its power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy," Art. I., § 8, cls. 12-13, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994, which permits returning services members to bring damages suits against state employers. The court below dismissed petitioner's suit, holding that Texas was entitled to sovereign immunity because Congress could not authorize suits against nonconsenting States under its Article I powers, except the Bankruptcy Clause. *See Central Va. Community College v. Katz*, 546 U.S. 356 (2006). The Court noted that for several years before and after *Katz*, it had refused to find similar waivers of sovereign immunity under other Article I powers, even describing "*Katz*'s analysis as 'good for one clause only.'" But in *PennEast Pipeline Co. v. New Jersey*, 594 U.S. ___ (2021), the Court held that the States consented to the exercise of federal eminent domain power—giving up sovereign immunity—in the plan of the Convention. Congress's Article I war powers, the Court reasoned, fit within *PennEast*'s test. The Constitution suggests a complete delegation of war powers to the federal government, and divests the States of the power to engage in war. History from the founding era and later—as well as an "unbroken line of precedents supports the same conclusion: Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces." As a result, Congress's war powers are "complete" in themselves, and allowing the State's to frustrate Congress's powers would contradict and be repugnant to the constitutional order. In short, "[t]ext, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense."

5. ***Kennedy v. Bremerton School District*, No. 21-418 (9th Cir., 991 F.3d 1004, 869 F.3d 813; cert. granted Jan. 14, 2022; Apr. 25, 2022). The Questions Presented are: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection. (2) Whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the establishment clause nevertheless compels public schools to prohibit it.**

   **Decided June 27, 2022 (597 U.S. ).** Ninth Circuit/Reversed. Justice Gorsuch for a 6–3 Court (Thomas, J., concurring; Alito, J., concurring; Sotomayor, J., joined by Breyer and Kagan, J.J., dissenting). The Court held that the Free Exercise and Free Speech Clauses of the First Amendment protect a public employee's right to engage in personal religious observance and prohibit the government from suppressing such observance. Respondent placed petitioner, a high school football coach, on administrative leave and then declined to rehire him "because he knelt at midfield after games to offer a quiet prayer of thanks." With respect to the Free Exercise Clause, the Court concluded that petitioner had carried his burden of showing that respondent burdened his sincere religious exercise under a policy that was "neither neutral nor generally applicable": Respondent restricted petitioner's actions in part because they were religious, and it "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." With respect to the Free Speech Clause, the Court concluded that petitioner was engaged in private speech, not government speech. Holding otherwise would generally permit schools to fire teachers for engaging in any religious speech, such as "wearing a headscarf in the classroom" or "praying quietly over … lunch." Under either Clause—and applying either strict or intermediate scrutiny—the Court rejected respondent's argument that its actions were "essential to avoid a violation of the Establishment Clause." The Free Speech Clause, the Free Exercise Clause, and the Establishment Clause "have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." And respondent's argument was based on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny, such as the "endorsement test." But the "Court long ago abandoned *Lemon* and its endorsement test offshoot," instead looking to "original meaning and history." Nor did the evidence support respondent's argument that petitioner's conduct coerced students into prayer. "And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." Because "[t]he Constitution neither mandates nor tolerates that kind of discrimination," the Court ultimately concluded that petitioner was entitled to summary judgment.

6. ***Concepcion v. United States*, No. 20-1650 (1st Cir., 991 F.3d 279; cert. granted Sept. 30, 2021; argued 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.**

**Decided June 27, 2022 (597 U.S. ).** First Circuit/Reversed and remanded. Justice Sotomayor for a 5–4 Court (Kavanaugh, J., joined by Roberts, C.J., and Alito and Barrett, J.J., dissenting). The Court held that the First Step Act permits district courts to consider intervening legal and factual developments. Since before the founding, the Court explained, district courts have had broad discretion in the types of information they consider at initial sentencing. And the Court's precedents made clear that district courts retain that discretion at sentence modification hearings. At either stage, district courts' discretion is limited only by statute or the Constitution. And nothing in the text or structure of the First Step Act expressly or implicitly does so. Moreover, "district courts deciding First Step Act motions regularly have considered evidence of postsentencing rehabilitation and unrelated [Sentencing] Guidelines amendments when raised by the parties." Thus, the Court concluded, the First Step Act permits district courts to consider intervening changes of fact and law. And consistent with established jurisprudence, they must consider nonfrivolous arguments, including regarding such intervening changes, when raised by the parties—although they need not agree with those arguments or modify a sentence accordingly.

7. ***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); argued Mar. 1, 2022). 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.**

**Decided June 27, 2022 (597 U.S. ).** Eleventh Circuit/Vacated and remanded. Justice Breyer for a unanimous Court (Alito, J., joined by Thomas, J., and in part by Barrett, J., concurring in the judgment). The Court held that if "a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." Section 841 prohibits a physician "[e]xcept as authorized," from "knowingly and intentionally" prescribing controlled substances. Prescription is authorized "for a legitimate medical purpose" by a doctor "acting in the usual course of his professional practice." 21 C.F.R. § 1306.4(a). The Court concluded that the "knowingly and intentionally" *mens rea* applies to the "[e]xcept as authorized" clause. Generally, the Court applies a presumption of scienter to criminal statutes—even those that are silent with respect to *mens rea*—a presumption that applies more forcefully to scope of a statute's general scienter provision. And scienter is particularly important in the context of a statute governing prescription, where it is essential to distinguish between beneficial and criminal conduct. To be sure, the Court noted, the particular clause in this case is not an element of the offense. But that simply means that the defendant bears the initial burden of production, it does not change the *mens rea* analysis or the ultimate burden of proof.

8. ***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 Department of Health and Human Services ("HHS") 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.**

**Decided June 24, 2022 (597 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Kagan for a 5–4 Court (Kavanaugh, J., joined by Roberts, C.J., and by Alito and Gorsuch, J.J., dissenting). The Court held that HHS permissibly included all patient days for Medicare-eligible patients, regardless of whether Medicare paid for part or all of the patient's hospital stay. For most hospitals, including such patient days in HHS's calculations decreases their payments from HHS. Although the statutory provision is complex, it has "a surprisingly clear meaning—the one chosen by HHS." HHS approach interprets the words in the provision "to mean just what they mean throughout the Medicare statute." And the structure supports HHS as well, because HHS's approach "accords with the statute's attempt to capture, through two separate measurements, two different segments of a hospital's low-income patient population."

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

**Decided June 24, 2022 (597 U.S. ).** Fifth Circuit/Reversed and remanded. Justice Alito for a 6–3 Court (Thomas, J., concurring; Kavanaugh, J., concurring; Roberts, C.J., concurring in the judgment; Breyer, Sotomayor, Kagan, J.J., dissenting). The Court held that the Constitution does not guarantee a right to abortion, overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court first considered whether the right to abortion is protected by the Constitution. The argument, raised by *amici*, that abortion regulations violate the Equal Protection Clause "is squarely foreclosed by [the Court's] precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." Rather, the right must be found—if at all—in the "liberty" protected by the Due Process Clause. In determining whether that Clause protects a particular liberty interest, the Court undertakes a "historical" inquiry to determine whether the interest is deeply rooted in the Nation's history and tradition. "Until the latter part of the 20th century," however, "there was no support in American law for a constitutional right to obtain an abortion." To the contrary, "abortion had long been a *crime* in every single State" until shortly before *Roe*. "At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." And by 1868, "three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow." Because "*Roe* either ignored or misstated this history, and *Casey*

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declined to reconsider *Roe*'s faulty analysis," the Court set forth the common-law and statutory history, coming to the "inescapable conclusion" that "a right to abortion is not deeply rooted in the Nation's history and traditions." Nor are *Roe* and *Casey* supported by precedent. *Casey* invoked, among others, *Loving v. Virginia*, 388 U.S. 1 (1967) (inter-racial marriage), *Griswold v. Connecticut*, 381 U.S. 438 (1965) (contraception), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education of one's children). And respondents and the United States added *Lawrence v. Texas*, 539 U.S. 558 (2003) (private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage). But none of those cases, the Court explained, involved the right to destroy "potential life," and thus "do not support the right to obtain an abortion." And although both sides made "important policy arguments," the Court lacks authority to weigh those arguments. The Court next determined that *stare decisis* did not require it to retain *Roe* and *Casey*. Five factors weighed in favor of overruling: (1) "*Roe* was … egregiously wrong and deeply damaging"; (2) *Roe*'s "reasoning was exceedingly weak," since it—among other things, "failed to ground its decision in text, history, or precedent," relied on an "erroneous historical narrative," and "concocted an elaborate set of rules" without explaining "how this veritable code could be teased out of anything in the Constitution"; (3) *Casey*'s "undue burden" test has proven unworkable; (4) "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines"; and (5) overruling would not implicate traditional reliance interests, nor is the Court well-positioned to evaluate the societal reliance interests on which *Casey* relied. Finally, the Court announced that abortion regulations should be subject to rational-basis review and concluded that Mississippi's ban on abortion after 15 weeks was justified by legitimate interests, including the "preservation of prenatal life at all stages of development."

10. ***Berger v. North Carolina State Conference of the NAACP*, No. 21-248 (4th Cir., 999 F.3d 915; cert. granted Nov. 24, 2021; argued Mar. 21, 2022). The Questions Presented are: (1) Whether a state agent authorized by state law to defend the state's interest in litigation must overcome a presumption of adequate representation to intervene as of right in a case in which a state official is a defendant. (2) Whether a district court's determination of adequate representation in ruling on a motion to intervene as of right is reviewed de novo or for abuse of discretion. (3) Whether petitioners are entitled to intervene as of right in this litigation.**

**Decided June 23, 2022 (597 U.S. ).** Fourth Circuit/Reversed. Justice Gorsuch for an 8–1 Court (Sotomayor, J., dissenting). When respondent challenged North Carolina's voter-ID law, the State's legislative leaders sought to intervene in the suit to defend the law. The district court denied that motion, and the en banc Fourth Circuit eventually affirmed, holding that they had not overcome the strong presumption that the State Board of Elections (represented by the attorney general) adequately represented their interests. The Court first reasoned that the legislative leaders had an interest in the lawsuit that might be practically impaired without their participation. North Carolina law allows the leaders to represent the State in defending the State's laws, and federal courts should respect "a State's

chosen means of diffusing its sovereign powers among various branches and officials." Moreover, "[p]ermitting the participation of lawfully authorized state agents promotes informed federal-court decisionmaking and avoids the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests." Next, the Court concluded that the legislative leaders' interest might not be "adequately represent[ed]" by the Board. The Fourth Circuit errored, the Court explained, in applying a presumption of adequate representation "when a duly authorized state agent seeks to intervene to defend a state law." And without such a presumption, it was obvious that their interests were not adequately represented. For example, the Board declined to submit any expert-witness affidavits when confronted with a preliminary injunction motion and declined to seek a stay when the district court issued an injunction. Although the Court noted that multiple intervenors might produce administrative difficulties it some cases, it would not produce such difficulties here. Accordingly, the Court determined that the legislative leaders had a right to intervene in the litigation.

11. ***Nance v. Ward*, 21-439 (11th Cir., 981 F.3d 1201; cert. granted Jan. 14, 2022; Apr. 25, 2022). The Questions Presented are: (1) Whether an inmate's as-applied method-of-execution challenge must be raised in a habeas petition instead of through a 42 U.S.C. § 1983 action if the inmate pleads an alternative method of execution not currently authorized by state law. (2) Whether, if such a challenge must be raised in habeas, it constitutes a successive petition when the challenge would not have been ripe at the time of the inmate's first habeas petition.**

**Decided June 23, 2022 (597 U.S. ).** Eleventh Circuit/Reversed and remanded. Justice Kagan for a 5–4 Court (Barrett, J., joined by Thomas, Alito, and Gorsuch, J.J., dissenting). The Court held that an inmate's challenge to his method of execution may be brought pursuant to Section 1983, even if the inmate's proposed alternative method of execution is not currently permitted under state law. A challenge to the method of execution is not a challenge to the validity of a conviction or sentence, nor does it "necessarily imply the invalidity of [the] conviction or sentence," and thus such relief cannot be pursued through habeas. The Court observed that it had previously held that method-of-execution claims generally must be brought pursuant to Section 1983, and that the only issue left open was whether such claims must be brought pursuant to Section 1983 if the inmate's proffered alternative method of execution is not provided for under the State's laws. The Court reasoned that the availability under the forum state's laws of the proffered alternative method of execution was irrelevant. The fact that the proposed relief, if granted, would force Georgia to alter its death penalty statute was no impediment, the Court ruled, because Section 1983 suits often require States to amend their statutes if they want to take a specified action. To hold otherwise, the Court explained, would result in the disparate protection of Eighth Amendment rights depending on whether a State offers alternative methods of execution and whether it has codified its execution protocols.

12. ***Vega v. Tekoh*, No. 21-499 (9th Cir., 985 F.3d 713; cert. granted Jan. 14, 2022; Apr. 20, 2022). Whether a plaintiff may state a claim for relief against a law**

**enforcement officer under 42 U.S.C. § 1983 based simply on an officer's failure to provide the warnings prescribed in *Miranda v. Arizona*.**

**Decided June 23, 2022 (597 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Alito for a 6–3 Court (Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that a failure to provide a *Miranda* warning is not a violation of a constitutional right and does not give rise to a claim under Section 1983. The *Miranda* rules are a prophylactic measure intended to safeguard the Fifth Amendment right against self-incrimination. The Court's precedents have allowed the use of statements obtained in violation of *Miranda* in ways that could not be possible if the *Miranda* rules represented a constitutional right. Although the Court held in *Dickerson v. United States*, 530 U.S. 428 (2000), that Congress could not abrogate *Miranda*, that does not mean that failure to provide a *Miranda* warning amounts to a constitutional violation. The Court reasoned that *Dickerson* addressed only the fact that the *Miranda* rules are intended to protect the Fifth Amendment right, but is not itself a constitutional mandate. As a result, the Court concluded, violation of the *Miranda* rules does not constitute a violation of federal constitutional right giving rise to a claim under Section 1983.

13. ***New York State Rifle & Pistol Association Inc. v. Bruen*, 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.**

**Decided June 23, 2022 (597 U.S. ).** Second Circuit/Reversed and remanded. Justice Thomas for a 6–3 Court (Alito, J., concurring; Kavanaugh, J., joined by Roberts, C.J., concurring; Barrett, J., concurring; Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," and that New York's may-issue licensing regime violates that right. New York is one of six states that conditions licenses to carry on a citizen's showing of "proper cause"—some special need beyond a general desire for self-defense. Following *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), the courts of appeals had applied a two-step analysis to gun regulations, combining a historical analysis with means-end scrutiny. The Court rejected that approach as "one step too many," explaining "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." In that circumstance, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Heller* adopted an historical approach—one that specifically rejected intermediate scrutiny. And the historical approach "accords" with how the Court "assess[es] other constitutional claims." Although that approach may be "difficult," the Court reasoned, it is "more legitimate, and more administrable, than asking judges" to balance competing interests. Under the historical approach, the Court explained, courts must apply "the Second Amendment's historically fixed meaning" to "new circumstances." Specifically, the term "arms" applies not only to weapons existing in the 18th century, but also to "modern instruments that facilitate armed

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self-defense." Similarly, in assessing modern regulations, courts should reason by analogy to historical regulations; for example, courts can identify new "sensitive places" similar to courthouses and polling places—where weapons were prohibited—but cannot extend that concept to reach the entire "island of Manhattan." Applying that approach, the Court concluded that New York's proper-cause requirement violated the Second Amendment. Because "the plain text of the Second Amendment" protects "carrying handguns publicly for self-defense," New York had the burden to show that its requirement was consistent with the tradition of firearms regulation. Canvassing historical sources from England, colonial America and the early Republic, ante-bellum America, Reconstruction, and the late-19th and early-20th century, the Court concluded that New York had not carried its burden: "apart from a handful of late-19th-century jurisdictions, the historical record compiled by respondents d[id] not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." As a result, New York's proper-cause requirement is unconstitutional.

14. ***Marietta Memorial Hospital Employee Health Benefit Plan v. Davita*, No. 20-1641 (6th Cir., 978 F.3d 326; cert. granted Nov. 5, 2021; argued Mar. 1, 2022). 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.**

**Decided June 21, 2022 (596 U.S. ).** Sixth Circuit/Reversed and remanded. Justice Kavanaugh for a 7–2 Court (Kagan, J., joined by Sotomayor, J., dissenting in part). The Court held that a healthcare insurance plan that provides only limited coverage for outpatient dialysis does not impermissibly differentiate in the benefits it provides between individuals having end stage renal disease and all other individuals covered by the plan. The plan at issue, the Court observed, "provide[s] the same benefits, including the same outpatient dialysis benefits, to individuals with and without end-stage renal disease." The Court rejected the contention that the statute prohibited insurance plans from limiting benefits in a way that disparately impacts individuals with end-stage renal disease, because the statute does not set forth a disparate-impact theory and such a theory would be difficult to apply in practice. The Court further reasoned that the healthcare insurance plan at issue did not impermissibly "take into account" the Medicare eligibility of plan participants with end-stage renal disease.

15. ***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).**

**Decided June 21, 2022 (596 U.S. ).** Fourth Circuit/Affirmed. Justice Gorsuch for a 7–2 Court (Thomas, J., dissenting; Alito, J., dissenting). The Court held that attempted robbery under the Hobbs Act is not a "crime of violence," because it does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Attempted robbery under the Hobbs Act requires the government to prove that (1) the defendant "intended to unlawfully take or obtain personal property by means of actual or threatened force," and (2) the defendant "completed a 'substantial step' toward that end." The parties agreed that the "substantial step" "need not be violent." This concession, the Court reasoned, resolved the case, because while "the government must show an intention to take property by force or threat, along with a substantial step toward achieving that object," an "intention is just that, no more." The Court rejected the government's counterarguments that (1) the "crime of violence" enhancement categorically applies to all attempts to commit a violent crime, (2) a "substantial step" toward the commission of Hobbs Act robbery necessarily requires the use, attempted use, or threatened use of physical force, and (3) there are very few cases involving attempted Hobbs Act robbery in which physical force was not used or threatened. Each of these arguments, the Court held, were inconsistent with the statutory language and precedent establishing a categorical approach for interpreting the meaning of a "crime of violence."

16. ***United States v. Washington*, No. 21-404 (9th Cir., 971 F.3d 856; cert. granted Jan. 10, 2022; argued Apr. 18, 2022). Whether a state workers' compensation law that applies exclusively to federal contract workers who perform services at a specified federal facility is barred by principles of intergovernmental immunity, or is instead authorized by 40 U.S.C. § 3172(a), which permits the application of state workers' compensation laws to federal facilities "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State."**

**Decided June 21, 2022 (596 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Breyer for a unanimous Court. The Court held that Washington's workers' compensation law violated the doctrine of intergovernmental immunity because it singled out the federal government or its contractors for less favorable treatment. Section 3172(a) did not save the law, because intergovernmental immunity is waived "only when and to the extent there is a clear congressional mandate." The Court reasoned that the statute's specification that the waiver permitted state regulation "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State" could plausibly be read to waive immunity only insofar as the state regulation does not discriminate against the federal government. In light of the core purpose of the intergovernmental immunity doctrine—preventing discrimination against the federal government—the Court held that "waivers of intergovernmental

immunity" must be read "narrowly, at least where a State claims that Congress has waived immunity from discriminatory state laws." The Court further held that the suit was not moot just because Washington had replaced the challenged law with a generally applicable law, observing that the United States might successfully vacate orders on appeal directing the United States to pay workers' compensation pursuant to the challenged law.

17. ***Shoop v. Twyford*, No. 21-511 (6th Cir., 11 F.4th 518; cert. granted Jan. 14, 2022; argued Apr. 26, 2022). The Questions Presented are: (1) Whether federal courts may use the All Writs Act to order the transportation of state prisoners for reasons not enumerated in 28 U.S.C. § 2241(c). (2) Whether, before a court grants an order allowing a habeas petitioner to develop new evidence, it must determine whether the evidence could aid the petitioner in proving his entitlement to habeas relief, and whether the evidence may permissibly be considered by a habeas court.**

**Decided June 21, 2022 (596 U.S. ).** Sixth Circuit/Reversed and remanded. Chief Justice Roberts for a 5–4 Court (Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting; Gorsuch, J., dissenting). The Court held that a federal court may not rely on the All Writs Act to permit a habeas petitioner to develop new evidence without first assessing whether the evidence sought to be obtained could be "lawfully considered" by the court. AEDPA substantially limits a federal court's ability to consider new evidence in a habeas proceeding seeking relief from a state conviction: Such evidence may be considered only if the evidence relates to a claim based on a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by the Supreme Court, or relies on a "factual predicate that could not have been previously discovered through the exercise of due diligence." The Court has previously held that in deciding whether to grant an evidentiary hearing in a habeas petition, a federal court must take into account these restrictions. The Court reasoned that invocation of the All Writs Act does not obviate that requirement, because "a petitioner cannot use that Act to circumvent statutory requirements or otherwise binding procedural rules." Moreover, "a writ seeking new evidence would not be 'necessary or appropriate in aid of' a federal habeas court's jurisdiction, as all orders under the All Writs Act must be, if it enables a prisoner to fish for unusable evidence." Because the habeas petitioner had offered no colorable explanation for how such evidence could be admitted and used in a habeas proceeding, the writ should have been denied.

18. ***Carson v. Makin*, No. 20-1088 (1st Cir., 979 F.3d 21; cert. granted July 2, 2021; argued 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.**

**Decided June 21, 2022 (596 U.S. ).** First Circuit/Reversed and remanded. Chief Justice Roberts for a 6–3 Court (Breyer, J., joined by Kagan, J., and in part

by Sotomayor, J., dissenting; Sotomayor, J., dissenting). The Court held that Maine's restriction preventing "sectarian" secondary schools from receiving tuition-aid funds violates the Free Exercise Clause. Certain areas in Maine do not have public secondary schools. Parents in those areas can designate the public or private secondary school they would like their children to attend, and Maine will defray the costs of tuition—so long as the school is "nonsectarian." That restriction, the Court reasoned, violated the principles set forth in *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. ___ (2017) (state could not preclude church from receiving playground resurfacing grant), and *Espinoza v. Montana Department of Revenue*, 591 U.S. ___ (2020) (state could not exclude religious schools from scholarship program). Under those cases, the government burdens the free exercise of religion when it precludes religious institutions from participating in a generally available benefit program. And a generalized interest in separating church and state beyond the requirements of the Establishment Clause is insufficient to survive strict scrutiny. Maine could not defend its program by recharacterizing the benefit it offered as the "rough equivalent" of a public school education. For one thing, the statute described the benefit as "*tuition* at a public *or* private school," with "no suggestion that the 'private school' must somehow provide a 'public' education." For another, the only equivalence between Maine public schools and the private schools it funds are that both provide a secular education. "Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools." Nor could Maine distinguish *Trinity Lutheran* and *Espinoza* by arguing that its program discriminated against religious *use* of funds, rather than the religious *status* of recipients. "[T]hose decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause." And attempting "to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." In *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that the Free Exercise Clause does not require states to fund a degree in ministerial training as part of a generally available tuition assistance program. But the Court limited *Locke* to "its narrow focus on vocational religious degrees." Thus, the Court concluded that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause."

19. ***George v. McDonough*, No. 21-234 (Fed. Cir., 991 F.3d 1227; cert. granted Jan. 14, 2022; argued Apr. 19, 2022). Whether, when the Department of Veterans Affairs ("VA") denies a veteran's claim for benefits in reliance on an agency interpretation that is later deemed invalid under the plain text of the statutory provisions in effect at the time of the denial, that is the kind of "clear and unmistakable error" that the veteran may invoke to challenge the VA's decision.**

**Decided June 15, 2022 (596 U.S. ).** Federal Circuit/Affirmed. Justice Barrett for a 6–3 Court (Sotomayor, J., dissenting; Gorsuch, J., joined by Breyer, J., and in part by Sotomayor, J., dissenting). The Court held that the "clear and

unmistakable error" exception does not allow "relief from a VA decision applying an agency regulation that, although unchallenged at the time, is later deemed contrary to law." Once a VA decision becomes final, veterans generally cannot seek collateral review absent exceptional circumstances. One such circumstance allows for review on grounds of "clear and unmistakable error." 38 U.S.C. §§ 5109A, 7111. To interpret this unusual provision, which "appears nowhere else in the entire United States Code," the Court turned to "a robust regulatory backdrop." Congress transplanted "clear and unmistakable" error as a term of art from longstanding VA practice. Under that practice, a change in law or a change in interpretation of law did not qualify as such an error. Rather, only the law and legal interpretations existing at the time of the initial VA decision could be considered. And because the later invalidation of a VA regulation is a change in interpretation of law, it cannot support a claim of clear and unmistakable error. Indeed, petitioner identified only one case arguably sustaining such a claim, and "[o]ne uncertain outlier does not come close to moving the mountain of contrary regulatory authority." Nor is there anything "incongruous about a system in which this kind of error—the application of a since-rejected statutory interpretation—cannot be remedied after a final judgment"; that is the general rule that applies in litigation as well.

20. ***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 HHS 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. § 1395*l*(t)(12).**

**Decided June 15, 2022 (596 U.S. ).** D.C. Circuit/Reversed and remanded. Justice Kavanaugh for a unanimous Court. The Court held that the Medicare statute does not preclude judicial review and does not permit HHS to vary the reimbursement rate by hospital group if it has not conducted a survey of hospitals' acquisition costs. HHS has two options for setting reimbursement rates: (1) it may conduct a survey of hospital acquisitions costs and reimburse at average drug cost, "which, at the option of Secretary, may vary by hospital group," or (2) it may use the average drug price "as calculated and adjusted by the Secretary." 42 U.S.C. § 1395*l*(t)(14)(A)(iii). In 2018 and 2019, without conducting a survey, HHS set a lower reimbursement rate for a group of hospitals that generally serve low-income or rural communities. That decision was reviewable, the Court reasoned, because nothing in the Medicare statute specifically rebutted the strong presumption favoring judicial review of final agency action. And the decision exceeded HHS's authority, the Court held, because "[t]he statute expressly authorizes HHS to vary rates by hospital group if HHS has conducted … a survey. But the statute does not authorize such a variance in rates if HHS has not conducted a survey." Although the second option permits HHS to "adjust" the average price, "varying a rate by hospital group is not a lesser-included power of adjusting price." Rather, the price must "be set drug by drug, not hospital by hospital or hospital group by hospital group." Concluding otherwise would make

little sense in light of statute's structure, since HHS would never need to conduct the survey required under the first option.

21. ***Ysleta del Sur Pueblo v. Texas*, No. 20-493 (5th Cir., 955 F.3d 408; cert. granted Oct. 18, 2021; argued Feb. 22, 2022). 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.**

**Decided June 15, 2022 (596 U.S. ).** Fifth Circuit/Vacated and remanded. Justice Gorsuch for a 5–4 Court (Roberts, C.J., joined by Thomas, Alito, and Kavanaugh, J.J., dissenting). The Court held that the Restoration Act "bans as a matter of federal law on tribal lands only those gaming activities also banned in Texas." In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court interpreted a 1953 law to mean that "if a state law *prohibits* a particular game," the "State may enforce its ban on tribal lands." But "if state laws merely *regulate* a game's availability," the State may not "enforce its rules on tribal lands." Six months later, Congress enacted the Restoration Act, which provides that: (a) "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and lands of the" Ysleta del Sur Pueblo Tribe; (b) precluded Texas from exercising "civil or criminal regulatory jurisdiction"; and (c) provided federal courts with exclusive jurisdiction over violations of subsection (a). The Court interpreted the Act to draw the "same prohibitory/regulatory framework" set forth in *Cabazon*. And because Texas does not prohibit bingo generally (instead regulating the time, place, and manner in which bingo can be offered), the Act permits the Tribe to offer bingo. To be sure, Texas's laws could be characterized as a prohibition on bingo that does not comply with state regulations, but that would collapse the distinction between prohibition and regulation and render subsection (b) superfluous. Moreover, Congress presumably was aware of *Cabazon* when it enacted the Restoration Act, so it makes sense to read the Act as tracking the same distinction *Cabazon* drew. Indeed, Congress enacted other statutes around the same time that provided regulatory authority to other states over gaming activities on certain tribal lands, but it did not provide the same authority to Texas.

22. ***Golan v. Saada*, No. 20-1034 (2d Cir., 833 F. App'x 829; cert. granted Dec. 10, 2021; argued Mar. 22, 2022). 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.**

**Decided June 15, 2022 (596 U.S. ).** Second Circuit/Vacated and remanded. Justice Sotomayor for a unanimous Court. The Court held that district courts need not "consider all ameliorative measures" before denying return due to a grave risk. Generally, the Hague Convention requires district courts to return a child to the child's country of habitual residence. One exception to that rule, however, is where the court finds "a grave risk that … return would expose the child to physical or psychological harm." Art. 13(b). Under Second Circuit

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precedent, a district court must consider "the full range of options that might make possible the safe return of a child" before denying return on that basis. *Blondin v. Dubois*, 238 F.3d 153, 163 n.11 (2d Cir. 2001). That requirement, the Court reasoned, is inconsistent with the Hague Convention. "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising" discretion after finding a grave risk. And the question whether such a risk exists "is separate from the question whether there are ameliorative measures that could mitigate that risk." Although courts may and often will consider the possibility of ameliorative measures in determining whether a grave risk exists, they are not categorically required to do so. Rather, they should consider such measures when raised by the parties and where the circumstances obviously suggest such measures, "guided by the legal principles and other requirements" of the Convention. Thus, for example, "a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings."

23. ***Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (Cal. Ct. App., 2020 WL 5584508; cert. granted Dec. 15, 2021; argued Mar. 30, 2022). Whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act.**

**Decided June 15, 2022 (596 U.S. ).** California Court of Appeal/Reversed and remanded. Justice Alito for an 8–1 Court (Sotomayor, J., concurring; Barrett, J., joined by Kavanaugh, J., and in part by Roberts, C.J., concurring in part and in the judgment; Thomas, J., dissenting). The Court held that the FAA preempts California's rule invalidating arbitration clauses that divide PAGA actions into individual and non-individual claims. PAGA permits individual employees who have suffered certain labor violations to enforce California's labor laws by suing their employer on behalf of themselves and other current and former employees. The majority of any recovery goes to the state labor agency, with the remainder divided among affected employees. In *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014), the California Supreme Court held that arbitration agreements purporting to waive the right to bring PAGA claims are invalid. The Court concluded that the FAA preempts *Iskanian*'s rule insofar as it precludes division of PAGA claims into individual and non-individual claims through an agreement to arbitrate. The Court reasoned that the FAA does not preempt *Iskanian*'s rule insofar as it bars wholesale waivers of the right to bring PAGA claims. Although the FAA bars state rules precluding arbitration agreements that waive the right to bring class actions, PAGA claims are distinct from class actions. Unlike a class-action plaintiff, a PAGA plaintiff represents a single principal—the state labor agency—and thus PAGA claims do not require the burdensome and complex procedures required for class actions that are inconsistent with the informal nature of arbitration. And there is nothing unusual about arbitrating claims on behalf of absent principals. Nonetheless, the Court did identify a conflict between the FAA and *Iskanian*'s rule, specifically, its invalidation of agreements to arbitrate only "individual PAGA claims for Labor

Code violations that an employee suffered" while excluding from arbitration claims for violations suffered by other employees. 59 Cal. 4th at 383. Requiring the parties to arbitrate violations suffered by all employees or forgo arbitration altogether conflicts with the FAA's demand that the parties must be able to control which claims are subject to arbitration by consent. Thus, the California courts appropriately held that petitioner's arbitration agreement was invalid insofar as it constituted a wholesale waiver of the right to bring PAGA claims. But they erred in refusing to enforce the agreement to arbitrate individual claims. And because respondent lacked statutory standing to bring solely non-individual claims, those claims should have been dismissed once the individual claims were sent to arbitration.

24. ***ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 (E.D. Mich., 2021 WL 3629899; cert. granted Dec. 10, 2021, consolidated with *AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States*, No. 21-518 (2d Cir., 5 F.4th 216); argued Mar. 23, 2022). Whether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in "a foreign or international tribunal," encompasses private commercial arbitral tribunals, as the U.S. Courts of Appeals for the 4th and 6th Circuits have held, or excludes such tribunals, as the U.S. Courts of Appeals for the 2nd, 5th, and 7th Circuits have held.**

**Decided June 13, 2022 (596 U.S. ).** Eastern District of Michigan/Reversed; Second Circuit/Reversed. Justice Barrett for a unanimous Court. The Court held that the term "foreign or international tribunal" means governmental or intergovernmental tribunals, not private adjudicatory bodies. Standing alone, the term "tribunal" could refer narrowly to courts or broadly to any adjudicatory body. But the term does not stand alone. Rather, it is attached to the modifiers "foreign" and "international" and, in that context, "is best understood as an adjudicative body that exercises governmental authority." The term "foreign" could mean "of" or "from" another country, but takes on the former, governmental "meaning when modifying a word with potential governmental or sovereign connotations." And the term "international" likewise could refer to multiple nations or multiple nationalities. But the latter would make little sense in the context of Section 1782, where it would make a tribunal "international" if the adjudicators were of different nationalities. Moreover, the history of Section 1782 reflects a desire for comity in international relations. And it allows for broader discovery than allowed under the FAA. Thus, the best interpretation, the Court concluded, is that a "foreign or international tribunal" is one that exercises government authority conferred by a single nation or by two or more nations. Because neither of the arbitration panels at issue in these cases qualified under that definition, the Court concluded that the litigants were not permitted to use Section 1782 to seek discovery.

25. ***Denezpi v. United States*, No. 20-7622 (10th Cir., 979 F.3d 777; cert. granted Oct. 28, 2021; argued Feb. 22, 2022). 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.**

**Decided June 13, 2022 (596 U.S. ).** Tenth Circuit/Affirmed. Justice Barrett for a 6–3 Court (Gorsuch, J., joined in part by Sotomayor and Kagan, J.J., dissenting). The Court held that the Double Jeopardy Clause does not bar successive prosecutions of different offenses by the same sovereign. "This case," the Court explained, "arguably involves a single sovereign (the United States) that enforced its own law (the Major Crimes Act) after having separately enforced the law of another sovereign (the Code of the Ute Mountain Ute Tribe)" for offenses arising out of the same incident. The Double Jeopardy Clause "focuses on whether successive prosecutions are for the same 'offense.'" "Because the sovereign source of a law is an inherent and distinctive feature of the law itself," the Court reasoned, "an offense defined by one sovereign is necessarily a different offense from that of another sovereign"—"even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign." And because the offenses for which petitioner was prosecuted were enacted by different sovereigns, prosecuting him separately for both did not violate the Clause. It makes no difference whether the same sovereign prosecutes in both instances, because the Clause focuses on the nature of the offense, not the identity of the prosecutor. And although certain passages in prior opinions suggested that the identity of the prosecutor might matter, none of those cases had involved or even mentioned the possibility "of a single sovereign successively prosecuting its own law and that of a different sovereign." "[I]f there is a constitutional barrier to such cross-enforcement, it does not derive from the Double Jeopardy Clause."

26. ***Johnson v. Arteaga-Martinez*, No. 19-896 (3d Cir.; cert. granted Aug. 23, 2021; argued 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.**

**Decided June 13, 2022 (596 U.S. ).** Third Circuit/Reversed and remanded. Justice Sotomayor for an 8–1 Court (Thomas, J., joined in part by Gorsuch, J., concurring; Breyer, J., concurring in part and dissenting in part). The Court held that Section 1231(a)(6) does not require the government "to offer detained noncitizens bond hearings after six months of detention," in which hearing the government "bears the burden of proving by clear and convincing evidence that a noncitizen poses a flight risk or danger to the community." That provision states that certain noncitizens who have been ordered removed "may be detained beyond the [90-day] removal period and, if released, shall be subject to [certain] terms of supervision." 8 U.S.C. § 1231(a)(6). That text, the Court reasoned, "says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required." The government can offer such hearings, but the statutory text does not require them. Nor does the canon of constitutional avoidance support such a result, because "there is no plausible construction of the text" that would impose such

requirements. Because the Third Circuit had concluded otherwise, the Court reversed, but it did not reach respondent's alternative argument that detaining him without a bond hearing violated due process.

27. ***Garland v. Gonzalez*, No. 20-322 (9th Cir., 955 F.3d 762; cert. granted Aug. 23, 2021; argued 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.**

**Decided June 13, 2022 (596 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Alito for a 6–3 Court (Sotomayor, J., joined by Kagan, J., and in part by Breyer, J., concurring in the judgment in part and dissenting in part). The Court held that the district courts lacked jurisdiction to grant classwide injunctive relief requiring the government to provide bond hearings to detained aliens. Section 1252(f)(1) strips all courts (other than the Supreme Court) of jurisdiction "to enjoin or restrain the operation of the provisions" of certain sections of the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1252(f)(1). Considering the ordinary meaning of those terms, the Court reasoned that Section 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." It also includes an exception, which applies "to the application of such provisions to an individual alien against whom proceedings … have been initiated." *Id.* That exception, the Court explained, does not permit "injunctive relief on behalf of an entire class of aliens." As a result, the district courts lacked jurisdiction to enter injunctions requiring the government to provide bond hearings on a classwide basis. The Court rejected respondents' argument that Section 1252(f)(1) applies only to the provisions of the INA as properly interpreted. That reading is not the most natural interpretation, would oddly deprive courts of jurisdiction over only constitutional claims, and would make jurisdiction turn on the merits of a particularly claim. And although Section 1252(f)(1), unlike a neighboring provision, contains no "express reference to class actions," the Court was "reluctant to give much weight to this negative inference," since Section 1252(f)(1) could apply to efforts to obtain injunctive relief beyond class actions.

28. ***Kemp v. United States*, No. 21-5726 (11th Cir., 857 F. App'x 573; cert. granted Jan. 10, 2022; argued Apr. 19, 2022). Whether Federal Rule of Civil Procedure 60(b)(1) authorizes relief based on a district court's error of law.**

**Decided June 13, 2022 (596 U.S. ).** Eleventh Circuit/Affirmed. Justice Thomas for an 8–1 Court (Sotomayor, J., concurring; Gorsuch, J., dissenting). The Court held that a "mistake" under Rule 60(b)(1) can include a judge's error of law. A motion for relief from a final judgment or order based on "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1) must be brought within one year of the entry of the judgment or order. A motion for relief based

upon the "catchall" provision of Rule 60(b)(6) is not subject to the one-year limit, but cannot be based upon a ground that could form the basis for relief under the other provisions of Rule 60(b). The Court determined that "mistake" in Rule 60(b)(1) includes judge's errors of law, and thus a motion arguing for relief based upon such an error must be brought within one year. That conclusion followed from the ordinary meaning of mistake when the Rule was adopted, from the fact that the drafters did not distinguish between mistakes of law and mistakes of fact, and from their decision not to limit the Rule to a party's mistake—as a previous version of the Rule did. At the same time, the Court rejected the government's view that Rule 60(b)(1) includes only "obvious" legal errors as unsupported by the text or history of the Rule.

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29. ***Egbert v. Boule*, No. 21-147 (9th Cir., 998 F.3d 370; cert. granted Nov. 5, 2021; argued Mar. 2, 2022). 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.**

**Decided June 8, 2022 (596 U.S. ).** Ninth Circuit/Reversed. Justice Thomas for a 6–3 Court with respect to the Fourth Amendment and for a unanimous Court with respect to the First Amendment (Gorsuch, J., concurring in the judgment; Sotomayor, J., joined by Breyer and Kagan, J.J., concurring in the judgment in part and dissenting in part). The Court held that *Bivens* does not create a cause of action for respondent's Fourth Amendment excessive-force claim or First Amendment retaliation claim. In *Bivens*, the Court created a damages remedy against federal narcotics officers for a Fourth Amendment claim. But over the past few decades, the Court has repeatedly declined to extend *Bivens* to recognize new causes of action. To decide whether to extend *Bivens*, the Court asks whether the claim arises in a new context and, if so, whether Congress or the Court is better positioned to fashion a new remedy. These "steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." With respect to respondent's Fourth Amendment claim, the Court held that the claim presented a new context, and the Court identified two "reason[s] to hesitate before recognizing a cause of action against" petitioner. For one, the claim arose in the context of cross-border security, which has national-security implications and runs the risk of undermining the security of the border. For another, Congress has provided alternative remedies, specifically, investigation by the Executive Branch and an administrative grievance program. The "question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts." With respect to respondent's First Amendment claim, the Court reasoned that such claims arise in a new context and that there are "many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy." For example, it "would pose an acute risk of increasing" social costs, such as the risk that harassing litigation would unduly inhibit federal officers.

Finally, the court noted that *Bivens* has been heavily criticized, but that it "need not reconsider *Bivens* itself" to decide this case.

30. ***Siegel v. Fitzgerald*, No. 21-441 (4th Cir., 996 F.3d 156; cert. granted Jan. 10, 2022; argued Apr. 18, 2022). Whether the Bankruptcy Judgeship Act violates the uniformity requirement of the Constitution's Bankruptcy Clause by increasing quarterly fees solely in districts under the U.S. Trustee program, not in those under the Bankruptcy Administrator program.**

**Decided June 6, 2022 (596 U.S. ).** Fourth Circuit/Reversed and remanded. Justice Sotomayor for a unanimous Court. The Court held that "Congress' enactment of a significant fee increase that exempted debtors in two States violated the uniformity requirement" of the Bankruptcy Clause. Because of a historical quirk, bankruptcy proceedings in North Carolina and Alabama are administered by the courts (the "Administrator Program") while bankruptcy proceedings elsewhere are administered by the Department of Justice (the "Trustee Program"). In 2017, Congress enacted a temporary, significant fee increase for large pending cases in the Trustee Program. In 2018, the courts ordered a corresponding increase for cases in the Administrator Program, but applied that increase only to new cases. That difference, the Court concluded, violated the uniformity requirement. As an initial matter, the Court declined to distinguish between "substantive" and "administrative" laws regulating bankruptcy and noted that this particular fee increase was not based on "regional needs." The Court thus reasoned that the uniformity requirement applied. And that requirement "offers Congress flexibility, but does not permit arbitrary geographically disparate treatment of debtors." Congress's 2017 fee increase was not geographically uniform, and nor was it a response to any regional variation or particular geographic problem. Rather, it was a response to "an artificial funding distinction that Congress itself created," and thus violated the Bankruptcy Clause. The Court declined to decide the appropriate remedy, however, leaving that issue to the court of appeals to consider in the first instance.

31. ***Southwest Airlines Co. v. Saxon*, No. 21-309 (7th Cir., 993 F.3d 492; cert. granted Dec. 10, 2021; argued Mar. 28, 2022). Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate "transportation workers" exempt from the FAA.**

**Decided June 6, 2022 (596 U.S. ).** Seventh Circuit/Affirmed. Justice Thomas for a unanimous Court. The Court held that workers who physically load and unload cargo from airplanes are transportation workers engaged in foreign or interstate commerce and thus exempt from the FAA. Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Respondent worked as a ramp supervisor who frequently loaded and unloaded cargo from airplanes. The Court explained that determining whether she was part of a "class of workers" covered by Section 1 depended on whether employees like her were "actually engaged in interstate commerce in their day-to-day work," not

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whether her employer engaged in interstate commerce. And "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." Employees who load and unload airline cargo are such a class, as the statutory text and context confirm. Although Section 1 does not extend to workers remotely connected to interstate commerce, it cannot be limited to those who "physically accompany freight across state or international boundaries."

32. ***Gallardo v. Marstiller*, No. 20-1263 (11th Cir., 963 F.3d 1167; cert. granted July 2, 2021; argued 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.**

**Decided June 6, 2022 (596 U.S. ).** Eleventh Circuit/Affirmed. Justice Thomas for a 7–2 Court (Sotomayor, J., joined by Breyer, J., dissenting). The Court held that the Medicaid Act permits states "to seek reimbursement from settlement payments allocated for future medical care." Under Medicaid, states must pay for certain medical costs and attempt to recoup "payment for medical care" from liable third parties. 42 U.S.C. § 1396k(a)(1)(A). The Court reasoned that nothing in the text of that provision limits that obligation to payments for past medical care, distinguishing only between medical care and non-medical care. Elsewhere, Congress expressly limited states' right to payment for past medical care, and no principle of statutory construction allowed the Court to read that limit into the reimbursement provision.

33. ***Morgan v. Sundance, Inc.*, No. 21-328 (8th Cir., 992 F.3d 711; cert. granted Nov. 15, 2021; argued Mar. 21, 2022). Whether the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violates 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."**

**Decided May 23, 2022 (596 U.S. ).** Eighth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that the FAA does not permit courts to create an arbitration-specific procedural rule governing waiver. Applying "the strong federal policy favoring arbitration," most federal courts had held that a party waives its contractual right to arbitration by litigating only if the other party would be prejudiced by its actions. Outside the arbitration context, however, waiver does not require a showing of prejudice. The FAA's policy favoring arbitration, the Court reasoned, "does not authorize federal courts to invent special, arbitration-preferring procedural rules." That "policy is about treating arbitration contracts like all others, not about fostering arbitration." Going forward, courts may apply a procedural framework other than waiver, such as forfeiture, estoppel, laches, or procedural timeliness—the Court did not address which, if any, of those frameworks might apply—but they may not concoct arbitration-specific rules.

34. ***Shinn v. Ramirez*, No. 20-1009 (9th Cir., 937 F.3d 1230; cert. granted May 17, 2021; argued Dec. 8, 2021). Whether application of the equitable rule the Supreme Court announced in *Martinez v. Ryan* renders AEDPA, 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.**

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**Decided May 23, 2022 (596 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Thomas for a 6–3 Court (Sotomayor, J., joined by Breyer and Kagan, J.J., dissenting). The Court held the equitable rule announced in *Martinez* does not permit federal courts to dispense with AEDPA's limits on expanding the state-court record where "a prisoner's state postconviction counsel negligently failed to develop" that record. The doctrine of procedural default prohibits a habeas petitioner from raising a claim in federal court that was not, and could no longer be, raised in state court, unless the petitioner can show both cause and prejudice. In *Martinez*, the Court recognized a narrow exception to the rule that attorney error cannot establish cause to excuse a procedural default, holding that ineffective assistance of postconviction counsel can constitute cause to forgive procedural default of trial-ineffective-assistance claims, but only if such claims cannot be raised before postconviction proceedings. At the same time, AEDPA establishes a narrow exception to the rule that federal habeas petitioners generally cannot develop a new record that was not developed in state court; the petitioner must both rely on a new rule of constitutional law or new evidence that could not have previously been discovered and show innocence by clear and convincing evidence. 28 U.S.C. § 2254(e). The Court declined to extend *Martinez*'s equitable exception to that standard. Although the Court had discretion to modify the judge-made rules for procedural default, it lacked authority to modify AEDPA's statutory scheme. And *Martinez*'s expressly narrow holding cut against extending that case to apply to record development. Moreover, expanding factfinding in federal court would undercut state criminal trials and act as "an affront to the State and its citizens who returned a verdict of guilt."

35. ***Patel v. Garland*, No. 20-979 (11th Cir., 971 F.3d 1258; cert. granted June 28, 2021; argued 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.**

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**Decided May 16, 2022 (596 U.S. ).** Eleventh Circuit/Affirmed. Justice Barrett for a 5–4 Court (Gorsuch, J., joined by Breyer, Sotomayor, and Kagan, J.J., dissenting). The Court held that federal courts lack jurisdiction to review factual findings underlying a denial of discretionary relief. "Section 1252(a)(2)(B)(i) strips courts of jurisdiction to review 'any judgment regarding the granting of relief' under 8 U.S.C. § 1255." The Court concluded that the word "judgment" in this context means any authoritative decision, rejecting the government's view that the word applies only to discretionary decisions and petitioner's view that it applies only to the ultimate decision whether to grant or withhold relief. That

followed from the text of the statute, which bars review of "*any*" judgment "*regarding*" the granting of relief, as well as from the statutory exception permitting review of constitutional and legal—but not factual—questions. Moreover, had Congress intended to restrict jurisdiction over only discretionary judgments, as the government urged, it could have done so expressly, as it did in other provisions of the immigration code. Similarly, if Congress intended to restrict jurisdiction over only the ultimate judgment, as petitioner argued, it could have used the term "final order," as in a neighboring provision. Finally, precluding judicial review of factual findings in the context of denials of discretionary relief is not arbitrary, the Court concluded, even though similar findings are reviewable in other contexts. Rather, "[i]t reflects Congress' choice to provide reduced procedural protections for discretionary relief," which is a "matter of grace," not of right.

36. ***FEC v. Cruz*, No. 21-12 (D.D.C.; jurisdiction postponed Sept. 30, 2021; argued 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.**

**Decided May 16, 2022 (596 U.S. ).** D.D.C./Affirmed. Chief Justice Roberts for a 6–3 Court (Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that appellees had standing to challenge the statutory loan-repayment limit and that the loan-repayment limit violated the First Amendment. Section 304 of the Bipartisan Campaign Reform Act of 2002 prohibits campaigns from using post-election contributions to repay more than $250,000 in personal loans from candidates. Implementing regulations, in turn, prohibit campaigns from repaying any amount above $250,000 more than 20 days after an election using any source of funds. To set up a constitutional challenge to the statute, Senator Ted Cruz loaned his campaign $260,000. After the election, his campaign repaid $250,000, leaving him $10,000 short. The Court first held that this "pocketbook" injury to Senator Cruz—and the campaign's inability to discharge its debt—gave them Article III standing. Although appellees had subjected themselves to those injuries willingly, the injuries nonetheless were traceable to Section 304. And although it was unclear whether the statute or the regulation prohibited refunding the $10,000 in this case, appellees had standing to challenge the statute, since it was the sole statutory basis for the regulation. Turning to the merits, the Court held that Section 304 violates the First Amendment. All agreed that the statute imposes at least some burden on core political speech: "Section 304 increases the risk that [personal] loans will not be repaid," which "inhibits candidates from loaning money to their campaigns in the first place." Yet the government failed to prove that Section 304 served a legitimate interest in restricting speech. The Court had previously "recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." But Section 304 did not serve that interest. Campaign contributions are capped at $2,900 for each primary and general election; significant contributions must be publicly disclosed; and the government put forward no record evidence or legislative findings suggesting that

an additional restriction on repaying candidate loans with post-election contributions prevents *quid pro quo* corruption. Nor was the government's "common sense" argument that post-election contributions made for that purpose function as a gift to candidates persuasive. *Winning* candidates expect to be repaid, so post-election contributions do not function as a gift. And *losing* candidates have nothing to offer in return. As a result, Section 304 restriction is unconstitutional.

37. ***Shurtleff v. Boston*, No. 20-1800 (1st Cir., 986 F.3d 78; cert. granted Sept. 30, 2021; argued 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.**

**Decided May 2, 2022 (596 U.S. ).** First Circuit/Reversed and remanded. Justice Breyer for a unanimous Court (Kavanaugh, J., concurring; Alito, J., joined by Thomas and Gorsuch, J.J., concurring in the judgment; Gorsuch, J., joined by Thomas, J., concurring in the judgment). The Court held that Boston's flag-raising program does not constitute government speech and that Boston's refusal to allow petitioner to fly a Christian flag was impermissible viewpoint discrimination. Boston allows private groups to use a flagpole outside city hall to raise flags of their choosing. The city had never denied a private group's request until it refused to allow petitioner to fly a Christian flag. Whether that refusal violated the First Amendment, the Court reasoned, turned on whether the flag-raising program constitutes government speech or a government-opened forum for private speech. Applying a "holistic inquiry"—guided by factors such as "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression"—the Court concluded that the program was not government speech. The general history of raising flags on government property favored Boston, since flags frequently convey government speech in that context. But Boston had not previously sought to exercise any control over the "content or meaning" of flags raised by private groups. In fact it had "no written policies or clear internal guidance … about what flags groups could fly and what those flags would communicate." Because the flag-program did not qualify as government speech, Boston could not discriminate on the basis of viewpoint in deciding what flags to allow. But it did precisely that in denying petitioner's request "solely because the Christian flag he asked to raise promoted a specific religion."

38. ***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.**

**Decided Apr. 28, 2022 (596 U.S. ).** Fifth Circuit/Affirmed. Chief Justice Roberts for a 6–3 Court (Breyer, J., joined by Sotomayor and Kagan, J.J., dissenting). The Court held that damages for emotional distress are not recoverable in actions brought to enforce the Rehabilitation Act or the Affordable Care Act. The Court has held—and Congress has ratified—that individuals may bring private lawsuits to enforce the antidiscrimination provisions found in a series of statutes enacted under the Spending Clause. Because those statutes are silent as to available remedies, the Court has looked to traditional contract doctrine and asked: "Would a prospective funding recipient, at the time it engaged in the process of deciding whether to accept federal dollars, have been aware that it would face such liability?" With respect to emotional distress damages, the Court reasoned, the answer was "no." As a matter of hornbook law, such damages are not available for breach of contract. And although certain treatises provide an exception allowing for emotional distress damages in certain situations, the Court's Spending Clause doctrine looks to the general rule, not limited exceptions. And, in any event, that exception "does not reflect the consensus rule among American jurisdictions."

39. ***Boechler, P.C. v. CIR*, No. 20-1472 (8th Cir., 967 F.3d 760; cert. granted Sept. 30, 2021; argued 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.**

**Decided Apr. 21, 2022 (596 U.S. ).** Eighth Circuit/Reversed and remanded. Justice Barrett for a unanimous Court. The Court held that the 30-day time limit to file a petition for review in the Tax Court is a nonjurisdictional deadline subject to equitable tolling. Jurisdictional deadlines cannot be waived or forfeited, must be raised by the court *sua sponte*, and are not subject to equitable tolling. In recent years, the Supreme Court has repeatedly clarified that particular deadlines are jurisdictional only if Congress clearly so provides. Section 6330(d)(1) states that a "person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." Although the government argued that the words "such matter" in the jurisdictional grant referred to the entire first clause, including the 30-day deadline, the Court concluded that the text did "not clearly mandate" that reading. And nothing else in the text or structure of the statute resolved the ambiguity in favor of the jurisdictional reading. So although the government might have the better reading of the text, "in this context, better is not enough." Moreover, the Court found no reason to depart from the presumption that nonjurisdictional deadlines are subject to equitable tolling in appropriate cases.

40. ***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 ("SSI")—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.**

**Decided Apr. 21, 2022 (596 U.S. ).** First Circuit/Reversed. Justice Kavanaugh for an 8–1 Court (Thomas, J., concurring; Gorsuch, J., concurring; Sotomayor, J., dissenting). The Court held that the equal protection component of the Fifth Amendment's Due Process Clause does not require Congress to extend SSI to residents of Puerto Rico. The Territory Clause, art. IV, § 3, cl. 2, gives Congress "broad authority to legislate with respect to the U.S. Territories." And Congress has long exercised that authority by imposing different taxes on—and extending different benefits to—Territories as opposed to States. The Supreme Court upheld such differential treatment under rational-basis review in *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), and *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam). Those precedents dictated the result in this case: Congress need only satisfy the rational-basis test, and it had a rational basis for declining to extend SSI benefits, having exempted residents of Puerto Rico "from most federal income, gift, estate, and excise tax."

41. ***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.**

**Decided Apr. 21, 2022 (596 U.S. ).** Sixth Circuit/Reversed. Justice Gorsuch for a 6–3 Court (Kagan, J., joined by Breyer and Sotomayor, J.J., dissenting). The Court held that "[w]hen a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant relief without first applying both the test th[e] Court outlined in *Brecht* and the one Congress prescribed in [the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA')]." "When Congress supplies a constitutionally valid rule of decision," as it did in AEDPA, "federal courts must follow it." The equitable rule articulated in *Brecht* and the rule Congress supplied in AEDPA both aimed at the same result—separating meritorious habeas petitions from the growing number of meritless petitions. But the AEDPA inquiry is not a logical subset of the *Brecht* test—the inquiries are different, and so are the legal materials a court may consult. And although the Court had previously stated that *Brecht* "subsumes" AEDPA's test, it did not mean that would always be true. Rather, if the state court has not adjudicated a claim on the merits, AEDPA does not apply; and if a claim fails under *Brecht*, there is no need to apply AEDPA. But none of the Court's prior cases considered a claim that succeeded under *Brecht* and failed under AEDPA, and *stare decisis*

does not compel the Court to search "for stray comments and stretch them beyond their context."

42. ***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; argued Jan. 18, 2022). Whether a federal court hearing state law claims brought under the Foreign Sovereign Immunities Act ("FSIA") 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.**

**Decided Apr. 21, 2022 (596 U.S. ).** Ninth Circuit/Vacated and remanded. Justice Kagan for a unanimous Court. The Court held that a court in an FSIA suit raising non-federal claims against a foreign state should apply the forum's choice-of-law rules. Under the FSIA, when a foreign state is no immune, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. That section compels the conclusion that courts should apply the same choice-of-law rules that they would apply in a suit between private parties. Otherwise, the substantive law governing a suit under the FSIA would differ from the law governing private suits. And in this suit, that means applying California's choice-of-law rule—"because that is the rule a court would use in comparable private litigation," whether in state or federal court. Even if Section 1606 were "not so clear," the Court would likely have reached the same result, since there is "scant justification for federal common lawmaking in this context."

43. ***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*.**

**Decided Apr. 21, 2022 (596 U.S. ).** Fifth Circuit/Reversed and remanded. Justice Sotomayor for a 6–3 Court (Breyer, J., concurring; Alito, J., concurring in the judgment in part and dissenting in part; Thomas, J., joined by Gorsuch and Barrett, J.J., dissenting). The Court held that Austin's distinction between on-premise and off-premise signs was facially content neutral. In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Court held that a speech regulation is facially content based if it "target[s] speech based on its communicative content"—that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. But the Fifth Circuit interpreted *Reed* too broadly when it held that a regulation is content based merely because it requires "reading the sign at issue." *Reed*'s concern was the possibility of singling out specific content for differential treatment, not distinguishing speech based on location. And the Court's prior cases recognized that some restrictions—such as regulation of solicitation—may require evaluation of the content of speech yet remain content neutral. Indeed, the Court had previously described on-/off-premise distinctions as content neutral. To be sure, *Reed* said that some content-based distinctions "defin[e] regulated speech by its function or purpose." But the

principle *Reed* articulated was merely that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." Even though Austin's distinction was facially content neutral, however, it might still violate the First Amendment if it had been adopted to pursue an impermissible purpose or if it fails intermediate scrutiny. But the Court left those questions to the lower courts.

44. ***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.**

**Decided Apr. 4, 2022 (596 U.S. ).** Second Circuit/Reversed and remanded. Justice Kavanaugh for a 6–3 Court (Alito, J., joined by Thomas and Gorsuch, J.J., dissenting). The Court held that "[t]o demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction." The Court's precedents recognize a Fourth Amendment claim for unreasonable seizure pursuant to legal process. To flesh out the elements of that claim under Section 1983, courts look to the most analogous tort as of 1871, when Section 1983 was enacted—in this case, to malicious prosecution. To bring a malicious prosecution claim, plaintiffs must show "favorable termination" of the criminal proceedings against them. In 1871, most courts had held that favorable termination meant that "the prosecution ended without a conviction," even if the prosecutor abandoned the case or the court dismissed without explanation. And several courts had held that "a favorable termination did not require an acquittal or a dismissal accompanied by some affirmative indication of innocence." "Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence," the Court "similarly construe[d] the Fourth Amendment claim under §1983 for malicious prosecution."

45. ***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 ("FAA") when the only basis for jurisdiction is that the underlying dispute involved a federal question.**

**Decided Mar. 31, 2022 (596 U.S. ).** Fifth Circuit/Reversed and remanded. Justice Kagan for an 8–1 Court (Breyer, J., dissenting). The Court held that a court assessing subject matter jurisdiction under Sections 9 and 10 of the FAA "may look only to the application actually submitted" and may not "look-

through" to the underlying dispute. In *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Court held that Section 4 of the FAA, which governs petitions to compel arbitration, instructs federal courts to look to the underlying dispute in assessing subject matter jurisdiction. But *Vaden* relied on the specific language of Section 4, which directs courts to assess whether, "save for [the arbitration] agreement," they would have jurisdiction over "the controversy between the parties." *Id.* at 62. Sections 9 and 10, by contrast, do not include a "save for" clause or mention subject matter jurisdiction at all. Giving effect to Congress's different statutory language, the Court reasoned, required it to conclude that the "look-through" method did not apply. And even if respondent's policy concerns with simplicity, uniformity, and a broader role for federal courts in arbitration were well founded, policy concerns cannot overcome clear statutory directives.

46. ***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.**

**Decided Mar. 24, 2022 (595 U.S. ).** Fifth Circuit/Reversed. Justice Gorsuch for a unanimous Court. The Court held that the First Amendment does not prevent an elected body from issuing a verbal censure in response to a member's conduct of official business. As a general matter, the First Amendment prohibits the government from taking retaliatory actions in response to protected speech. But "elected bodies in this country have long exercised the power to censure their members" from the founding until the present, and "no evidence" suggests that "prior generations thought an elected representative's speech might be 'abridg[ed]' by that kind of countervailing speech from his colleagues." Contemporary doctrine confirms this understanding. To bring a First Amendment retaliation claim, a plaintiff must show some "adverse action." But a verbal censure of an elected official is not a materially adverse action; to the contrary, respondent did not change his speech or conduct after he was censured. A censure accompanied by punishment or of a non-elected official might be different, but a purely verbal censure of a member of an elected body does not violate the First Amendment.

47. ***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.**

**Decided Mar. 24, 2022 (595 U.S. ).** Fifth Circuit/Reversed and remanded. Chief Justice Roberts for an 8–1 Court (Sotomayor, J., concurring; Kavanaugh, J., concurring; Thomas, J., dissenting). The Court held that petitioner was likely to succeed on his claim that Texas's refusal to permit his pastor to lay hands on and pray over him during his execution violated the Religious Land Use and

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Institutionalized Persons Act ("RLUIPA"), and that the other preliminary injunction factors justified relief. As a threshold matter, the Court concluded that petitioner properly exhausted available administrative remedies for his claim. On the merits, the Court first concluded that petitioner was likely to show that his requests were based on a sincere religious belief; laying on hands and praying "are traditional forms of religious exercise." Because the State did not dispute that it would substantially burden petitioner's religious exercise, it was required to satisfy strict scrutiny. But the State did not show that it was likely to carry that burden. "[T]here is a rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding" and continuing throughout our Nation's history. And the State did not show that forbidding such prayer was the least restrictive means of serving its interests in monitoring the prisoner or preventing disruption. Nor did the State show that a "categorical ban on touch" was the least restrictive means of accomplishing its interests in "security in the execution chamber, preventing unnecessary suffering, and avoiding further emotional trauma to the victim's family members." The Court also concluded that petitioner had shown irreparable harm, since he would "be unable to engage in protected religious exercise in the final moments of his life." And the other factors tipped in petitioner's favor since the State could accommodate his religious exercise "without delaying or impeding his execution." Thus, if the State rescheduled petitioner's "execution and decline[d] to permit audible prayer or religious touch," the district court should grant a preliminary injunction.

48. ***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 ("ACCA").**

**Decided Mar. 7, 2022 (595 U.S. ).** Sixth Circuit/Reversed. Justice Kagan for a unanimous Court (Sotomayor, J., concurring; Kavanaugh, J., concurring; Barrett, J., joined by Thomas, J., concurring in part and concurring in the judgment; Gorsuch, J., joined in part by Sotomayor, J., concurring in the judgment). The Court held that "[c]onvictions arising from a single criminal episode" are not committed on separate "occasions." The ordinary meaning of "occasion" suggests that offenses committed at the same time, in the same place, and as part of the same scheme compose one occasion. And statutory history, too, suggests that Congress enacted the "occasions" clause to prevent enhanced sentences based on multiple offenses committed as part of a single criminal spree. Because a defendant who commits multiple related crimes on the same evening is not—for that reason—a "career criminal," the Court declined to apply the ACCA's sentencing enhancement.

49. ***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 ("FISA") 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.**

**Decided Mar. 4, 2022 (595 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Alito for a unanimous Court. The Court held that Section 1806(f) of the FISA does not displace the state secrets privilege. The parties disputed whether Section 1806(f) applies at all in the context of a civil lawsuit seeking to obtain secret surveillance information. But the Court declined to resolve that dispute. Instead, it reasoned that even if Section 1806(f) applies in that context, it does not displace the state secrets privilege. The statute says nothing about the privilege, and courts should not read statutory silence to abrogate common-law or constitutional privileges. Nor is there any clash between the statute and the privilege, since they call for different inquiries, authorize different forms of relief, and require different procedures. Thus, the Court concluded, "Congress did not eliminate, curtail, or modify the state secrets privilege when it enacted § 1806(f)."

50. ***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.**

**Decided Mar. 4, 2022 (595 U.S. ).** First Circuit/Reversed. Justice Thomas for a 6–3 Court (Barrett, J., joined by Gorsuch, J., concurring; Breyer, J., joined in part by Sotomayor and Kagan, J.J., dissenting). The Court held that the First Circuit improperly vacated respondent Dzhokhar Tsarnaev's capital sentence for his role in the Boston Marathon bombing. First, the Court concluded that the district court "did not abuse its broad discretion by declining to ask about the content and extent of each juror's media consumption regarding the bombings." Focusing on each juror's media consumption, the district court reasonably decided, would improperly emphasize what each juror knew before coming to court, rather than on potential bias. And the district court in fact asked potential jurors generally about their media consumption and engagement. To the extent a court of appeals may exercise "supervisory power" to set rules for district courts, the First Circuit exceeded its authority by supplanting "the district court's broad discretion to manage *voir dire*" and "prescribing specific lines of questioning." Second, the Court concluded that the district court did not err in excluding evidence linking Tamerlan Tsarnaev to an unsolved triple homicide. Since there "was no allegation that Dzhokhar had any role in that crime," and no "way to confirm or verify the relevant facts," the court's conclusions that the evidence lacked probative value and would confuse the jury were reasonable. And although the Eighth Amendment requires the sentence to consider mitigating circumstances in the death-penalty context, it does not deprive district courts of

their traditional authority to determine that certain types of evidence are inadmissible. Because the district court had not erred, the Court reversed the First Circuit's judgment vacating respondent's capital sentence.

51. ***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.**

**Decided Mar. 3, 2022 (595 U.S. ).** Sixth Circuit/Reversed and remanded. Justice Alito for an 8–1 Court (Thomas, J., concurring; Kagan, J., joined by Breyer, J., concurring in the judgment; Sotomayor, J., dissenting). The Court held that the Sixth Circuit erred in denying the Kentucky attorney general's motion to intervene. The attorney general sought to intervene for the purpose of filing a petition for rehearing en banc after the Sixth Circuit struck down a Kentucky abortion law and Kentucky's secretary for Health and Family Services declined to seek further review. The Court reasoned that the Kentucky attorney general was not jurisdictionally barred from intervening, nor prohibited from doing so by a mandatory claims processing rule. And it concluded that the Sixth Circuit has abused its discretion in denying intervention. For one thing, the court of appeals erred as a matter of law by failing "to account for the strength of the Kentucky attorney general's interest in taking up the defense" of the law. For another, the court erred in concluding that the motion to intervene was not timely, since it was filed just two days after the attorney general learned that the secretary would not seek further review.

52. ***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.**

**Decided Mar. 3, 2022 (595 U.S. ).** Ninth Circuit/Reversed and remanded. Justice Breyer for a 7–2 Court as to the merits, and a 6–3 Court as to the judgment of dismissal (Thomas, J., joined by Alito, J., concurring in part and concurring in the judgment; Kavanaugh, J., joined by Barrett, J., concurring in part; Kagan, J., concurring in part and dissenting in part; Gorsuch, J., joined by Sotomayor, J., dissenting). The Court held that the government could invoke the state secrets privilege to prevent former CIA contractors from confirming or denying the location of a detention site. Respondent sought discovery from former CIA contractors, seeking to confirm (or deny) public reporting that he had been held at a detention site in Poland. Any response to his discovery requests, the Court held, would tend to confirm or deny the location of his detention site. And the government had reasonably explained why such confirmation or denial could harm national security interests—specifically, "a former CIA insider's

confirmation of confidential cooperation between the CIA and a foreign intelligence service could damage the CIA's clandestine relationships with foreign authorities." Such confirmation is "different in kind" from press speculation, since it "leaves virtually no doubt as to the veracity of the information that has been confirmed." Nor does it matter that the confirmation would come from former CIA contractors, given their "central role in the relevant events." Moreover, respondent's need to know the location of his detention was "not great." As a result, the Court remanded with instructions to dismiss respondent's discovery application.

53. ***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. 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.**

**Decided Feb. 24, 2022 (595 U.S. ).** Ninth Circuit/Vacated and remanded. Justice Breyer for a 6–3 Court (Thomas, J., joined by Alito and Gorsuch, J.J., dissenting). The Court held that lack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration. Under 17 U.S.C. § 411(b)(1)(4), a copyright registration containing inaccurate information is valid so long as the copyright holder lacked "knowledge that it was inaccurate." Nothing in the text of the statute, the Court reasoned, distinguishes between knowledge of the facts and knowledge of the law. And nearby statutory provisions confirm that the word "knowledge" refers to "actual subjective awareness of both the facts and the law." Moreover, cases predating § 411 excused mistakes of law, and the legislative history suggests that Congress intended to make it easier for nonlawyers to obtain valid copyright registrations. Of course, nothing requires courts to accept a copyright holder's assertion of ignorance of the law, and willful blindness may support a finding of knowledge.

54. ***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; argued 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).**

**Decided Jan. 24, 2022 (595 U.S. ).** Seventh Circuit/Vacated and remanded. Justice Sotomayor for a unanimous Court. The Court held that the Seventh Circuit should have considered whether petitioners plausibly alleged that respondents violated the duty of prudence articulated in *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), rather than relying on the investment options respondents made available. In *Tibble*, the Court decided that ERISA plan fiduciaries have an

ongoing duty to monitor plan investments and remove imprudent investments. Petitioners alleged that respondents violated that duty by retaining investment options with excessive fees while "neglecting to provide cheaper and otherwise-identical alternative investments." The Seventh Circuit rejected that claim because respondents had offered the types of low-cost investment options petitioners wanted. "The Seventh Circuit erred," the Court concluded, "in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents." The mere fact that respondents also offered prudent investment options was insufficient. As a result, the Court vacated and remanded for the Seventh Circuit to determine whether petitioners stated a claim under *Tibble*.

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55. ***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.**

**Decided Jan. 20, 2022 (595 U.S. ).** New York Court of Appeals/Reversed and remanded. Justice Sotomayor for an 8–1 Court (Alito, J., joined by Kavanaugh, J., concurring; Thomas, J., dissenting). The Court held that the Confrontation Clause bars the introduction of unconfronted testimonial hearsay whether or not it is reasonably necessary to correct a misleading impression made by the defendant. The Supreme Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause prohibits the government from introducing unconfronted testimonial hearsay unless an exception to that rule was established at the time of the Founding. Under New York law, however, a defendant could "open the door" by offering misleading argument or evidence that unconfronted testimonial hearsay was reasonably necessary to rebut. The Court determined that petitioner properly presented his constitutional challenge to that rule below and, on the merits, that the rule is inconsistent with *Crawford*. New York did not argue that the "opening the door" rule "was an exception to the right to confrontation at common law." And the Court rejected New York's argument that the rule was merely a procedural rule regarding how a defendant properly objects to unconfronted testimonial hearsay, as opposed to a "substantive principle of evidence that dictates what material is relevant and admissible in a case." Under the Confrontation Clause, trials judges have no authority to decide whether a defendant's argument is "unreliable, incredible, or otherwise misleading in light of" unconfronted testimonial hearsay. Nor may judges overlook that Clause's command in order to safeguard the courts' truth-finding function. Because the trial court did so, the Court reversed.

56. ***National Federation of Independent Business v. Department of Labor*, No. 21A244 (6th Cir.; consolidated with *Ohio v. Department of Labor*, No. 21A247 (6th Cir.); argued Jan. 7, 2022). Applications seeking stays of OSHA's COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402.**

**Decided Jan. 13, 2022 (595 U.S. ).** Applications granted; stay granted. Per Curiam (Gorsuch, J., joined by Thomas and Alito, J.J., concurring; Breyer, J., Sotomayor, J., and Kagan, J., dissenting). The Court held that applicants were likely to succeed on the merits of their claim that OSHA lacked authority to impose its vaccination mandate. In November 2021, OSHA announced an emergency rule requiring virtually all employers with at least 100 employees to enforce a vaccine mandate. The rule "requires that covered workers receive a COVID-19 vaccine" unless they "obtain a medical test each week at their own expense" and "wear a mask each workday." Numerous States, businesses, trade groups, and nonprofit organizations filed petitions for review challenging the mandate. The Fifth Circuit initially entered a stay. But the petitions were then consolidated in the Sixth Circuit, which denied initial rehearing en banc by an equally divided vote and then dissolved the stay. The Court disagreed with the Sixth Circuit's conclusion that a stay of the mandate was not justified. Because the mandate represents "a significant encroachment into the lives—and health—of a vast number of employees," the Court reasoned, Congress must have "plainly authorize[d]" OSHA's mandate. But the Occupation Safety and Health Act does not. It "empowers [OSHA] to set *workplace* safety standards, not broad public health measures," and COVID-19 "is not an *occupational* hazard" in most workplaces because it "can and does spread at home, in schools, during sporting events, and everywhere else that people gather." And unlike fire or sanitation regulations, a vaccine "cannot be undone at the end of the workday." The Court noted that OSHA would have authority to promulgate rules more targeted to workplace-specific risks of COVID-19, but that its "indiscriminate approach" did not account for the difference "between occupational risk and risk more generally." Finally, the Court determined that "[t]he equities d[id] not justify withholding interim relief." Applicants asserted that the mandate would "force them to incur billions of dollars in unrecoverable compliance costs" and "cause hundreds of thousands of employees to leave their jobs," while OSHA contended that the mandate would "save over 6,500 lives and prevent thousands of hospitalizations." But the Court held that it lacked the institutional competence "to weigh such tradeoffs." Thus, the Court stayed the vaccine mandate pending disposition of the petitions by the Sixth Circuit and any subsequent petitions for certiorari.

57. ***Biden v. Missouri*, No. 21A240 (8th Cir.; consolidated with *Becerra v. Louisiana*, No. 21A241 (5th Cir.); argued Jan. 7, 2022). Applications seeking stays of orders enjoining Health and Human Services regulation requiring healthcare facilities participating in Medicare and Medicaid to require their staff to be vaccinated from COVID-19.**

**Decided Jan. 13, 2022 (595 U.S. ).** Applications granted; injunctions stayed. Per Curiam (Thomas, J., joined by Alito, Gorsuch, and Barrett, J.J., dissenting; Alito, J., joined by Thomas, Gorsuch, and Barrett, J.J., dissenting). The Court held that the Secretary of Health and Human Services was authorized to promulgate an interim final rule requiring recipients of Medicare and Medicaid funding to ensure that their non-exempt staff are vaccinated against COVID-19. In November 2021, the Secretary adopted a rule requiring Medicare and Medicaid

participants to ensure that staff who do not have a medical or religious exemption or do not telework full-time are vaccinated. The Secretary did not provide advance notice or an opportunity to comment on the rule, finding "good cause" to forgo those usual requirements. After coalitions of States challenged the rule, two district court granted preliminary injunctions, which the Fifth and Eighth Circuits declined to stay. The Court concluded that the injunctions should be stayed. First, the Court determined that the Secretary had statutory authority to adopt the rule. The relevant statute permits the Secretary to impose conditions on the receipt of funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." *E.g.*, 42 U.S.C. § 1395x(e)(9). The Secretary's determination "that a COVID-19 mandate w[ould] substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients" aligned with "the language of the statute" and how the Secretary had previously implemented it. And although the rule is broader than previous "health-related participation conditions," so too is the scale and scope of the challenge posed by the pandemic. Second, the Court concluded that the rule complied with the Administrative Procedure Act. The Secretary considered the relevant factors and "acted within a zone of reasonableness," and also reasonably determined that the upcoming winter flu season was a reasonable basis for forgoing notice and comment. "The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have. Because the latter principle governs in these cases," the Court concluded, it granted the applications and stayed the district courts' injunctions.

58. ***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.**

**Decided Jan. 13, 2022 (595 U.S. ).** Sixth Circuit/Affirmed. Justice Barrett for an 8–1 Court (Gorsuch, J., dissenting). The Court held that civil-service pension payments based on employment as a "dual-status military technician" are not based wholly on service as a member of a uniformed service. Social Security benefits are generally reduced when a retiree receives benefits from a separate pension plan. But this "windfall" reduction does not apply to "a payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). Petitioner served for many years as a "dual-status military technician." In that role, he was a civilian employee charged with assisting the military in training and maintenance, but he was also required to be a member of the National Guard and to wear a uniform while working. The Court concluded that this was not service "as" a member of the National Guard. The word "as" means "[i]n the role, capacity, or function of," and petitioner served in the role, capacity, or function of a civilian. And the statutory scheme as a whole distinguishes between technician employment and National Guard service. The

mere fact that petitioner's membership in and wearing the uniform of the National Guard were conditions of his employment did not erase that distinction.

59. ***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.**

**Decided Dec. 10, 2021 (595 U.S. ).** Western District of Texas/Affirmed in part, reversed in part, and remanded to Fifth Circuit. Justice Gorsuch for a 5–4 Court with respect to defendant state-court clerk and the Texas Attorney General, for an 8–1 Court with respect to defendant licensing officials, and for a unanimous Court with respect to defendant state-court judge and a private-individual defendant (Thomas, J., concurring in part and dissenting in part; Roberts, C.J., joined by Breyer, Sotomayor, and Kagan, J.J., concurring in the judgment in part and dissenting in part; Sotomayor, J., joined by Breyer and Kagan, J.J., concurring in the judgment in part and dissenting in part). The Court held that petitioners' pre-enforcement challenge to S.B. 8 could proceed against defendant licensing officials, but could not proceed against the state-court clerk, the Texas Attorney General, the state-court judge, or the private-individual defendant. Texas enacted a statute, known as the Texas Heartbeat Act or S.B. 8, that generally prohibits abortions "if the physician detected a fetal heartbeat for the unborn child." Tex. Health & Safety Code Ann. §§ 171.204(a), 171.205(a). S.B. 8 generally does not permit the State to enforce the Act, but instead directs enforcement through private civil actions against those who perform or assist prohibited abortions. Applicants sued numerous defendants seeking a pre-enforcement injunction against S.B. 8. The district court denied the Texas officials' motion to dismiss on the ground of sovereign immunity. While their appeal was pending, the Fifth Circuit stayed proceedings in the district court, and petitioners sought emergency injunctive relief from the Court. The Court first held that the state-court judge and state-court clerk were entitled to sovereign immunity. Although *Ex parte Young* created an exception to sovereign immunity for suits seeking injunctive relief against state executive officials, the Court declined to extend that exception to state-court judges or clerks. Also, the Court explained, those officials were not adverse to petitioners, as required for Article III jurisdiction, nor was it clear what remedy could be imposed against them. The Court next held that the Texas Attorney General was entitled to sovereign immunity. According to the Court, the Attorney General does not possess "any enforcement authority" with respect to S.B. 8, nor would an injunction against the Attorney General run against "any and all unnamed private persons who might seek to bring their own S.B. 8 suits." With respect to defendant licensing officials, however, the plurality concluded that they fell within *Ex parte Young*'s exception because it appeared, "at least based on the limited arguments put to [the Court] at this stage of the litigation," "that the licensing defendants do have authority to enforce S.B. 8." And petitioners had "plausibly alleged that S.B. 8 ha[d] already had a direct effect on their day-to-day operations." The Court then held that petitioners lacked standing to sue the private-individual defendant because he had disclaimed any intent to

file suit under S.B. 8. Finally, responding to the dissent, the majority explained that "many paths exist to vindicate the supremacy of federal law in this area." Petitioners could sue the defendant licensing officials, they could potentially file a pre-enforcement suit in state court, or they could raise constitutional arguments in defending against an S.B. 8 suit. The Court thus affirmed the district court's judgment in part and reversed it in part. Subsequently, the Court granted petitioners' motion to issue the mandate immediately, but remanded to the Fifth Circuit, not to the district court, as petitioners had requested.

60. ***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 aquafers 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.

## Case Awaiting An Argument Date

61. ***Pivotal Software, Inc. v. Tran*, No. 20-1541 (Cal. Super. Ct.; cert. granted July 2, 2021; argument scheduled Nov. 9, 2021; argument date vacated Sept. 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.**

# October Term 2022

1. ***Percoco v. United States*, No. 21-1158 (2d Cir., 13 F.4th 180; cert. granted June 30, 2022). Whether a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owes a fiduciary duty to the general public such that he can be convicted of honest-services fraud.**

2. ***Ciminelli v. United States*, No. 21-1170 (2d Cir., 13 F.4th 158; cert. granted June 30, 2022). Whether the U.S. Court of Appeals for the 2nd Circuit's "right to control" theory of fraud—which treats the deprivation of complete and accurate information bearing on a person's economic decision as a species of property fraud—states a valid basis for liability under the federal wire fraud statute.**

3. ***Moore v. Harper*, No. 21-1271 (N.C., 868 S.E.2d 97; cert. granted June 30, 2022). Whether a state's judicial branch may overturn regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," and replace them with rules of the state courts' own devising, based on state constitutional provisions vesting the state judiciary with power to prescribe rules it deems appropriate to ensure a "fair" or "free" election.**

4. ***MOAC Mall Holdings LLC v. Transform Holdco LLC*, No. 21-1270 (2d Cir.; cert. granted June 27, 2022). Whether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or order deemed "integral" to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.**

5. ***United States ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052 (3d Cir., 17 F.4th 376; cert. granted June 21, 2022). Whether the government has the authority to dismiss a False Claims Act suit after initially declining to proceed with the action, and what standard applies if the government has that authority.**

6. ***Bittner v. United States*, No. 21-1195 (5th Cir., 19 F.4th 734; cert. granted June 21, 2022). Whether a "violation" under the Bank Secrecy Act is the failure to file an annual Report of Foreign Bank and Financial Accounts (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported.**

7. ***Wilkins v. United States*, No. 21-1164 (9th Cir., 13 F.4th 791; cert. granted June 6, 2022). Whether the Quiet Title Act's statute of limitations is a jurisdictional requirement or a claim-processing rule.**

8. ***SEC v. Cochran*, No. 21-1239 (5th Cir., 20 F.4th 194; cert. granted May 16, 2022). Whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing Securities and Exchange Commission administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding.**

9. ***Jones v. Hendrix*, No. 21-857 (8th Cir., 8 F.4th 683; cert. granted May 16, 2022). Whether federal inmates who did not challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under 28 U.S.C. § 2241 after the Supreme Court later makes clear a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.**

10. ***Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806 (7th Cir., 6 F.4th 713; cert. granted May 2, 2022). The Questions Presented are: (1) Whether the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 U.S.C. § 1983. (2) Whether, assuming spending clause statutes can give rise to private rights enforceable via Section 1983, the Federal Nursing Home Amendments Act of 1987's transfer and medication rules do so.**

11. ***Bartenwerfer v. Buckley*, No. 21-908 (9th Cir., 860 F. App'x 544; cert. granted May 2, 2022). Whether an individual may be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent, or knowledge of her own.**

12. ***Helix Energy Solutions Group, Inc. v. Hewitt*, No. 21-984 (5th Cir., 15 F.4th 289; cert. granted May 2, 2022; argument scheduled Oct. 12, 2022). Whether a supervisor making over $200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29 C.F.R. § 541.601 remains subject to the detailed requirements of 29 C.F.R. § 541.604 when determining whether highly compensated supervisors are exempt from the Fair Labor Standards Act's overtime-pay requirements.**

13. ***Reed v. Goertz*, No. 21-442 (5th Cir., 995 F.3d 425; cert. granted Apr. 25, 2022; argument scheduled Oct. 11, 2022). Whether the statute of limitations for a 42 U.S.C. § 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals, or whether it begins to run at the moment the state trial court denies DNA testing, despite any subsequent appeal.**

14. ***Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (Pa., 266 A.3d 542; cert. granted Apr. 25, 2022; argument scheduled Oct. 11, 2022). Whether the due**

**process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state.**

15. ***National Pork Producers Council v. Ross*, No. 21-468 (9th Cir., 6 F.4th 1021; cert. granted Mar. 28, 2022; argument scheduled Oct. 11, 2022). The Questions Presented are: (1) Whether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant commerce clause. (2) Whether such allegations, concerning a law that is based solely on preferences regarding out-of-state housing of farm animals, state a claim under *Pike v. Bruce Church, Inc.***

16. ***Cruz v. Arizona*, No. 21-846 (Ariz., 487 P.3d 991; cert. granted Mar. 28, 2022). Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.**

17. ***Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, No. 21-869 (2d Cir., 11 F.4th 26; cert. granted Mar. 28, 2022; argument scheduled Oct. 12, 2022). Whether a work of art is "transformative" when it conveys a different meaning or message from its source material, or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material.**

18. ***Haaland v. Brackeen*, No. 21-376, consolidated with *Cherokee Nation v. Brackeen*, No. 21-377, *Texas v. Haaland*, No. 21-378, *Brackeen v. Haaland*, No. 21-380 (5th Cir., 994 F.3d 249; cert. granted Feb. 28, 2022). The Questions Presented are: (1) Whether the Indian Child Welfare Act of 1978's ("ICWA") placement preferences—which disfavor non-Indian adoptive families in child-placement proceedings involving an "Indian child"—discriminate on the basis of race in violation of the U.S. Constitution. (2) Whether ICWA's placement preferences exceed Congress's Article I authority by invading the arena of child placement and otherwise commandeering state courts and state agencies to carry out a federal child-placement program.**

19. ***Arellano v. McDonough*, No. 21-432 (Fed. Cir., 1 F.4th 1059; cert. granted Feb. 22, 2022; argument scheduled Oct. 4, 2022). The Questions Presented are: (1) Whether the rebuttable presumption of equitable tolling from *Irwin v. Department of Veterans Affairs* applies to the one-year statutory deadline in 38 U.S.C. § 5110(b)(1) for seeking retroactive disability benefits, and, if so, whether the government has rebutted that presumption. (2) Whether, if 38 U.S.C. § 5110(b)(1) is amenable to equitable tolling, this case should be remanded so the agency can consider the particular facts and circumstances in the first instance.**

**Gibson Dunn**
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**Partner**
Matthew D. McGill

20. ***303 Creative LLC v. Elenis*, No. 21-476 (10th Cir., 6 F.4th 1160; cert. granted Feb. 22, 2022). Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.**

21. ***Merrill v. Milligan*, No. 21-1086 (N.D. Ala.; probable jurisdiction noted Feb. 7, 2022; consolidated with *Merrill v. Caster*, No. 21-1087 (11th Cir.); argument scheduled Oct. 4, 2022). Whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U.S.C. § 10301.**

22. ***Delaware v. Pennsylvania*, No. 22O145 (Original Jurisdiction; exceptions to the Report of the Special Master filed Nov. 18, 2021; exceptions opposed Dec. 20, 2021; sur-reply in support of exceptions filed Jan. 19, 2022; case set for oral argument in due course Feb. 22, 2022; consolidated with *Arkansas v. Delaware*, No. 22O146; argument scheduled Oct. 3, 2022). The Questions Presented are: (1) Whether MoneyGram official Checks are "a money order, traveler's check, or other similar written instrument (other than a third-party bank check) on which a banking or financial organization or a business association is directly liable," pursuant to 12 U.S.C. § 2503. (2) Whether the court should command Pennsylvania, Wisconsin, and Arkansas not to assert any claim over abandoned and unclaimed property related to MoneyGram Official Checks. (3) Whether all future sums payable on abandoned MoneyGram Official Checks should be remitted to Delaware.**

23. ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 (1st Cir., 980 F.3d 157; cert. granted Jan. 24, 2022; consolidated with *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707 (4th Cir.)). The Questions Presented are: (1) Whether the Court should overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions. (2) Whether public universities violate Title VI of the Civil Rights Act by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, rejecting workable race-neutral alternatives.**

24. ***Axon Enterprise, Inc. v. FTC*, No. 21-86 (9th Cir., 986 F.3d 1173; cert. granted Jan. 24, 2022). Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and-desist orders.**

25. ***Sackett v. EPA*, No. 21-454 (9th Cir., 8 F.4th 1075; cert. granted Jan. 24, 2022; argument scheduled Oct. 3, 2022). Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).**

## Cases Decided Without Argument

1. ***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; judgment vacated as moot Apr. 18, 2022).**

2. ***Wisconsin Legislature v. Wisconsin Elections Comm'n*, No. 21A471 (Wisc., 971 N.W.2d 402; Reversed Mar. 23, 2022).** Per Curiam (Sotomayor, J., joined by Kagan, J., dissenting). The Court held that the Wisconsin Supreme Court committed legal error in selecting the Governor's proposed state legislative maps. Because that map added a new majority-black district, the Wisconsin Supreme Court concluded that it must satisfy strict-scrutiny under the Equal Protection Clause. But it erred in applying strict scrutiny. The Governor provided almost no evidence in support of a new majority-black district other than "the sort of uncritical majority-minority district maximization that" the Supreme Court had "expressly rejected." And the Wisconsin Supreme Court concluded only that a new majority-black district *might* be required under the Voting Rights Act, without decided whether one was *in fact* required. Nor did the Wisconsin Supreme Court carefully evaluate the evidence "at the district level," instead relying on impermissible "generalizations." The Court thus reversed and remanded.

3. ***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.

4. ***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.

## Case Affirmed By Equally Divided Court

1. ***LeDure v. Union Pacific Railroad Company*, No. 20-807 (7th Cir., 962 F.3d 907; cert. granted Dec. 15, 2021; argued Mar. 28, 2022; affirmed by equally divided Court Apr. 28, 2022). Whether a locomotive is in use on a railroad's line and subject to the Locomotive Inspection Act and its safety regulations 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.**

## Cases Dismissed As Improvidently Granted

1. ***United States v. Texas*, No. 21-588 (5th Cir.; cert. before judgment granted Oct. 22, 2021; argued Nov. 1, 2021; dismissed as improvidently granted Dec. 10, 2021 (Sotomayor, J., dissenting)). 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.**

2. ***Arizona v. City and County of San Francisco*, No. 20-1775 (9th Cir., 992 F.3d 742; cert. granted Oct. 29, 2021; argued Feb. 23, 2022; dismissed as improvidently granted June 15, 2022 (Roberts, C.J., joined by Thomas, Alito, and Gorsuch, J.J., concurring)). Whether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend.**

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

1. ***Perez v. Sturgis Public Schools*, No. 21-887 (6th Cir., 3 F.4th 236; CVSG June 21, 2022). The Questions Presented are: (1) Whether, and in what circumstances, courts should executive further exhaustion of the Individuals with Disabilities Education Act's administrative proceedings under Section 1415(*l*) when such proceedings would be futile. (2) Whether Section 1415(*l*) requires exhaustion of a non-IDEA claim seeking money damages that are not available under the IDEA.**

2. ***NSO Group Technologies Ltd. v. WhatsApp Inc.*, No. 21-1338 (9th Cir., 17 F.4th 930; CVSG June 6, 2022). Whether the Foreign Sovereign Immunities Act entirely displaces common-law immunity for entities, such that private entities that act as agents for foreign governments may never under any circumstances seek common-law immunity in U.S. courts.**

3. ***ERISA Industry Committee v. City of Seattle*, No. 21-1019 (9th Cir., 840 F. App'x 248; CVSG May 31, 2022). Whether state and local play-or-pay laws that require employers to make minimum monthly healthcare expenditures for their covered employees relate to ERISA plans and are thus preempted by ERISA.**

4. ***Fairfax County School Board v. Doe*, No. 21-968 (4th Cir., 1 F.4th 257; CVSG May 16, 2022). The Questions Presented are: (1) Whether a recipient of federal funding may be liable in damages in a private action in cases alleging student-on-student sexual harassment when the recipient's response to such allegations did not itself cause any harassment actionable under Title IX. (2) Whether the requirement of "actual knowledge" in a private action is met when a funding recipient lacks a subjective belief that any harassment actionable under Title IX occurred.**

5. ***United States ex rel. Owsley v. Fazzi Associates, Inc.*, No. 21-1019 (6th Cir., 16 F.4th 192; CVSG May 16, 2022). Whether Federal Rule of Civil Procedure 9(b) requires plaintiffs in False Claims Act cases who plead a fraudulent scheme with particularity to also plead specific details of false claims.**

6. ***Abitron Austria GmbH v. Hetronic International, Inc.*, No. 21-1043 (10th Cir., 10 F.4th 1016; CVSG May 2, 2022). Whether the U.S. Court of Appeals for the 10th Circuit erred in applying the Lanham Act, which provides civil remedies for infringement of U.S. trademarks, extraterritorially to Abitron Austria GmbH's foreign sales, including purely foreign sales that never reached the United States or confused U.S. consumers.**

7. ***Amgen Inc. v. Sanofi*, No. 21-757 (Fed. Cir., 987 F.3d 1080; CVSG Apr. 18, 2022). The Questions Presented are: (1) Whether enablement under Section 112 of the Patent Act is a question of fact to be determined by the jury or a question of law. (2) Whether enablement is governed by the statutory requirement that the specification teach those skilled in the art to "make and use" the claimed invention, or whether it must instead enable those skilled in the art "to reach the full scope of claimed embodiments" without undue experimentation.**

8. ***Republic of Turkey v. Usoyan*, No. 21-1013 (D.C. Cir., 6 F.4th 31; CVSG Apr. 18, 2022). The Questions Presented are: (1) Whether the Discretionary Function Rule within the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5)(A) applies to claims based upon a presidential security detail's use of force during an official state visit to the United States, when they are acting within the scope of their employment. (2) Whether the plaintiff or the defendant bears the burden of proving that the Discretionary Function Rule does not apply.**

9. ***Kinney v. HSBC Bank USA, N.A.*, No. 21-599 (10th Cir., 5 F.4th 1136; CVSG Mar. 7, 2022). Whether a bankruptcy court may deny a motion to dismiss and/or grant a completion discharge when there remains, at the end of the plan term, a shortfall that the debtor is willing and able to cure within a reasonable time, or whether such a payment is not a payment "under the plan" but an impermissible modification of the plan.**

# CVSG Cases In Which The Solicitor General Supported Certiorari

1. ***American Axle & Manufacturing Inc. v. Neapco Holdings LLC*, No. 20-891 (Fed. Cir., 966 F.3d 1294; CVSG May 3, 2021; cert. supported in part May 24, 2022; cert. denied June 30, 2022). 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. ***LeDure v. Union Pacific Railroad Co.*, No. 20-807 (7th Cir., 962 F.3d 907; CVSG May 17, 2021; cert. supported Nov. 9, 2021; cert. granted Dec. 15, 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.**

3. ***Golan v. Saada*, No. 20-1034 (2d Cir., 833 F. App'x 829; CVSG Apr. 5, 2021; cert. supported Oct. 27, 2021; cert. granted Dec. 10, 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.**

4. ***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.**

5. ***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).**

6. ***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.**

## CVSG Cases In Which The Solicitor General Opposed Certiorari

**Gibson Dunn**
Counsel for Respondents
Digger's Polaris et al.

**Partner**
Thomas H. Dupree Jr.

1. ***Bierbach v. Digger's Polaris*, No. 21-998 (Minn., 965 N.W.2d 281; CVSG Feb. 22, 2022; cert. opposed May 16, 2022; cert. denied June 21, 2022). Whether the Controlled Substances Act preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury.**

2. ***Musta v. Mendota Heights Dental Center*, No. 21-676 (Minn., 965 N.W.2d 312; CVSG Feb. 22, 2022; cert. opposed May 16, 2022; cert. denied June 21, 2022). Whether the Controlled Substances Act preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury.**

3. ***Apple Inc. v. Qualcomm Inc.*, No. 21-746 (Fed. Cir., 992 F.3d 1378; CVSG Feb. 22, 2022; cert. opposed May 24, 2022; cert. denied June 27, 2022). Whether a licensee has Article III standing to challenge the validity of a patent covered by a license agreement that covers multiple patents.**

4. ***Johnson v. Bethany Hospice and Palliative Care LLC*, No. 21-462 (11th Cir., 853 F. App'x 496; CVSG Jan. 18, 2022; cert. opposed May 24, 2022). Whether Federal Rule of Civil Procedure 9(b) requires plaintiffs in False Claims Act cases who plead a fraudulent scheme with particularity to also plead specific details of false claims.**

5. ***Olaf Sööt Design, LLC v. Daktronics*, No. 21-438 (Fed. Cir., 839 F. App'x 505; CVSG Jan. 10, 2022; cert. opposed May 11, 2022; cert. denied June 21, 2022). Whether the Seventh Amendment allows the U.S. Court of Appeals for the Federal Circuit to reverse a jury verdict based on a sua sponte new claim construction of a term the district court concluded was not a term of art and construed to have its plain and ordinary meaning; where the Federal Circuit's sua sponte claim construction essentially recasts a specific infringement factual question, previously decided by the jury, as a claim construction issue, to be decided de novo by the appellate court.**

6. ***Doe 1 v. Express Scripts, Inc.*, No. 21-471 (2d Cir., 837 F. App'x 44; CVSG Dec. 13, 2021; cert. opposed May 24, 2022; cert. denied June 27, 2022). The Questions Presented are: (1) Whether an administrator hired by a plan under the Employee Retirement Income Security Act of 1974 acts as a fiduciary when it controls prices paid by the plan or its participants, or whether control over pricing is exempt from the definition of "fiduciary" (the exception from *DeLuca v. Blue Cross Blue Shield of Michigan*) if the administrator is in the "business" of setting prices for its clients. (2) Whether, if the *DeLuca* exception is, in fact, a proper gloss on ERISA, it exempts from fiduciary status a third-party benefit manager that exercises ongoing discretion over the actual prices charged to the plans pursuant to a contract with the plan administrator.**

7. ***Monsanto Co. v. Hardeman*, No. 21-241 (9th Cir., 997 F.3d 941; CVSG Dec. 13, 2021; cert. opposed May 10, 2022; cert. denied June 21, 2022). The Questions Presented are: (1) Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a state-law failure-to-warn claim where the warning cannot be added to a product without EPA approval and EPA has repeatedly concluded that the warning is not appropriate. (2) Whether the Ninth Circuit's standard for admitting expert testimony is inconsistent with the Supreme Court's precedent and Federal Rule of Evidence 702.**

8. ***Weiss v. National Westminster Bank, PLC*, No. 21-381 (2d Cir., 993 F.3d 144; CVSG Dec. 13, 2021; cert. opposed May 24, 2022; cert. denied June 27, 2022). Whether a person who knowingly transfers substantial funds to a designated foreign terrorist organization aids and abets that organization's terrorist acts for purposes of civil liability under the Justice Against Sponsors of Terrorism Act.**

9. ***Virgin America, Inc. v. Bernstein*, No. 21-260 (9th Cir., 3 F.4th 1127; CVSG Nov. 15, 2021; cert. opposed May 24, 2022; cert. denied June 30, 2022). 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.**

10. ***California Trucking Ass'n v. Bonta*, No. 21-194 (9th Cir., 996 F.3d 664; CVSG Nov. 15, 2021; cert. opposed May 24, 2022; cert. denied June 30, 2022). 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.**

11. ***Epic Systems Corp. v. Tata Consultancy Services Ltd.*, No. 20-1426 (7th Cir., 980 F.3d 1117; CVSG Oct. 12, 2021; cert. opposed Feb. 15, 2022; cert. denied Mar. 21, 2022). 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.**

12. ***Epic Systems Corp. v. Tata Consultancy Services Ltd.*, No. 20-1426 (7th Cir., 980 F.3d 1117; CVSG Oct. 12, 2021; cert. opposed Feb. 15, 2022; cert. denied Mar. 21, 2022). 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.**

13. ***Robertson v. Intratek Computer, Inc.*, No. 20-1229 (5th Cir., 976 F.3d 575; CVSG Oct. 4, 2021; cert. opposed Apr. 11, 2022; cert. denied May 16, 2022). 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.**

14. ***PersonalWeb Technologies, LLC v. Patreon, Inc.*, No. 20-1394 (Fed. Cir., 961 F.3d 1365; CVSG Oct. 4, 2021; cert. opposed Apr. 8, 2022; cert. denied May 16, 2022). 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.**

15. ***Marin Housing Authority v. Reilly*, No. 20-1046 (Cal., 472 P.3d 472; CVSG June 21, 2021; cert. opposed Nov. 9, 2021; cert. denied Dec. 13, 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.**

16. ***Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, No. 20-1199 (1st Cir., 980 F.3d 157; CVSG June 14, 2021; cert. opposed Dec. 8, 2021; cert. granted Jan. 24, 2022). 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.**

17. ***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.**

18. ***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.**

19. ***Gannett Co. v. Quatrone*, No. 20-609 (4th Cir., 970 F.3d 465; CVSG Apr. 19, 2021; cert. opposed Nov. 9, 2021; cert. denied Dec. 13, 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.**

20. ***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.**

21. ***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; cert. granted Dec. 15, 2021). Whether Congress has the power to authorize suits against nonconsenting states pursuant to its constitutional war powers.**

## 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 6 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 33 petitions for certiorari since 2006.



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