

GIBSON DUNN

Supreme Court Round-Up

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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.



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Opinions Related to Orders

1. ***Yeshiva University v. YU Pride Alliance*, No. 22A184 (N.Y. Sup. Ct., 2022 WL 2158381; application for stay or, in the alternative, petition for certiorari and stay filed Aug. 24, 2022).** The Questions Presented were: (1) Whether, under the First Amendment's Religion Clauses, the New York City Human Rights Law can be applied to override Yeshiva University's religious judgment about which student organizations to officially recognize on campus consistent with its Torah values. (2) Whether, under *Employment Division v. Smith*, the New York City Human Rights Law, which categorically exempts hundreds of organizations from its reach and allows individualized exceptions for "bona fide reasons of public policy," is "neutral" and "generally applicable." (3) Whether *Employment Division v. Smith* should be overruled.

Decided September 14, 2022 (597 U.S. ___). N.Y. Super Ct./Application for Stay Denied Without Prejudice. Per curiam opinion for a 5–4 Court (Alito, J., joined by Thomas, Gorsuch, and Barrett, JJ., dissenting). The Court denied Yeshiva University's emergency application for stay of a state trial court order that applied New York City's Human Rights Law to compel Yeshiva, a religious university, to recognize the YU Pride Alliance, an LGBTQ student group, as an official student club. The Court concluded that the university had not exhausted its avenues for relief from the state courts and left open that the university could renew its application for stay if the state courts declined to expedite the university's appeal or provide interim relief. Dissenting on behalf of four Justices, Justice Alito would have granted the stay. In the dissent's view, the state courts' denial of a stay constituted a final order, and it was "far from clear" in any event that the Court's power to stay state court orders that violated the Constitution was "limited to situations in which a final order has been entered below." The dissent forecasted that at least four members of the Court would likely vote to grant certiorari if the state courts rejected the university's First Amendment arguments on appeal, and that the university would likely prevail

in the Supreme Court on the merits. The dissent also concluded that forcing Yeshiva to recognize the Pride Alliance even for a short time in violation of its religious beliefs constituted irreparable injury warranting a stay.

Cases Scheduled for Oral Argument

October Calendar

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GIBSON DUNN & CRUTCHER
2022

1. *Sackett v. EPA*, No. 21-454 (9th Cir., 8 F.4th 1075; cert. granted Jan. 24, 2022; argument scheduled Oct. 3, 2022). The Question Presented is: 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).
2. *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.
3. *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.
4. *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). The Question Presented is: 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.

5. *Reed v. Goertz*, No. 21-442 (5th Cir., 995 F.3d 425; cert. granted Apr. 25, 2022; argument scheduled Oct. 11, 2022). The Question Presented is: 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.
6. *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.*
7. *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). The Question Presented is: 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.
8. *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). The Question Presented is: 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.

November Calendar

1. *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; argument scheduled Oct. 31, 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.

2. *Cruz v. Arizona*, No. 21-846 (Ariz., 487 P.3d 991; cert. granted Mar. 28, 2022; argument scheduled Nov. 1, 2022). The Question Presented is: 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.
3. *Jones v. Hendrix*, No. 21-857 (8th Cir., 8 F.4th 683; cert. granted May 16, 2022; argument scheduled Nov. 1, 2022). The Question Presented is: 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.
4. *Bittner v. United States*, No. 21-1195 (5th Cir., 19 F.4th 734; cert. granted June 21, 2022; argument scheduled Nov. 2, 2022). The Question Presented is: 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.
5. *SEC v. Cochran*, No. 21-1239 (5th Cir., 20 F.4th 194; cert. granted May 16, 2022; argument scheduled Nov. 7, 2022). The Question Presented is: 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.
6. *Axon Enterprise, Inc. v. FTC*, No. 21-86 (9th Cir., 986 F.3d 1173; cert. granted Jan. 24, 2022; argument scheduled Nov. 7, 2022). The Question Presented is: 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.
7. *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (Pa., 266 A.3d 542; cert. granted Apr. 25, 2022; argument scheduled Nov. 8, 2022). The Question Presented is: 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.
8. *Health and Hospital Corp. of Marion County v. Talevski*, No. 21-806 (7th Cir., 6 F.4th 713; cert. granted May 2, 2022; argument scheduled Nov. 8, 2022). The Questions Presented are: (1) Whether the Supreme Court



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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.



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9. *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.d 249; cert. granted Feb. 28, 2022; argument scheduled Nov. 9, 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.

Cases Awaiting An Argument Date

1. *Pivotal Software, Inc. v. Tran*, No. 20-1541 (Cal. Super. Ct.; cert. granted July 2, 2021; argument scheduled Nov. 9, 2021; argument date vacated in light of ongoing settlement discussions Sept. 2, 2021). The Question Presented is: 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.
2. *303 Creative LLC v. Elenis*, No. 21-476 (10th Cir., 6 F.4th 1160; cert. granted Feb. 22, 2022). The Question Presented is: Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.
3. *Bartenwerfer v. Buckley*, No. 21-908 (9th Cir., 860 F. App’x 544; cert. granted May 2, 2022). The Question Presented is: 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.
4. *Wilkins v. United States*, No. 21-1164 (9th Cir., 13 F.4th 791; cert. granted June 6, 2022). The Question Presented is: Whether the Quiet Title Act’s statute of limitations is a jurisdictional requirement or a claim-processing rule.

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). The Question Presented is: 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. ***MOAC Mall Holdings LLC v. Transform Holdco LLC***, No. 21-1270 (2d Cir.; cert. granted June 27, 2022). The Question Presented is: 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.
7. ***Percoco v. United States***, No. 21-1158 (2d Cir., 13 F.4th 180; cert. granted June 30, 2022). The Question Presented is: 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.
8. ***Ciminelli v. United States***, No. 21-1170 (2d Cir., 13 F.4th 158; cert. granted June 30, 2022). The Question Presented is: 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.
9. ***Moore v. Harper***, No. 21-1271 (N.C., 868 S.E.2d 97; cert. granted June 30, 2022). The Question Presented is: 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.
10. ***United States v. Texas***, No. 22-58 (5th Cir., 40 F.4th 205; cert. granted July 21, 2022). The Questions Presented are: (1) Whether the state plaintiffs have Article III standing to challenge the Department of Homeland Security’s Guidelines for the Enforcement of Civil Immigration Law. (2) Whether the Guidelines are contrary to 8 U.S.C. §1226(c) or 8 U.S.C. §1231(a), or otherwise violate the Administrative Procedure Act. (3) Whether 8 U.S.C. §1252(f)(1) prevents the entry of an order to “hold unlawful and set aside” the Guidelines under 5 U.S.C. §706(2).

Pending Petitions With Calls For The Views Of The Solicitor General (“CVSG”)

1. *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.
2. *Republic of Turkey v. Usayan*, 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.
3. *Abitron Austria GmbH v. Hetronic International, Inc.*, No. 21-1043 (10th Cir., 10 F.4th 1016; CVSG May 2, 2022). The Question Presented is: 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.
4. *ERISA Industry Committee v. City of Seattle*, No. 21-1019 (9th Cir., 840 F. App’x 248; CVSG May 31, 2022). The Question Presented is: 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.
5. *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.



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6. *NSO Group Technologies Ltd. v. WhatsApp Inc.*, No. 21-1338 (9th Cir., 17 F.4th 930; CVSG June 6, 2022). The Question Presented is: 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.
7. *United States ex rel. Schutte v. SuperValu, Inc.*, No 21-1326 (7th Cir., 9 F.4th 455; CVSG Aug. 22, 2022). The Question Presented is: Whether and when a defendant’s contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it “knowingly” violated the False Claims Act.

CVSG: Petitions In Which The Solicitor General Supported Certiorari

1. *Perez v. Sturgis Public Schools*, No. 21-887 (6th Cir., 3 F.4th 236; CVSG June 21, 2022; cert. supported Aug. 24, 2022). The Questions Presented are: (1) Whether, and in what circumstances, courts should excuse 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.

CVSG: Petitions In Which The Solicitor General Opposed Certiorari

1. *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). The Question Presented is: 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.
2. *Kinney v. HSBC Bank USA, N.A.*, No. 21-599 (10th Cir., 5 F.4th 1136; CVSG Mar. 7, 2022; cert opposed Aug. 30, 2022). The Question Presented is: 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.



3. ***United States ex rel. Owsley v. Fazzi Associates, Inc.*, No. 21-936 (6th Cir., 16 F.4th 192; CVSG May 16, 2022; cert. opposed Sept. 9, 2022).** **The Question Presented is: 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.**

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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