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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.

October Arguments

1. ***Sackett v. EPA*, No. 21-454 (9th Cir., 8 F.4th 1075; cert. granted Jan. 24, 2022; argument 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 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.**

   Decided Feb. 28, 2023 (598 U.S. __). Original jurisdiction/Special Master's recommendation in First Interim Report adopted. Justice Jackson for a unanimous Court with respect to Parts I, II, III, and IV-A, and for the Court with respect to Part IV-B. The Court held that the Disposition of Abandoned Money Orders and Traveler's Checks Act ("Federal Disposition Act" or "FDA"), 12 U.S.C. § 2503, rather than federal common law, governed which State had the power to escheat the proceeds of two types of MoneyGram financial instruments never collected by the intended payee. At common law, the proceeds of abandoned money orders would often escheat to the State where the debtor was incorporated—with the "debtor" referring to the entity, like

MoneyGram, that held the unclaimed money order. Congress enacted the FDA to abrogate the common law regime and allow for more equitable distribution of abandoned money orders among the States. Under the FDA, "sums payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check)" escheat to the State where the instrument was purchased. The Court held that MoneyGram's agent checks and teller's checks fall within the scope of the FDA because they are "similar" to money orders in two respects: (1) they are "prepaid" by a purchaser who wishes to transmit money to a payee and (2) they tend to "inequitably escheat" under the common law rules to MoneyGram's state of incorporation, Delaware. The Court rejected Delaware's argument that MoneyGram's products are "third party bank checks" not covered by the FDA. Without construing the phrase "third party bank checks," which has no "traditional meaning in either the legal or the financial realms," the Court concluded that Delaware's arguments were unpersuasive. In Part IV-B of the opinion, which Justices Thomas, Alito, Gorsuch, and Barrett did not join, the Court relied on the FDA's legislative history to conclude that the "third party bank check" language was narrow and was not intended to exempt "entire swaths of prepaid financial instruments . . . similar to money orders" from the FDA's coverage.

3. ***Arellano v. McDonough*, No. 21-432 (Fed. Cir., 1 F.4th 1059; cert. granted Feb. 22, 2022; argument 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.**

Decided Jan. 23, 2023 (598 U.S. __). Federal Circuit/Affirmed. Justice Barrett for a unanimous Court. The Court held that 38 U.S.C. § 5110(b)(1) is not subject to equitable tolling. Section 5110(a)(1) sets forth a default rule that the effective date of an award of veterans benefits "shall not be earlier than the date of receipt of application therefor," unless "specifically provided otherwise in this chapter." Section 5110(b)(1) in turn provides one of 16 exceptions to that rule, providing that the effective date "shall be the day following the date of the veteran's discharge or release" if the veteran's application "is received within one year from such date of discharge or release" from the military. A veteran who filed his application for benefits years after his discharge argued that the one-year period should be equitably tolled because he was too sick to realize he could apply for benefits. The Supreme Court unanimously rejected that position. Although federal statutes of limitations are presumptively subject to equitable tolling, that presumption can be rebutted "if equitable tolling is inconsistent with the statutory scheme." The text and structure of § 5110 rebutted the presumption because the statute "contains detailed instructions for when a veteran's claim for benefits may enjoy an effective date earlier than" the filing date. "It would be inconsistent with this comprehensive scheme for an adjudicator to extend effective dates still further through the doctrine of

equitable tolling." Moreover, the statute set "substantive limitations" on the "amount of recovery due" to a veteran, suggesting Congress would not have intended for large retroactive awards of benefits based on an equitable tolling regime not specifically provided by statute.

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 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 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 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 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 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.**

Decided Feb. 22, 2023 (598 U.S. __). 5th Circuit/Affirmed. Justice Kagan for a 6–3 Court (Gorsuch, J., dissenting; Kavanaugh, J., joined by Alito, J., dissenting). The Court held that a highly compensated executive employee who is paid at a daily rate is not paid on a "salary basis" and thus is not exempt from

the FLSA's overtime pay requirement under 29 C.F.R. § 541.602(a). The FLSA generally requires employers to pay time and a half to employees who work more than 40 hours in a week, but it exempts certain bona fide executive, administrative, and professional employees from its overtime pay requirement. Implementing regulations specify that the exemption requires, among other things, that exempt employees be paid on a "salary basis," meaning that they are paid on a weekly or less frequent basis and receive a "predetermined amount" for each pay period in which they perform work. 29 C.F.R. § 541.602(a). The Court reasoned that an employee is paid on a "salary basis" under 29 C.F.R. § 541.602(a) if the employee receives a "fixed amount for a week no matter how many days he has worked." The Court concluded that "[n]othing in that description fits a daily-rate worker, who by definition is paid for each day he works and no others." The Court stated that employees paid on a daily or hourly basis can still be exempt from the FLSA's overtime pay requirement if their employers also guarantee a weekly amount of pay that is more than $455 "regardless of the number of hours, days or shifts worked," and "a reasonable relationship exists between the guaranteed amount and the amount actually earned." 29 C.F.R. § 541.604(b).

November Arguments

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 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 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.**

   Decided Feb. 22, 2023 (598 U.S. __). Arizona Supreme Court/Vacated and remanded. Justice Sotomayor for a 5–4 Court (Barrett, J., joined by Thomas, Alito, and Gorsuch, JJ., dissenting). Petitioner John Cruz was sentenced to death in Arizona for killing a police officer. Cruz argued at trial that he had a due process right, under *Simmons v. South Carolina*, 512 U.S. 154 (1994), to inform the jury that a life sentence would not carry the possibility of parole. The Arizona Supreme Court rejected his argument on direct review, holding that *Simmons* did not apply in Arizona because the State's sentencing scheme was distinct from the one at issue in *Simmons*. After the U.S. Supreme Court held in *Lynch v. Arizona*, 578 U.S. 613 (2016), that *Simmons* applies with full

force in Arizona, Cruz sought review under Arizona Rule of Criminal Procedure 32.1(g), which permits successive state petitions for postconviction relief based on a significant change in the law. The Arizona Supreme Court denied relief on the ground that *Lynch* did not amount to a significant change in the law because it merely changed how Arizona applied an existing federal precedent—*Simmons*. The U.S. Supreme Court vacated and remanded, holding that the Arizona Supreme Court's ruling that Cruz failed to satisfy Rule 32.1(g) was not an "adequate and independent state-law ground for the judgment" that would preclude Supreme Court review. The Arizona Supreme Court's interpretation of Rule 32.1(g) was "entirely new and in conflict with prior Arizona case law" because, unlike previous state cases, it considered only whether *Lynch* created a change in federal law, while "disregarding the fact that *Lynch* overruled binding Arizona Supreme Court precedents, to dramatic effect for capital defendants in Arizona."

3. ***Jones v. Hendrix*, No. 21-857 (8th Cir., 8 F.4th 683; cert. granted May 16, 2022; argument 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 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.**

   Decided Feb. 28, 2023 (598 U.S. __). Fifth Circuit/Reversed and remanded. Justice Gorsuch announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, and III (Barrett J., joined by Thomas, Sotomayor, and Kagan, JJ., dissenting). The Bank Secrecy Act ("BSA") requires U.S. persons who maintain foreign bank accounts with an aggregate balance of more than $10,000 to file a Report of Foreign Bank and Financial Accounts ("FBAR") every year. 31 U.S.C. § 5314. The statute imposes a maximum penalty of $10,000 for each nonwillful violation of the law. *Id.* § 5321. The Court held that the failure to file an accurate and timely FBAR constituted a single violation carrying a maximum penalty of $10,000, rejecting the government's view that a separate violation (and separate penalty) accrued for each foreign bank account the filer failed to disclose. The Court concluded that violations occurred on a per-report, rather than a per-account, basis because the statutory text "does not speak of accounts or their number." The Court also reasoned that the government's interpretation of the BSA would produce anomalous results. Under the government's view, for example, a person who failed to report a single foreign bank account with a balance of $10 million would be subject to a maximum penalty of $10,000, while a person who failed to report a dozen foreign accounts with an aggregate balance of $10,0001

would face a penalty of $120,000. Finally, the Court observed that the interpretation of the BSA the government advanced in its brief stood "at odds" with guidance it had issued to the public about the law's reporting requirements. Citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court said it could "consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." And "when the government . . . speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one."

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5. ***SEC v. Cochran*, No. 21-1239 (5th Cir., 20 F.4th 194; cert. granted May 16, 2022; argument 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 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.**

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7. ***Mallory v. Norfolk Southern Railway Co.*, No. 21-1168 (Pa., 266 A.3d 542; cert. granted Apr. 25, 2022; argument 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 Nov. 8, 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.**

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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 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.

December Arguments

1. ***Ciminelli v. United States*, No. 21-1170 (2d Cir., 13 F.4th 158; cert. granted June 30, 2022; argument Nov. 28, 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.**

2. ***Percoco v. United States*, No. 21-1158 (2d Cir., 13 F.4th 180; cert. granted June 30, 2022; argument Nov. 28, 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.**

3. ***United States v. Texas*, No. 22-58 (5th Cir., 40 F.4th 205; cert. granted July 21, 2022; argument Nov. 29, 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).**

4. ***Wilkins v. United States*, No. 21-1164 (9th Cir., 13 F.4th 791; cert. granted June 6, 2022; argument Nov. 30, 2022). The Question Presented is: Whether the Quiet Title Act's statute of limitations is a jurisdictional requirement or a claim-processing rule.**

5. ***MOAC Mall Holdings LLC v. Transform Holdco LLC*, No. 21-1270 (2d Cir.; cert. granted June 27, 2022; argument Dec. 5, 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.**

6. ***303 Creative LLC v. Elenis*, No. 21-476 (10th Cir., 6 F.4th 1160; cert. granted Feb. 22, 2022; argument Dec. 5, 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.

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7. ***Bartenwerfer v. Buckley*, No. 21-908 (9th Cir., 860 F. App'x 544; cert. granted May 2, 2022; argument Dec. 6, 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.**

Decided Feb. 22, 2023 (598 U.S. __). Ninth Circuit/Affirmed. Justice Barrett for a unanimous Court (Sotomayor, J., joined by Jackson, J., concurring). The Court held that the Bankruptcy Code's provision barring debtors from discharging debt for money "obtained by . . . fraud," 11 U.S.C. § 523(a)(2)(A), applies to "a debtor [who] is liable for fraud that she did not personally commit—for example, deceit practiced by a partner or an agent." Congress's use of passive voice in this provision, the Court explained, "pulls the actor off the stage." Consequently, the exception "turns on how the money was obtained, not who committed fraud to obtain it." The Court found support for this plain-text reading in the common law of fraud, which "has long maintained that fraud liability is not limited to the wrongdoer," but extends to partners and agents. The Court also relied on *Strang v. Bradner*, 114 U.S. 555 (1885), a century-old precedent that barred two debtors from discharging a state fraud judgment that was based on the misrepresentations of their business partner—even though the bankruptcy code at the time expressly barred debtors from discharging debts based on the fraud "*of the bankrupt*." When Congress revised the bankruptcy code only 13 years after *Strang*, it "embraced" that case's holding by deleting the words "of the bankrupt" from the statute. The Court declared that Congress's post-*Strang* amendment "eliminates any possible doubt about our textual analysis." Finally, the Court noted that its holding does not contravene "the fresh start policy of modern bankruptcy law" because the bankruptcy code "balances multiple, often competing interests," and "Congress has evidently concluded that the creditors' interest in recovering full payment of debts obtained by fraud outweighs the debtors' interest in a complete fresh start."

8. ***United States ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052 (3d Cir., 17 F.4th 376; cert. granted June 21, 2022; argument Dec. 6, 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.**

9. ***Moore v. Harper*, No. 21-1271 (N.C., 868 S.E.2d 97; cert. granted June 30, 2022; argument Dec. 7, 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.**

January Arguments

1. ***In re Grand Jury*, No. 21-1397 (9th Cir., 23 F.4th 1088; cert. granted Oct. 3, 2022; argument Jan. 9, 2023). The Question Presented is: Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication.**

   Dismissed as improvidently granted on Jan. 23, 2023.

2. ***The Ohio Adjutant General's Department v. Federal Labor Relations Authority*, No. 21-1454 (6th Cir., 21 F.4th 40; cert. granted Oct. 3, 2022; argument Jan. 9, 2023). The Question Presented is: Whether the Civil Service Reform Act of 1978, which empowers the Federal Labor Relations Authority to regulate the labor practices of federal agencies only, empower it to regulate the labor practices of state militias.**

3. ***Glacier Northwest v. Int'l Brotherhood of Teamsters*, No. 21-1449 (Wash., 500 P.3d 119; cert. granted Oct. 3, 2022; argument Jan. 10, 2023). The Question Presented is: Whether the National Labor Relations Act impliedly preempts a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute.**

4. ***Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo*, No. 22-96 (1st Cir., 35 F.4th 1; cert. granted Oct. 3, 2022; argument Jan. 11, 2023). The Question Presented is: Whether the Puerto Rico Oversight, Management, and Economic Stability Act's ("PROMESA") general grant of jurisdiction to the federal courts over claims against the Financial Oversight and Management Board for Puerto Rico and claims otherwise arising under PROMESA abrogate the Board's sovereign immunity with respect to all federal and territorial claims.**

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5. ***Santos-Zacaria v. Garland*, No. 21-1436 (5th Cir., 22 F.4th 570; cert. granted Oct. 3, 2022; argument Jan. 17, 2023). The Question Presented is: Whether Section 1252(d)(1)'s exhaustion requirement is jurisdictional, or merely a mandatory claims processing rule that may be waived or forfeited, and thus whether a noncitizen who challenges a new error introduced by the BIA must first ask the agency to exercise its discretion to reopen or reconsider.**

6. ***Turkiye Halk Bankasi A.S. v. United States*, No. 21-1450 (2d Cir., 16 F.4th 336; cert. granted Oct. 3, 2022; argument Jan. 17, 2023). The Question Presented is: Whether U.S. district courts may exercise subject matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611.**

7. ***Perez v. Sturgis Public Schools*, No. 21-887 (6th Cir., 3 F.4th 236; cert. granted Oct. 3, 2022; argument Jan. 18, 2023). 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.**

   Decided Mar. 21, 2023 (598 U.S. __). Sixth Circuit/Reversed and remanded. Justice Gorsuch for a unanimous Court. The Court held that a plaintiff need not exhaust administrative procedures under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(*l*), before seeking relief under another federal antidiscrimination statute that is not available under IDEA. Although IDEA does not restrict plaintiffs from seeking "remedies" under other federal laws, the statute requires plaintiffs to exhaust IDEA's dispute resolution procedures before "seeking relief that is also available under IDEA." The petitioner, who is deaf, sought damages under the Americans with Disabilities Act ("ADA") for his public school district's failure to provide an appropriate education. The school district argued that the ADA claim should be dismissed because petitioner was seeking relief for the same underlying harm that IDEA addresses, but without exhausting IDEA's dispute resolution procedures. The Court rejected the school district's view, holding that IDEA's "exhaustion requirement applies only to suits that seek relief . . . also available under IDEA," a condition that "simply is not met . . . where a plaintiff brings a suit under another federal law for compensatory damages—a form of relief everyone agrees IDEA does not provide." The Court acknowledged that its decision treated the word "relief" as "synonymous" with the word "remedies," which also appears in § 1415(*l*), but it observed that other sections of IDEA, other federal laws, and the Court's precedents also use "relief" and "remedies" interchangeably.

February Arguments

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1. ***Gonzalez v. Google LLC*, No. 21-1333 (9th Cir., 2 F.4th 871; cert. granted Oct. 3, 2022; argument Feb. 21, 2023). The Question Presented is: Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.**

2. ***Twitter v. Taamneh*, No. 21-1496 (9th Cir., 2 F.4th 871; cert. granted Oct. 3, 2022; argument Feb. 22, 2023). The Questions Presented are: (1) Whether a defendant that provides generic, widely available services to all its numerous users and "regularly" works to detect and prevent terrorists from using those services "knowingly" provided substantial assistance under 18 U.S.C. § 2333 merely because it allegedly could have taken more "meaningful" or "aggressive" action to prevent such use. (2) Whether a defendant whose generic, widely available services were not used in connection with the specific "act of international terrorism" that injured the plaintiff may be liable for aiding and abetting under Section 2333.**

3. ***Dubin v. United States*, No. 22-10 (5th Cir., 27 F.4th 1021; cert. granted Nov. 10, 2022; argument Feb. 27, 2023). The Question Presented is: Whether a person commits aggravated identity theft any time they mention or otherwise recite someone else's name while committing a predicate offense.**

4. ***Biden v. Nebraska*, No. 22-506 (8th Cir., 52 F.4th 1044; cert. granted Dec. 1, 2022; argument Feb. 28, 2023). Related to *Dep't of Education v. Brown*, No. 22-535. The Questions Presented are: (1) Whether respondents have Article III standing. (2) Whether the plan exceeds the Secretary's statutory authority or is arbitrary and capricious.**

5. ***Dep't of Education v. Brown*, No. 22-535 (N.D. Tex., 2022 WL 16858525; cert. granted Dec. 12, 2022; argument Feb. 28, 2023). Related to *Biden v. Nebraska*, No. 22-506. The Questions Presented are: (1) Whether respondents have Article III standing. (2) Whether the Department's plan is statutorily authorized and was adopted in a procedurally proper manner.**

6. ***New York v. New Jersey*, No. 22O156 (156, ORIG.; order: Dec. 12, 2022; argument Mar. 1, 2023). The Question Presented is: Whether New Jersey may unilaterally withdraw from the Waterfront Commission Compact with New York, which grants the Waterfront Commission of New York Harbor broad regulatory and law-enforcement powers over all operations at the Port of New York and New Jersey.**

Cases Scheduled for Oral Argument

March Calendar

1. ***Arizona v. Navajo Nation*, No. 21-1484, consolidated with *Dept. of Interior v. Navajo Nation*, No. 22-51 (9th Cir., 26 F.4th 794; cert. granted Nov. 4, 2022; argument Mar. 20, 2023). The Questions Presented are: (1) Whether the opinion of the court of appeals, allowing the Navajo Nation to proceed with a claim to enjoin the secretary of the U.S. Department of the Interior to develop a plan to meet the Navajo Nation's water needs and manage the mainstream of the Colorado River in the Lower Basin ("LBCR") so as not to interfere with that plan, infringes upon the Supreme Court's retained and exclusive jurisdiction over the allocation of water from the LBCR mainstream in *Arizona v. California.* (2) Whether the Navajo Nation can state a cognizable claim for breach of trust consistent with the Supreme Court's holding in *United States v. Jicarilla Apache Nation* based solely on unquantified implied rights to water under the doctrine of *Winters v. United States*.**

2. ***Coinbase, Inc. v. Bielski*, No. 22-105 (9th Cir., 2022 WL 3095991; cert. granted Dec. 9, 2022; argument Mar. 21, 2023). The Question Presented is: Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?**

3. ***Abitron Austria GmbH v. Hetronic Int'l*, No. 21-1043 (10th Cir., 10 F.4th 1016; cert. granted Nov. 4, 2022; argument Mar. 21, 2023). The Question Presented is: Whether the court of appeals erred in applying the Lanham Act, which provides civil remedies for infringement of U.S. trademarks, extraterritorially to petitioners' foreign sales, including purely foreign sales that never reached the United States or confused U.S. consumers.**

4. ***Jack Daniel's Properties v. VIP Products LLC*, No. 22-148 (9th Cir., 2022 WL 1654040; cert. granted Nov. 21, 2022; argument scheduled Mar. 22, 2023). The Questions Presented are: (1) Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, 15 U.S.C. § 1125(a)(1), or instead receives heightened First Amendment protection from trademark-infringement claims. (2) Whether humorous use of another's mark as one's own on a commercial product is "noncommercial" and thus bars as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act, 15 U.S.C. § 1125(c)(3)(C).**

5. ***United States v. Helaman Hansen*, No. 22-179 (9th Cir., 25 F.4th 1103; cert. granted Dec. 9, 2022; argument scheduled Mar. 27, 2023). The Question Presented is: Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.**

6. ***Amgen Inc. v. Sanofi*, No. 21-757 (Fed. Cir., 987 F.3d 1080; cert. granted Nov. 4, 2022; argument scheduled Mar. 27, 2023). The Question Presented is: 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—i.e., to cumulatively identify and make all or nearly all embodiments of the invention without substantial "time and effort."**

7. ***Lora v. United States*, No. 20-33 (2d Cir., 2022 WL 453368; cert. granted Dec. 9, 2022; argument scheduled Mar. 28, 2023). The Question Presented is: Whether 18 U.S.C. § 924(c)(1)(D)(ii), which provides that "no term of imprisonment imposed . . . under this subsection shall run concurrently with any other term of imprisonment," is triggered when a defendant is convicted and sentenced under 18 U.S.C. § 924(j).**

8. ***Smith v. United States*, No. 21-1576 (11th Cir., 22 F.4th 1236; cert. granted Dec. 13, 2022; argument scheduled Mar. 28, 2023). The Question Presented is: Whether the proper remedy for the government's failure to prove venue is an acquittal barring re-prosecution of the offense, as the Fifth and Eighth Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the Sixth, Ninth, Tenth, and Eleventh Circuits have held.**

9. ***Polselli v. IRS*, No. 21-1599 (6th Cir., 23 F.4th 616; cert. granted Dec. 9, 2022; argument scheduled Mar. 29, 2023). The Question Presented is: Whether the exception in I.R.C. § 7609(c)(2)(D)(i) to the notice requirements for an Internal Revenue Service summons on third-party recordkeepers applies only when the delinquent taxpayer owns or has a legal interest in the summonsed records, as the U.S. Court of Appeals for the 9th Circuit has held, or whether the exception applies to a summons for anyone's records whenever the IRS thinks that person's records might somehow help it collect a delinquent taxpayer's liability, as the U.S. Courts of Appeals for the 6th and 7th Circuits have held.**

10. ***Samia v. United States*, No. 22-196 (2d Cir., 2022 WL 1166623; cert. granted Dec. 12, 2022; argument scheduled Mar. 29, 2023). The Question Presented is: Whether admitting a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context**

violates the defendant's rights under the Confrontation Clause of the Sixth Amendment.

April Calendar

1. ***Pugin v. Garland*, No. 22-23 (4th Cir., 19 F.4th 437; cert. granted Jan. 13, 2023; argument scheduled Apr. 17, 2023). Consolidated with *Garland v. Cordero-Garcia*, No. 22-331 (9th Cir., 44 F.4th 1181). The Question Presented is: Whether a predicate "offense relating to obstruction of justice," 8 U.S.C. § 1101(A)(43)(S), requires a nexus with a pending or ongoing investigation or judicial proceeding.**

2. ***Slack Technologies, LLC v. Pirani*, No. 22-200 (9th Cir., 13 F.4th 940; cert. granted Dec. 13, 2022; argument scheduled Apr. 17, 2023). The Question Presented is: Whether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading.**

3. ***United States ex rel. Schutte v. SuperValu, Inc.*, No 21-1326 (7th Cir., 9 F.4th 455; CVSG Aug. 22, 2022; cert. supported Dec. 6, 2022; cert. granted Jan. 13, 2023; argument scheduled Apr. 18, 2023); consolidated with *United States ex rel. Proctor v. Safeway, Inc.*, No. 22-111 (7th Cir., 30 F.4th 649). 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.**

4. ***Groff v. DeJoy*, No. 22-174 (3d Cir., 35 F.4th 162; cert. granted Jan. 13, 2023; argument scheduled Apr. 18, 2023). The Questions Presented are: (1) Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). (2) Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.**

5. ***Counterman v. Colorado*, No. 22-138 (Ct. App. Colorado, 497 P.3d 1039; cert. granted Jan. 13, 2023; argument scheduled Apr. 19, 2023). The Question Presented is: Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.**

6. ***Dupree v. Younger*, No. 22-210 (4th Cir. 2022 WL 738610; cert. granted Jan. 13, 2023; argument scheduled Apr. 24, 2023). The Question Presented is:**

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Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment.

7. ***Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, No. 22-227 (1st Cir., 33 F.4th 600; cert. granted Jan. 13, 2023; argument scheduled Apr. 24, 2023). The Question Presented is: Whether the Bankruptcy Code expresses unequivocally Congress's intent to abrogate the sovereign immunity of Indian tribes.**

8. ***Yegiazaryan v. Smagin*, No. 22-381 (9th Cir., 37 F.4th 562; cert. granted Jan. 13, 2023; argument scheduled Apr. 25, 2023); Consolidated with *CMB Monaco v. Smagin*, No. 22-383 (9th Cir., 37 F.4th 562). The Question Presented is: Does a foreign plaintiff state a cognizable civil RICO claim when it suffers an injury to intangible property, and if so, under what circumstances?**

9. ***Tyler v. Hennepin County, Minnesota*, No. 22-166 (8th Cir., 26 F.4th 789; cert. granted Jan. 13, 2023; argument scheduled Apr. 26, 2023). The Questions Presented are: (1) Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause. (2) Whether the forfeiture of property worth far more than needed to satisfy a debt plus interest, penalties, and costs, is a fine within the meaning of the Eighth Amendment.**

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Cases Awaiting An Argument Date

1. ***Arizona v. Mayorkas*, No. 22-592 (D.C. Cir. Dec. 16. 2022; D.D.C., 2022 WL 17957850; cert. granted Dec. 27, 2022; argument scheduled Mar. 1, 2023; removed from argument calendar Feb. 16, 2023). The Question Presented is: Whether the State applicants may intervene to challenge the District Court's summary judgment order vacating a policy suspending the entry of immigrants to protect against the transmission of contagious disease under Title 42 of the Public Health Services Act.**

2. ***Pulsifer v. United States*, No. 22-340 (8th Cir., 39 F.4th 1018; cert. granted Feb. 27, 2023). The Questions Presented is: Whether a defendant satisfies the criteria in 18 U.S.C. § 3553(f)(1) to qualify for the federal drug-sentencing "safety valve" provision so long as he does not have (a) more than four criminal history points, (b) a three-point offense, *and* (c) a two-point offense, or whether the defendant satisfies the criteria so long as he does not have (a), (b), *or* (c).**

3. ***Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, No. 22-448 (5th Cir., 51 F.4th 616; cert. granted Feb. 27, 2023). The Question Presented is: Whether the court of appeals erred in holding that the statute providing funding to the**

Consumer Financial Protection Bureau (CFPB), 12 U.S.C. § 5497, violates the appropriations clause in Article I, Section 9 of the Constitution, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

4. ***Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 22-500 (3rd. Cir., 47 F.4th 225; cert. granted Mar. 6, 2023). The Question Presented is: Whether, under federal admiralty law, a choice-of-law clause in a maritime contract can be rendered unenforceable if enforcement is contrary to the "strong public policy" of the state whose law is displaced.**

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

1. ***Teva Pharmaceuticals USA, Inc., v. GlaxoSmithKline, LLC*, No. 22-37 (Fed. Cir., 25 F.4th 949; CVSG Oct. 3, 2022). The Question Presented is: Whether a generic drug manufacturer's FDA-approved label that carves out all of the language the brand manufacturer has identified as covering its patented uses can be held liable on a theory that its label still intentionally encourages infringement of those carved-out uses.**

2. ***Interactive Wearables, LLC v. Polar Electro Oy*, No. 21-1281 (Fed. Cir., 2021 WL 4783803; CVSG Oct. 3, 2022). The Questions Presented are: (1) What the appropriate standard is for determining whether a patent claim is "directed to" a patent-ineligible concept under step one 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. (3) Whether it is proper to apply 35 U.S.C. § 112 considerations to determine whether a patent claims eligible subject matter under 35 U.S.C. § 101.**

3. ***Midwest Air Traffic Control Service, Inc. v. Badilla*, No. 21-867 (2d Cir., 8 F.4th 105; CVSG Oct. 3, 2022). The Question Presented is: Whether state-law tort claims that arise out of the uniquely federal sphere of the military's combat operations are preempted by the interests embodied in the Federal Tort Claims Act's combatant-activities exception.**

4. ***Wells v. McCallister*, No. 21-1448 (9th Cir., 2021 WL 5755086; CVSG Oct. 11, 2022). The Question Presented is: Whether a homestead exemption to which a debtor is entitled on the date he files for bankruptcy can vanish if the debtor sells his homestead during the pendency of bankruptcy proceedings and does not reinvest the proceeds in another homestead.**

5. ***Tropp v. Travel Sentry, Inc.*, No. 22-22 (Fed. Cir., 2022 WL 443202; CVSG Oct. 17, 2022). The Question Presented is: Whether patent claims reciting physical rather than computer-processing steps are patent-eligible under 35 U.S.C. § 101, as interpreted in *Alice Corporation Pty v. CLS Bank International*, 573 U.S. 208 (2014).**

6. ***Buckner v. U.S. Pipe & Foundry*, No. 22-115 (Bankr. M.D. Fla. 599 B.R. 193; CVSG Dec. 12, 2022). The Questions Presented are: (1) Whether the equitable right to compel a coal company covered by the Coal Industry Retiree Health Benefit Act of 1992 to maintain an individual employer plan is a dischargeable "claim" under 11 U.S.C. § 101(5)(B). (2) Whether the U.S. Court of Appeals for the 11th Circuit erred in holding that a covered company's obligations under the Coal Act arose, once and for all time, when the act became law, such that a bankruptcy discharge relieves a company from its statutory obligations to maintain a plan and pay Coal Act premiums incurred after bankruptcy.**

7. ***ML Genius Holdings, LLC v. Google LLC*, No. 22-121 (2d Cir., 2022 WL 710744; CVSG Dec. 12, 2022). The Question Presented is: Whether the Copyright Act's preemption clause allows a business to invoke traditional state-law contract remedies to enforce a promise not to copy and use its content.**

8. ***Muldrow v. City of St. Louis*, No. 22-193 (8th Cir., 30 F.4th 680; CVSG Jan. 9, 2023). The Question Presented is: Whether Title VII of the Civil Rights Act of 1964 prohibits discrimination as to all "terms, conditions, or privileges of employment," or whether its reach is limited to discriminatory employer conduct that courts determine causes materially significant disadvantages for employees.**

9. ***Davis v. Legal Services of Alabama*, No. 22-231 (11th Cir., 19 F.4th 1261; CVSG Jan. 9. 2023). The Question Presented is: Whether Title VII of the Civil Rights Act of 1964 and Section 1981 of Title VII prohibit discrimination as to all "terms," "conditions," or "privileges" of employment, or are limited to "significant" discriminatory employer actions only.**

10. ***Charter Day School, Inc. v. Peltier*, No. 22-238 (4th Cir., 37 F.4th 104; CVSG Jan. 9, 2023). The Question Presented is: Whether a private entity that contracts with the state to operate a charter school engages in state action when it formulates a policy without coercion or encouragement by the government.**

11. ***Apple, Inc. v. California Institute of Technology*, No. 22-203 (Fed. Cir., 25 F.4th 976; CVSG Jan. 17, 2023). The Question Presented is: Whether the U.S. Court of Appeals for the Federal Circuit erroneously extended inter partes review estoppel under 35 U.S.C. § 315(e)(2) to all grounds that**

reasonably could have been raised in the petition filed before an inter partes review is instituted, even though the text of the statute applies estoppel only to grounds that "reasonably could have [been] raised during that inter partes review."

12. ***Moody v. NetChoice, LLC*, No. 22-277 (11th Cir., 34 F.4th 1196; CVSG Jan. 23, 2023). The Questions Presented are: (1) Whether the First Amendment prohibits a state from requiring that social-media companies host third-party communications, and from regulating the time, place, and manner in which they do so. (2) Whether the First Amendment prohibits a state from requiring social-media companies to notify and provide an explanation to their users when they censor the user's speech.**

13. ***NetChoice, LLC v. Moody*, No. 22-393 (11th Cir., 34 F.4th 1196; CVSG Jan. 23, 2023). The Question Presented is: Whether Florida Senate Bill 7072 in its entirety, and its compelled disclosure provisions in particular, comply with the First Amendment.**

14. ***NetChoice, LLC v. Paxton*, No. 22-555 (5th Cir., 49 F.4th 439; CVSG Jan. 23, 2023). The Question Presented is: Whether the First Amendment prohibits viewpoint-, content-, or speaker-based laws restricting select websites from engaging in editorial choices about whether, and how, to publish and disseminate speech—or otherwise burdening those editorial choices through onerous operational and disclosure requirements.**

15. ***Lake v. NextEra Energy Capital Holdings, Inc.*, No. 22-601 (5th Cir., 48 F.4th 306; CVSG Mar. 6, 2023). The Question Presented is: Whether, consistent with the commerce clause, states may exercise their core police power to regulate public utilities by recognizing a preference for allowing incumbent utility companies to build new transmission lines.**

16. ***Georgia-Pacific Consumer Products LP v. International Paper Company*, No. 22-465 (6th Cir., 32 F.4th 534; CVSG Mar. 6, 2023). The Question Presented is: Whether a bare declaratory judgment that determines liability but imposes no "costs" and awards no "damages" triggers the Comprehensive Environmental Response, Compensation, and Liability Act's three-year statute of limitations for an "action for contribution for any response costs or damages."**

17. ***Ohio v. CSX Transportation, Inc.*, No. 22-459 (Ohio, 168 Ohio St.3d 543; CVSG Mar. 20, 2023). The Questions Presented are: (1) Whether 49 U.S.C. § 101501(b) preempts state laws that regulate the amount of time a stopped train may block a grade crossing. (2) Whether 49 U.S.C. § 20106(a)(2) protects state laws that regulate the amount of time a stopped train may block a grade crossing from preemption.**

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; cert. denied Oct. 17, 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; cert. denied Oct. 11, 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; cert. denied Oct. 17, 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.**

4. ***Republic of Turkey v. Usoyan*, No. 21-1013 (D.C. Cir., 6 F.4th 31; CVSG Apr. 18, 2022; cert. opposed Sept. 28, 2022; cert. denied Oct. 31, 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.**

5. ***ERISA Industry Committee v. City of Seattle*, No. 21-1019 (9th Cir., 840 F. App'x 248; CVSG May 31, 2022; cert. opposed Oct. 19, 2022; cert. denied Nov. 21, 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.**

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6. ***Fairfax County School Board v. Doe*, No. 21-968 (4th Cir., 1 F.4th 257; CVSG May 16, 2022; cert. opposed Sept. 27, 2022; cert. denied Nov. 21, 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.**

7. ***NSO Group Technologies Ltd. v. WhatsApp Inc.*, No. 21-1338 (9th Cir., 17 F.4th 930; CVSG June 6, 2022; cert. opposed Nov. 21, 2022; cert. denied Jan. 9, 2023). 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.**

8. ***Cuker Interactive, LLC v. Pillsbury Winthrop Shaw Pittman, LLP,* No. 22-18 (9th Cir., 2022 WL 612671; CVSG Oct. 3, 2022; cert. opposed Feb. 17, 2023). The Question Presented is: Whether a federal court deciding a state-law issue in a bankruptcy case must apply the forum state's choice-of-law rules or federal choice-of-law rules to determine what substantive law governs.**

9. ***Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder* County, No. 21-1550 (10th Cir., 25 F.4th 1238; CVSG Oct. 3, 2022; cert. opposed Mar. 16, 2023). The Questions Presented are: (1) Whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate. (2) Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.**

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 seven most recent Terms, 11 different Gibson Dunn partners will have presented oral argument; the firm will have argued a total of 17 cases in the Supreme Court during that period, including closely watched cases with far-reaching significance in the areas of intellectual property, securities, 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 34 petitions for certiorari since 2006.

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