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GIBSON DUNN
Supreme Court Round-Up


Theodore B. Olson
202.955.8668
tolson@gibsondunn.com


Amir C. Tayrani
202.887.3692
atayrani@gibsondunn.com


Kate Meeks
202.955.8258
kmeeks@gibsondunn.com


Jessica L. Wagner
202.955.8652
jwagner@gibsondunn.com

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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).**

   Decided May 25, 2023 (598 U.S. __). Ninth Circuit/Reversed. Justice Alito delivered the opinion of the Court (Thomas, J., joined by Gorsuch, J., concurring) (Kagan, J., joined by Sotomayor and Jackson, JJ., concurring in the judgment) (Kavanaugh, J., joined by Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment). The Court held that the Clean Water Act covers wetlands only if they have a continuous surface connection to bodies of water that are "waters of the United States" in their own right, such that the wetlands are indistinguishable from those waters. Following the plurality in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court concluded that the term "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" And the Court clarified that wetlands qualify as jurisdictional waters only if they are "indistinguishably part of a body of water that itself constitutes 'waters' under the [statute]," which requires a "continuous surface connection" and the absence of any "clear demarcation between 'waters' and wetlands." The Court explained that adopting the significant-nexus test applied by the Ninth Circuit below would interfere with traditional state authority over private property and require a "freewheeling inquiry" that is inconsistent with the statutory text, provides landowners little guidance, and creates "serious vagueness concerns" in light of the statute's criminal penalties.

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. 115). 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. ***Allen 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.

Decided June 8, 2023 (599 U.S. __). N.D. Ala./Affirmed. Chief Justice Roberts for a 5–4 Court (Kavanaugh, J., concurring in part; Thomas, J., joined by Gorsuch and in part by Barrett and Alito, JJ., dissenting; Alito, J., joined by Gorsuch, J., dissenting). The Court held, at the preliminary injunction stage, that Alabama's congressional redistricting plan likely violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301. The Court concluded that the three-judge district court had "faithfully applied" *Thornburg v. Gingles*, 478 U.S. 30 (1986), and "correctly determined . . . under existing law" that the redistricting plan runs afoul of § 2. But the Court went on to observe that the "heart" of the case is "not about the law as it exists," but is rather about Alabama's "attempt to remake our § 2 jurisprudence anew." The Court rejected Alabama's argument that it should evaluate the state's compliance with § 2 of the Voting Rights Act by comparing the number of majority-minority districts in the state's redistricting plan against the number of such districts in "race-neutral" maps generated with modern computer technology. The Court reasoned that its past cases properly focused on the "specific illustrative maps that a plaintiff adduces," which show whether it is possible that the state's redistricting plan has disparate racial effects. The Court also rejected Alabama's argument that § 2 does not apply to single-member redistricting. The Court has previously held that § 2 and *Gingles* "certainly apply" to claims challenging single-member districts, and "statutory *stare decisis* counsels our staying the course." Finally, the Court rejected Alabama's argument that § 2 is unconstitutional as applied to redistricting because the Fifteenth Amendment "permits Congress to legislate against only purposeful discrimination." Even if that amendment prohibits only purposeful discrimination by the states, the Court's prior decisions foreclose any argument that Congress may not, pursuant to § 2 of the Fifteenth Amendment, outlaw voting practices that are discriminatory in effect.

4. ***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. 1). 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 sixteen 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.

5. ***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.***

Decided May 11, 2023 (598 U.S. __). Ninth Circuit/Affirmed. Justice Gorsuch for 5–4 Court (Roberts, C.J., joined by Alito, Kavanaugh, and Jackson, JJ., concurring in part and dissenting in part). California's Proposition 12, a law forbidding the in-state sale of pork from breeding pigs "confined in a cruel manner," does not violate the dormant Commerce Clause because it imposes the same burdens on in-state pork producers that it imposes on out-of-state ones. The Court rejected the "extraterritoriality doctrine" invoked by petitioners, who argued that the dormant Commerce Clause imposes an "almost *per se*" rule "forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State." The Court emphasized that the crux of the dormant Commerce Clause inquiry is whether a state law purposefully discriminates against out-of-state interests, not whether it has extraterritorial effects. The Court also concluded that the California law passed muster under the balancing test from *Pike v. Bruce Church*, 397 U.S. 137 (1970), which requires courts to assess whether the burdens a state law imposes on interstate commerce are excessive in relation to its putative local benefits. A majority agreed that *Pike* balancing serves to identify state laws whose "practical effects . . . disclose the presence of a discriminatory purpose." But the Court then fractured over why Proposition 12 survived this test. Justice Gorsuch, joined by Justices Thomas and Barrett, concluded that courts lacked "any juridical principle" by which they could balance the ethical and noneconomic benefits of Proposition 12 against the economic costs to pork producers. Justice

Gorsuch, this time joined by Justices Thomas, Sotomayor, and Kagan, further concluded that the complaint failed to state a claim under the dormant Commerce Clause because it merely alleged that Proposition 12 would shift market share from one group of out-of-state farmers to another. This plurality emphasized that the dormant Commerce Clause does not protect one particular market structure or method of operation.

6. ***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.**

   Decided Apr. 19, 2023 (598 U.S. 230). Fifth Circuit/Reversed. Justice Kavanaugh for a 6–3 Court (Thomas J., joined by Alito and Gorsuch, JJ., dissenting). The Court held that the statute of limitations for a state prisoner's suit under 42 U.S.C. § 1983 challenging the state's process for postconviction DNA testing begins to run at the end of the state court litigation denying DNA testing. The petitioner, Texas death row inmate Rodney Reed, filed a § 1983 claim in federal court alleging that Texas's postconviction testing regime does not comport with procedural due process. The parties agreed that the statute of limitations for this claim is two years but disagreed about when the limitations period began to run. The Court observed that the statute of limitations generally begins running when the plaintiff has a "complete and present cause of action." "To determine when the plaintiff has a complete and present cause of action, the Court focuses first on the specific constitutional right alleged to have been infringed." Here, the specific right at issue is procedural due process, a claim that accrues "not . . . when the deprivation occurs," but when the state "fails to provide due process." Since Texas's process for considering a request for DNA testing in capital cases includes not only trial court proceedings, but also appellate review, Reed's § 1983 claim was complete—and the statute of limitations began to run—when the Texas Court of Criminal Appeals denied his motion for rehearing. If the statute of limitations began to run earlier, when the trial court denied the motion for DNA testing, then a plaintiff like Reed would likely continue pursuing relief in the state system while simultaneously filing "a protective federal § 1983 suit challenging that ongoing state process." Such "parallel litigation" would create "senseless duplication" and run counter to principles of "judicial economy." By contrast, "significant systemic benefits ensue from starting the statute of limitations clock when the state litigation in DNA testing . . . has concluded" because "any due process flaws" that might "lurk in the DNA testing law" can be cured by the "state appellate process," rendering a federal § 1983 suit unnecessary.

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 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.

Decided May 18, 2023 (598 U.S. __). Second Circuit/Affirmed. Justice Sotomayor for a 7–2 Court (Kagan, J., joined by Roberts, C.J., dissenting). The Court held that a copier's addition of a new meaning or message to an original work of visual art is not sufficient to render the new work "transformative" for purposes of copyright's fair use defense. The contemporary artist Andy Warhol created silkscreened images of the musician Prince from a photograph by professional photographer Lynn Goldsmith. Warhol's foundation, which acquired the rights to his work upon his death, licensed one of those images to Conde Nast, which published it on the cover of a special tribute issue devoted to Prince. After Goldsmith informed the foundation that its licensing activity infringed the copyright in her photograph, the foundation sought a declaratory judgment of fair use. The foundation argued that Warhol's silkscreens were "transformative" under the first fair use factor because they commented on the nature of modern celebrity and therefore invested the original photograph with a new meaning or message. The Court rejected the foundation's position, concluding that, although a new meaning or message may be relevant under the first fair use factor, it is not dispositive. If a new meaning or message alone rendered a reproduction "transformative," it would swallow the copyright owner's exclusive right to prepare derivative works—including adaptations, sequels, and spinoffs—many of which "transform" the original work with new expression, meaning, or messages. The first fair use factor asks, instead, whether the reproduction serves the same purpose as the original work and is therefore likely to "supplant" or "substitute for" that work in the marketplace. Here, the foundation's commercial licensing of Warhol's Prince image to Conde Nast weighed against a finding of fair use because it served the same purpose as Goldsmith's photograph, which she also offered for licensing to popular magazines. The commercial nature of the foundation's licensing activity further counted against it under the first fair use factor.

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. 39). Fifth 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

9. ***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, and rejecting workable race-neutral alternatives.**

Decided June 29, 2023 (600 U.S. __). First Circuit and M.D.N.C./Reversed. Justice Roberts for a 6–3 Court (Thomas, J. concurring; Gorsuch, J., joined by Thomas, J., concurring; Kavanaugh, J. concurring; Sotomayor, J., joined by Kagan, J., dissenting; Jackson, J. abstained). The Court held that the systems Harvard College and the University of North Carolina use to consider an applicant's race as part of the admissions process violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Court instructed that race-based admissions programs at universities "must comply with strict scrutiny, . . . may never use race as a stereotype or negative, and—at some point—they must end." First, applying strict scrutiny, which requires that race-based admissions criteria be "narrowly tailored" to serve a "compelling" interest, the Court held that the programs failed to pass muster. The Court dismissed the universities' asserted interests in "training future leaders," educating students "though diversity," and "breaking down stereotypes" as "not sufficiently coherent for purposes of strict scrutiny." Likewise, the Court found no "meaningful connection" between the sweeping racial categories used in the admissions process and the universities' above-

stated interests. Next, the Court held that the universities impermissibly used race as a "negative" and a "stereotype" that counted against certain applicants, including Asian-Americans. Because college admissions "are zero-sum," a racial preference "provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." Finally, the Court observed that the universities' use of race lacked a "logical end point." The Court clarified that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." But each applicant must be "treated based on his or her experiences as an individual—not on the basis of race."

10. ***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.**

Decided June 22, 2023 (599 U.S. __). Eighth Circuit/Affirmed. Justice Thomas for a 6–3 Court (Sotomayor and Kagan, JJ. dissenting; Jackson, J. dissenting). The Court held that a federal inmate may not petition for habeas corpus based on a claim of legal innocence following a change in statutory interpretation because doing so would circumvent the restrictions on second or successive motions for federal postconviction relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Federal prisoners must seek postconviction relief through motions under 18 U.S.C. § 2255 unless such motions are "inadequate or ineffective to test the legality of [their] detention." *Id.* § 2255(e). In AEDPA, Congress prohibited second or successive § 2255 motions unless they are based on "newly discovered evidence" or a "new rule of constitutional law." *Id.* § 2255(h)(1), (2). The Court concluded that Congress intended second or successive motions under § 2255(e) to be available "where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention other than collateral attacks on a sentence." AEDPA's restrictions on second or successive § 2255 motions do not present these "unusual circumstances" for a prisoner's legal innocence claim based on intervening changes to statutory interpretation. Thus, "the inability of a prisoner with a statutory claim to satisfy" § 2255(h)'s exceptions does not render § 2255 an "inadequate or ineffective" remedy. Rather, by barring second or successive § 2255 motions that do not meet the provision's exceptions, Congress "chose[] finality over error correction." To hold otherwise "would make AEDPA curiously self-defeating" by "merely rerouting" non-constitutional claims, rather than barring them altogether, as was Congress's intent by permitting successive petitions based on a "new rule of constitutional law."

11. ***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. 17). 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."

12. ***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. 85). 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 $10,001 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."

13. ***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.**

    ***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.**

    Decided Apr. 14, 2023 (598 U.S. 175). Ninth Circuit/Reversed and remanded; Fifth Circuit/Affirmed and remanded. Justice Kagan for the Court (Thomas, J., concurring; Gorsuch, J., concurring in the judgment). Axon Enterprise, a company subject to an FTC enforcement action, and Michelle Cochran, a certified public accountant subject to an SEC enforcement action, sued the respective agencies in federal district court while the enforcement actions were pending, arguing that the agencies' structure and operations were unconstitutional and that their enforcement efforts were thus unlawful. The district courts dismissed the complaints in both cases, holding that the specialized judicial review provisions of the FTC Act and Securities Exchange Act deprived them of jurisdiction by funneling review of final agency orders to the federal courts of appeals. After the Fifth and Ninth Circuits reached conflicting decisions, the Supreme Court granted review, heard the cases together, and resolved them in a consolidated opinion. The Court held that,

Gibson Dunn
Counsel for Amici
Raymond J. Lucia, Sr.,
George R. Jarkesy, Jr. &
Christopher M. Gibson

Attorney
Kellam Conover

notwithstanding the statutes' judicial review provisions, federal courts have jurisdiction under 28 U.S.C. § 1331 to hear structural challenges to the FTC or SEC. In so holding, the Court reaffirmed the multifactor test set out in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), which—in analyzing whether claims are of the sort Congress intended to funnel through specialized judicial review processes—asks whether (i) precluding district court jurisdiction would foreclose meaningful judicial review of the claim, (ii) the claim is collateral to the judicial review provisions, and (iii) the claim is beyond the agency's expertise. The Court held that structural challenges to the FTC and SEC could proceed in federal district court because being subjected to an allegedly unconstitutional administrative process is a "here-and-now" injury and because the structural claims were collateral to and distinct from the typical matters submitted to the agencies' decisionmaking and expertise.

Gibson Dunn
Counsel for Amicus
Association of American
Railroads

Partners
Thomas H. Dupree Jr.
Jacob T. Spencer

14. ***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.**

Decided June 27, 2023 (600 U.S. __). Pennsylvania Supreme Court/Vacated and Remanded. Justice Gorsuch for a 5–4 majority in part, and for a four-justice plurality in part (Jackson, J., concurring; Alito, J., concurring in part and in the judgment; Barrett, J., joined by Roberts, C.J., and Kagan and Kavanaugh, JJ., dissenting). Pennsylvania's statute requiring registered businesses to consent to general personal jurisdiction in that state does not violate due process. The Court concluded that this case was controlled by *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), which upheld a substantially similar state law. In reaffirming *Pennsylvania Fire*, the Court rejected the defendant railroad's argument that the decision had been effectively overruled by subsequent cases on personal jurisdiction, including *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which held that a state court has personal jurisdiction over an out-of-state corporation only if the corporation has "minimum sufficient contacts" with the forum state. The Court explained that *International Shoe* applies to non-consenting corporations, but a state may obtain a corporation's consent to general jurisdiction when it registers to conduct business in that state. In a concurring opinion, Justice Alito agreed that *Pennsylvania Fire* foreclosed the due process challenge to Pennsylvania's law, but he suggested that other constitutional provisions or fundamental structural principles may limit a state's ability to obtain consent to personal jurisdiction, suggesting that he might strike down the consent-by-registration scheme in a challenge based on the dormant Commerce Clause. Writing for the dissent, Justice Barrett argued that the Pennsylvania statute violates due process as well as principles of interstate federalism.

15. ***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.

Decided June 8, 2023 (599 U.S. __). Seventh Circuit/Affirmed. Justice Jackson for a 7–2 Court (Gorsuch, J., concurring; Barrett, J., joined by Roberts, C.J., concurring; Thomas, J., dissenting; Alito, J., joined by Thomas, J., dissenting). The Court held that two disputed provisions of the Federal Nursing Home Reform Act ("FNHRA")—the right to be free from unnecessary restraints, and the right to predischarge notice, 42 U.S.C. §§ 1396a(a)(28), 1396r)—created individual rights enforceable through 42 U.S.C. § 1983, and that FNHRA's remedial scheme did not implicitly preclude such enforcement. First, the Court rejected the argument that "Spending Clause statutes [like FNHRA] do not give rise to privately enforceable rights under Section 1983." Although the Court has previously observed that Spending Clause statutes resemble contracts between the federal government and the states, the practice of precluding third-party beneficiaries from enforcing contractual obligations was not "firmly rooted" in the common law when § 1983 was enacted, and therefore was not incorporated into § 1983. And because § 1983's private right of action is a tort claim, the relevant common law principles arise from tort law, not contract law. Second, the Court held that the FNHRA's unnecessary-restraint and predischarge-notice provisions unambiguously confer individual federal rights. The text of these provisions concerns individual "residents' rights" and is "unmistakabl[y] focus[ed] on the benefited class," not merely on the distribution of public funds in aggregate. And because FNHRA's remedial scheme is not incompatible with an enforcement action under § 1983, FNHRA does not implicitly preclude such an action.

16. ***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.**

Decided June 15, 2023 (599 U.S. __). Fifth Circuit/Affirmed in part, reversed in part, vacated and remanded in part. Justice Barrett for a 7–2 Court (Gorsuch, J., joined by Sotomayor and Jackson, JJ., concurring; Kavanaugh, J., concurring; Thomas, J., dissenting; Alito, J., dissenting). The Court rejected four constitutional challenges to the Indian Child Welfare Act ("ICWA"), two on the merits and two on standing. ICWA is a federal statute that governs state

Gibson Dunn
Counsel for Petitioners
Chad Brackeen et al.

Partner
Matthew D. McGill

Of Counsel
Lochlan F. Shelfer

court adoption and foster-case proceedings involving Indian children. The act generally requires placement of an Indian child according to the act's hierarchical preferences, under which any Indian family or tribe outranks unrelated non-Indians. 25 U.S.C. § 1915(a)–(b). Adoptive families and the state of Texas unsuccessfully challenged the Act on four constitutional grounds. First, the Court held that ICWA is consistent with Congress's "plenary and exclusive" Article I power to legislate with respect to Indian tribes, which power extends to regulating Indian affairs generally. Second, the Court held that ICWA does not violate the anticommandeering doctrine because ICWA's requirements evenhandedly regulate state and private parties, and because Congress may require state courts to enforce federal law. Third, the Court found that no party had standing to raise an equal protection challenge. The defendants in the underlying lawsuit were federal officials, but only state courts and agencies implement ICWA, so a federal court judgment would not redress the plaintiffs' injuries. And Texas could not assert equal protection claims on behalf of its citizens against the federal government. Fourth, Texas did not have standing to bring a nondelegation challenge to an ICWA provision that authorizes tribes to alter ICWA's hierarchical placement preferences because the state's pocketbook injury would be the same even if it were not bound to apply the placement preferences. Justice Kavanaugh concurred to note that ICWA's "serious" equal protection issues could be challenged "in a case arising out of a state-court . . . proceeding." Justices Thomas and Alito each dissented, and each would have held ICWA unconstitutional for exceeding Congress's legislative powers.

December Arguments

17. ***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.**

Decided May 11, 2022 (598 U.S. 319). Second Circuit/Reversed. Justice Alito for a Court 9–0 as to the judgment (Gorsuch, J., joined by Thomas, J., concurring in the judgment). The Court rejected the theory advanced by petitioner that a private citizen nominally outside of public employment—here, a longtime aide to Governor Cuomo on a temporary hiatus from government service—can never owe a fiduciary duty to the public that would support a conviction for honest-services fraud. Under 18 U.S.C. § 1346, the public is owed a duty of "honest services," and depriving the public of that right is a federal crime. To obviate the concern that this statute is too vague to provide fair notice to defendants of what it forbids, the Court held in *Skilling v. United States*, 561 U.S. 358, 408 (2010), that the statute applies only to "heartland" cases like the acceptance of bribes or kickbacks. Though the statute typically applies to public officials, the Court held here that it can also extend to private citizens who are engaged in special relationships, such as an agency

relationship, with the government. But the Court concluded that the district court's instructions in this case—which permitted the jury to convict a private citizen if it found he "dominated and controlled . . . government business" and "people working for the government actually relied on him because of a special relationship he had with the government"—were too vague under *Skilling* because they could sweep in trusted counselors who lack any formal government position or even well-connected and effective lobbyists. A conviction for honest-services fraud requires a finding that the private citizen breached a legal duty owed to the government under an independent source of law—for instance, the fiduciary duty a private citizen would owe to the government when acting as its agent.

18. ***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 Second 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.**

Decided May 11, 2023 (598 U.S. 306). Second Circuit/Reversed. Justice Thomas for a 9–0 Court (Alito, J., concurring). The Court held that valuable economic information needed to make discretionary economic decisions is not a traditional property interest and thus does not constitute "property" for purposes of the federal wire fraud statute. The wire fraud statute proscribes making false statements to obtain "money or property." 18 U.S.C. § 1343. The Supreme Court has previously held that federal fraud statutes apply only to schemes to deprive victims of "traditional property interests." Because valuable economic information needed to make discretionary economic decisions is not a traditional property interest, the Court concluded that the federal wire fraud statute does not apply to schemes to deprive victims of such information. The Court therefore invalidated the Second Circuit's "right-to-control" theory as a basis for liability under § 1343 and reversed the Second Circuit's decision upholding petitioner Louis Ciminelli's conviction. The Court also declined the government's invitation to uphold Ciminelli's conviction on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property fraud theory because the government relied exclusively on the right-to-control theory in obtaining Ciminelli's conviction and defending that conviction in the Second Circuit.

19. ***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).

Decided June 23, 2023 (599 U.S. __). S.D. Tex./Reversed. Justice Kavanaugh for a Court 8–1 as to the judgment (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring; Barrett, J., joined by Gorsuch, J., concurring; Alito, J., dissenting). The Supreme Court held that Texas and Louisiana lacked standing to challenge Biden Administration immigration guidelines that prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently. Texas and Louisiana sued the Department of Homeland Security alleging that the new guidelines violate federal laws that supposedly require the United States to arrest *more* noncitizens pending their removal. The states argued that they had standing to pursue these claims because the Department's failure to comply with statutory arrest mandates forces them to incur costs for incarcerating and providing social services to noncitizens who should be (but are not) arrested by the federal government. The Court rejected the states' standing argument, citing to the well-established principle that a plaintiff "lacks standing to contest the policies or decisions of a prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." A lawsuit asserting that the executive has made an insufficient number of arrests also clashes with Article II, which grants authority to the executive branch "to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." The executive's enforcement discretion "extends to the immigration context," where it "implicates not only normal domestic law enforcement priorities but also foreign-policy objectives." In separate concurrences, Justices Gorsuch and Barrett agreed that the federal courts lacked Article III jurisdiction over the states' claims but diagnosed the jurisdictional defect as one of redressability rather than standing. In a solo dissent, Justice Alito would have found standing under the *Lujan* test based on the financial injuries Texas would allegedly sustain as a result of the guidelines.

20. ***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.**

Decided Mar. 28, 2023 (598 U.S. 152). Ninth Circuit/Reversed. Justice Sotomayor for a 6–3 Court (Thomas, J., joined by Roberts, C.J., and Alito, J., dissenting). The Court held that the Quiet Title Act's 12-year statute of limitations in 28 U.S.C. § 2409a(g) is not jurisdictional in nature. A procedural requirement such as a limitations period does not qualify as jurisdictional unless "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." Observing that "most time bars" are not jurisdictional, the Court concluded that nothing in § 2409a(g)'s text or context "gives reason to depart from this beaten path." That section contains "mundane statute-of-limitations language" that is "separat[e]" from the Quiet Title Act's jurisdictional grant in 28 U.S.C. § 1346(f). The Court

rejected the government's argument that it already resolved the question presented in a trilogy of prior decisions. The Court concluded that *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273 (1983), contained "a textbook drive-by jurisdictional ruling" that "should be accorded no precedential effect." The Court also explained that the equitable tolling analysis in *United States v. Beggerly*, 524 U.S. 38 (1998), did not help the government because subject-matter jurisdiction "is never subject to equitable tolling." As for *United States v. Mottaz*, 476 U.S. 834 (1986), the Court explained that "general statements" in that opinion concerning conditioning a waiver of sovereign immunity on a statute of limitations did not rise to the level of a jurisdictional analysis. The dissenting Justices disagreed on this last point, arguing that Congress's waiver of sovereign immunity in the Quiet Title Act was expressly conditioned on a 12-year statute of limitations, and "[i]n the context of a waiver of sovereign immunity, the Court presumes that procedural limitations are jurisdictional." The dissent also read *Block* and *Mottaz* as having already ruled that § 2409(g) is jurisdictional and would "continue to treat it" as such "unless and until Congress directs otherwise."

21. ***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.**

Decided June 30, 2023 (600 U.S. __). Tenth Circuit/Reversed. Justice Gorsuch for a 6–3 Court (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). The Court held that a public accommodations law, the Colorado Anti-Discrimination Act ("CADA"), violated the First Amendment to the extent it would compel a website designer to produce expressive speech that would "align" with the state's views but "defy her conscience about a matter of major significance." Colorado-based graphic artist Lorie Smith sought to design and sell wedding websites through her business, 303 Creative LLC. Smith believes that marriage should be limited to unions between one man and one woman. CADA requires most public-facing Colorado businesses to offer "full and equal enjoyment" of their goods and services to customers of all sexual orientations, among other protected traits. Violators can be ordered to pay fines, attend "remedial training," submit compliance reports, or take other "affirmative actions." Smith sought an injunction to prevent Colorado from applying CADA to require her to create websites "celebrating marriages she does not endorse." The parties stipulated that the websites Smith creates are "expressive in nature," are "customized and tailored" for each client, and express her own message "celebrating and promoting" her views of marriage. The parties further agreed that Smith is "willing" to provide her services to "all people regardless of . . . sexual orientation" but that she "will not produce content" with which she disagrees "regardless of who orders it." On these stipulated facts, the Court held that Smith's wedding websites qualify as her own "pure speech," which the government may not compel. Despite Colorado's "compelling interest in eliminating discrimination in places of public accommodation"—including

discrimination on the basis of sexual orientation—government efforts "can sweep too broadly when deployed to compel speech." A state may not "coopt an individual's voice for its own purposes," no matter how "unique" that voice or its platform. The Court rejected Colorado's argument that Ms. Smith could simply repurpose websites she created for marriages she does endorse for marriages she does not. In the Court's view, Colorado's position was inconsistent with the parties' stipulation that Smith creates "an original, customized creation for each client." The Court also rejected Colorado's contention that Smith refused to create websites for certain couples on the basis of "protected characteristics," again finding that position inconsistent with the parties' stipulation that Smith would create custom websites for gay, lesbian, or bisexual clients so long as the content does "not violate her beliefs."

22. ***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.**

Decided Apr. 19, 2023 (590 U.S. 288). Second Circuit/Vacated and remanded. Justice Jackson for a unanimous Court. The Bankruptcy Code permits interested parties to object to the sale or lease of a bankruptcy estate's property outside of the ordinary course of the bankrupt entity's business. 11 U.S.C. § 363(b). If the bankruptcy court allows the sale over an objection, the interested parties may appeal. But the Bankruptcy Code limits the effect of such an appeal, providing that even a "reversal or modification on appeal . . . does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith . . . unless such an authorization or lease were stayed pending appeal." *Id.* § 363(m). The Court held that § 363(m)'s stay requirement was not jurisdictional. The Court began by recognizing that statutes often contain directives for litigants that may serve as mandatory preconditions for relief. But the fact that a condition is mandatory does not render it jurisdictional. The Court will "only treat a provision as jurisdictional if Congress 'clearly states' as much." Here, the Court discerned "nothing" in the text of § 363(m) that "purports to govern a court's adjudicatory capacity." Contextual clues further clinched the Court's analysis. As the Court observed, Congress separated § 363(m) from provisions of the Bankruptcy Code that recognize federal court jurisdiction over bankruptcy matters, and § 363(m) contains no "clear tie" to those jurisdictional provisions.

23. ***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.**

Gibson Dunn
Counsel for Amicus Pharmaceutical Research and Manufacturers of America

Partners
Lucas C. Townsend
Jonathan M. Phillips
John D.W. Partridge

Decided June 16, 2023 (599 U.S. __). Third Circuit/Affirmed. Justice Kagan for an 8–1 Court (Thomas, J., dissenting). The False Claims Act (FCA) allows private individuals, or relators, to bring claims on behalf of the government against parties who have allegedly defrauded the federal government. When a relator files a complaint based on an alleged violation of the FCA, the government has the opportunity during a "seal period" to intervene and litigate the action itself, or it can decline to intervene and allow the relator to litigate on its behalf. The statute also permits the government to "dismiss the action" over the relator's objections. 31 U.S.C. § 3730(c)(2)(A). The Court held that the government may seek dismissal of an FCA over a relator's objection even if it declined to intervene during the seal period, "so long as it intervened sometime in the litigation, whether at the outset or afterward." The decision permits the government to dispose of FCA suits that have become adverse to the public interest, either because they impose discovery costs on federal employees and agencies or because they interfere with federal policy priorities. "Congress decided not to make seal-period intervention an on-off switch. It knew that circumstances could change and new information come to light. So Congress enabled the Government, in the protection of its own interests, to reassess *qui tam* actions and change its mind." Once the government has properly intervened, a district court should assess the government's motion to dismiss under the standard set forth in Federal Rule of Civil Procedure 41(a), which governs voluntary dismissals. The application of Rule 41 in the FCA context will differ from the norm in two respects. First, the district court must afford the relator notice and an opportunity for a hearing before dismissing the action over his objection. 31 U.S.C. § 3730(c)(2)(A). Second, the court must consider the relator's interests in allowing the suit to proceed. At the same time, the government's motion to dismiss should satisfy Rule 41 in "all but the most exceptional cases." "If the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary."

24. ***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. 69). 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-

Gibson Dunn
Counsel for Amicus National Consumer Bankruptcy Rights Center, et al.

Partners
Robert Klyman
Jacob T. Spencer

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."

25. ***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.**

Decided June 27, 2023 (600 U.S. __). Chief Justice Roberts for a 6–3 Court (Kavanaugh, J., concurring; Thomas, J., joined by Gorsuch and in part by Alito, JJ., dissenting). Following the 2020 census, the North Carolina legislature redrew the state's federal congressional map. Several groups challenged the map as an impermissible partisan gerrymander in violation of the North Carolina Constitution. The North Carolina Supreme Court initially agreed and enjoined use of the 2021 map. In so doing, the North Carolina Supreme Court rejected arguments that (1) partisan gerrymanders are nonjusticiable under the state constitution and (2) the Elections Clause of the U.S. Constitution vests exclusive and independent authority in state legislatures to draw federal congressional maps. After the U.S. Supreme Court granted certiorari, however, the state supreme court reversed its prior decision, holding that partisan gerrymanders are nonjusticiable under the North Carolina Constitution. In a 6–3 ruling, the U.S. Supreme Court held that the North Carolina Supreme Court's about-face did not render the case moot. The state court had overruled "only the reasoning" of its initial decision and had neither altered its judgment enjoining use of the 2021 maps nor revisited its decision rejecting the legislature's Elections Clause defense. As a result, the state legislature's "path to complete relief runs through this Court." On the merits, the Court held that the Elections Clause does not insulate state legislatures from review by state courts for compliance with state law. The federal Elections Clause provides in relevant part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

thereof." U.S. Const. art. I, § 4, cl. 1. Relying on evidence of judicial review of state legislative actions from the Founding era through the 20th century, the Court rejected the legislature's argument that it remains bound only by the limits of the federal Constitution when regulating federal elections. Instead, the Framers understood that "when legislatures make laws, they are bound by the provisions of the very documents that give them life." Nothing in the Elections Clause suggests otherwise. When state legislatures craft rules governing federal elections, "they make laws." Such lawmaking is "subject to the ordinary constraints on lawmaking in the state constitution" and may be reviewed by state courts, which are empowered to enforce such restraints.

January Arguments

26. ***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.**

Decided May 18, 2023 (598 U.S. __). Sixth Circuit/Affirmed (Alito, J., joined by Gorsuch, J., dissenting). The Court held that the Federal Labor Relations Authority ("FLRA") has jurisdiction over a labor dispute between the Ohio National Guard and the union that represents federal employees known as "dual-status technicians" who work in both civilian and military roles. Under the Federal Service Labor-Management Relations Statute, the FLRA has authority to investigate and resolve complaints concerning "an unfair labor practice" by a federal "agency." 5 U.S.C. § 7116(a). The Court held that the Ohio National Guard qualifies as an "agency" for purposes of the statute. The law defines an "agency" to include an "Executive agency," which in turn includes the Department of Defense and its constituent parts. *Id*. § 7103(a)(3). The Ohio National Guard employs and supervises dual-status technicians under authority delegated by the Secretaries of the Army and Air Force, and the technicians are employees of either the Army or the Air Force, both of which are components of the Department of Defense. 32 U.S.C. § 709(d), (e). Because the Guard acts on behalf of, and exercises the authority of, a covered federal agency when it supervises dual-status technicians, the FLRA has jurisdiction over the labor dispute. The Court rejected the Guard's federalism arguments, concluding that the supervision of dual-status technicians does "not implicate the balance between federal and state powers" because the Guard was acting on behalf of a federal agency.

27. ***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.**

Decided June 1, 2023 (598 U.S. __). Washington Supreme Court/Reversed and remanded. Justice Barrett for a Court 8–1 as to the judgment (Thomas, J., joined by Gorsuch, J., concurring in the judgment; Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment; Jackson, J., dissenting). The Court held that the National Labor Relations Act ("NLRA") does not preempt state law tort claims alleging that a union intentionally destroyed property in the course of a labor strike. A union agent called for a work stoppage as Glacier, a company that sells ready-mix concrete, was mixing substantial amounts of concrete, loading it onto trucks, and making deliveries. Because concrete begins to harden immediately once at rest, the sudden work stoppage imperiled Glacier's trucks and destroyed its concrete. Glacier sued the union for common law conversion and trespass to chattels. The union asserted a preemption defense, arguing that, under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), federal law displaces state tort claims that even "arguably" conflict with the NLRA. But the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from "foreseeable, aggravated, and imminent danger due to the sudden cessation of work." Accepting the allegations in Glacier's complaint as true, the Court concluded that the union not only failed to take reasonable precautions, but "executed the strike in a manner designed to compromise the safety of Glacier's trucks and destroy its concrete." Accordingly, the NLRA did not "arguably" protect the union's conduct or preempt Glacier's state tort claims.

28. ***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.**

Decided May 11, 2023 (598 U.S. 339). First Circuit/Reversed and remanded. Justice Kagan for an 8–1 Court (Thomas, J., dissenting). The Court assumed without deciding that Puerto Rico enjoys sovereign immunity from suit in federal court and that the Financial Oversight and Management Board, which Congress created to manage the territory's finances, shares in whatever immunity Puerto Rico possesses. Having assumed such immunity exists, the Court held that PROMESA does not categorically abrogate that immunity. The standard for finding abrogation is stringent: Congress must make its intent to abrogate "unmistakably clear in the language of the statute." The Court has previously found this standard satisfied where the statute in question either states "in so many words that it is stripping immunity from the sovereign entity" or else "creates a cause of action and authorizes suit against a government on that claim." PROMESA neither subjects the Board to suit nor creates a cause of action against the Board. The Court rejected respondent's argument that Congress made a "clear statement" of its intent to abrogate in PROMESA's jurisdictional provision, which channels claims against the Board to federal

Gibson Dunn
Counsel for Amicus
Reporters Committee for
Freedom of the Press

Partners
Theodore J. Boutrous Jr.
Matthew D. McGill
Amir C. Tayrani

Of Counsel
Kate Meeks

district court in Puerto Rico. The Court reasoned that this provision ensures that suits against the Board will be heard in federal court when another statute waives or abrogates the Board's immunity. Simply "providing for a judicial forum" for claims against the Board does not constitute "the requisite clear statement" necessary to abrogate whatever immunity the Board enjoys.

29. ***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.**

Decided May 11, 2023 (598 U.S. 411). Fifth Circuit/Vacated in part and remanded. Justice Jackson for a unanimous Court (Alito, J., joined by Thomas, J., concurring in the judgment). The Court held, first, that the requirement that a noncitizen first exhaust certain administrative remedies before seeking judicial review of an order of removal, 8 U.S.C. § 1252(d), is not jurisdictional. And it held, second, that a noncitizen need not request discretionary forms of administrative review, such as reconsideration of an unfavorable Board of Immigration Appeals ("BIA") decision, to satisfy the exhaustion requirement in § 1252(d). As to the first holding, the Court explained that Congress did not make the required clear statement that the exhaustion requirement in § 1252(d) is jurisdictional. To the contrary, § 1252(d)'s language "differs substantially from more clearly jurisdictional language in related statutory provisions." The Court also reasoned that threshold requirements that litigants exhaust their claims typically are *not* jurisdictional in nature, and for good reason. Exhaustion requirements promote efficiency, and treating an exhaustion rule as jurisdictional would force litigants to "slog through preliminary nonjudicial proceedings even when . . . no party demands it or a court finds it would be pointless, wasteful, or too slow." Similarly, an exhaustion objection raised late in litigation—as jurisdictional objections can be—"might derail many months of work on the part of the attorneys and the court." As to the second holding, the Court concluded that a noncitizen need not request discretionary forms of relief because § 1252(d) requires exhaustion only of "administrative remedies available to the alien as of right." Because reconsideration by the BIA is a discretionary form of review, it is not available to a noncitizen "as of right." Section 1252(d)(1) therefore does not require a noncitizen to pursue it.

30. ***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.**

Decided April 19, 2023 (598 U.S. 264). Second Circuit/Affirmed in part, vacated and remanded in part. Justice Kavanaugh for a Court 9–0 as to the judgment (Gorsuch J., joined by Alito, J., concurring in part and dissenting in part.). The Court held that the federal district court could exercise jurisdiction under 18 U.S.C. § 3231 over the criminal prosecution of a bank owned by the Republic of Turkey. That statute vests district courts with jurisdiction over the full range of criminal prosecutions for violations of federal criminal law, and the Court declined to carve out an "atextual" exception for criminal prosecutions of foreign states and their instrumentalities. Separately, the Court held that the Foreign Sovereign Immunities Act ("FSIA") does not provide foreign states or their instrumentalities with immunity from criminal proceedings. The text of the FSIA addresses only civil suits against foreign states and their instrumentalities and sets forth a carefully calibrated scheme that relates only to civil cases. For instance, the statute governs venue, service, counterclaims, and other concepts relevant only in civil litigation. Additionally, the FSIA is located within Title 28 of the U.S. Code, which concerns civil procedure, and does not modify Title 18, which concerns criminal offenses. Although the Court concluded that the FSIA did not afford the bank immunity from criminal prosecution, it remanded for the court of appeals to consider whether the bank was entitled to common law immunity. Writing separately, Justices Gorsuch and Alito agreed that district courts can "hear cases alleging offenses committed by foreign sovereigns" but would have held that the FSIA provides immunity from criminal prosecution unless an exception applies. One such exception instructs that a foreign sovereign is not entitled to immunity when "the action is based upon" certain "commercial activity." 28 U.S.C. § 1605(a)(2). Here, the indictment sufficiently alleged that the bank was "engaged in just those kinds of commercial activities."

31. ***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. 142). 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 Calendar

Gibson Dunn
Counsel for Amicus Meta Platforms, Inc.

Partners
Theodore J. Boutrous Jr.
Helgi C. Walker
Kristin Linsley
Amir C. Tayrani
Russell Balikian
Brad G. Hubbard

32. ***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.**

Decided May 18, 2023 (598 U.S. __). Ninth Circuit/Vacated and remanded. Per Curiam. In light of its opinion in *Twitter v. Taamneh*, No. 21-1496, released the same day, the Court declined to address the application of § 230 of the Communications Decency Act to the recommendations of social media services. Instead, because plaintiffs' underlying claims were based on aiding and abetting under the Anti-Terrorism Act, 18 U.S.C. § 2333(d)(2), and the "allegations were materially identical" to those in *Taamneh*, it became "clear" to the Court "that plaintiffs' complaint—independent of § 230—states little if any claim for relief." Accordingly, the Court vacated and remanded for the Ninth Circuit to evaluate the complaint under the Court's opinion in *Taamneh*.

Gibson Dunn
Counsel for Respondent Facebook, Inc. Supporting Petitioner

Partners
Theodore J. Boutrous Jr.
Helgi C. Walker
Kristin Linsley
Jonathan Bond
Jacob T. Spencer

33. ***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 § 2333.**

Decided May 18, 2023 (598 U.S. __). Ninth Circuit/Reversed. Justice Thomas for a unanimous Court (Jackson, J., concurring). The Court held that technology and social media companies were not liable under the Anti-Terrorism Act, 18 U.S.C. § 2333(d)(2), for aiding and abetting terrorist attacks perpetrated by ISIS. To aid and abet, the companies must "knowingly provid[e] substantial assistance" to the commission of the particular act of terrorism at issue. *Id.* Plaintiffs made generalized allegations that ISIS (like billions of others) used the companies' services and benefitted from recommendation algorithms, and the companies took insufficient action to remove them. But plaintiffs failed to "allege any definable nexus between the defendants' assistance and that attack" at issue—a shooting at a nightclub in Istanbul. "[A]t minimum, this drastically increase[d] their burden to show that defendants somehow consciously and culpably assisted the attack," which they failed to do. Relying on common law principles of aiding-and-abetting and the "framework" of the D.C. Circuit's decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), the Court explained that "ISIS' ability to benefit from these platforms was merely incidental to defendants' services and general business models; it was not attributable to any culpable conduct of defendants directed toward ISIS."

34. ***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.**

Decided June 8, 2023 (599 U.S. __). Fifth Circuit/Vacated and remanded. Justice Sotomayor for a Court 9–0 as to the judgment (Gorsuch, J., concurring in the judgment). The Court held that a defendant "uses" another person's means of identification "in relation to" a predicate offense under 18 U.S.C. § 1028A(a)(1) when that use is at the crux of what makes the conduct criminal. The petitioner, David Dubin, submitted a claim for Medicaid reimbursement that falsely identified the employee who conducted the test as a licensed psychologist, when that person was only a licensed psychological *associate*. This falsehood inflated the amount of reimbursement. The government charged Dubin with aggravated identity theft under § 1028A(a)(1), which applies when a defendant "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" during and "in relation to" a predicate offense—here, health care fraud. The Court rejected the government's argument that a defendant "uses" a means of identification "in relation to" a predicate offense if "the use of that means of identification facilitates or furthers the predicate offense in some way." Section 1028A(a)(1)'s title and text both "point to a narrower reading, one centered around the ordinary understanding of identity theft." The Court adopted a "targeted reading" of the statute that captures the ordinary understanding of identity theft, "where misuse of a means of identification is at the crux of the criminality." Identity theft is committed, in other words, "when a defendant uses the means of identification itself to defraud or deceive." The Court found support for its reading in the title of the statute, which punishes "Aggravated

identity theft." The government's reading of the statute would "apply the 'aggravated' label to all manner of everyday overbilling offenses," which the "ordinary user of the English language would not consider identity theft at all." The Court also reasoned that the "staggering breadth" of the government's interpretation of § 1028A(a)(1) is inconsistent with the principles of restraint the Court ordinarily applies in assessing the reach of a federal criminal statute.

35. ***Biden v. Nebraska, et al.*, 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, et al.*, 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.**

Decided June 30, 2023 (600 U.S. __). E.D. Mo./Reversed. Chief Justice Roberts for a 6–3 Court (Barrett, J., concurring; Kagan, J., joined by Sotomayor and Jackson, JJ., dissenting). The Court held that the Higher Education Relief Opportunities for Students Act ("HEROES Act") does not authorize the Secretary of Education to cancel approximately $430 billion of federal student loan debt. That statute empowers the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title VI" of the Higher Education Act of 1965 "as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). In response to the COVID-19 pandemic, the Biden Administration announced it would issue "waivers and modifications" under the act to reduce or eliminate certain federal student loans. Six states sought a preliminary injunction, and the district court dismissed their complaint for lack of Article III standing. The Eighth Circuit entered a nationwide preliminary injunction pending appeal, and the Supreme Court granted certiorari before judgment and expedited argument. The Court reversed the district court's judgment of dismissal, holding that Missouri had standing because the Secretary's student loan relief plan would deprive the Missouri Higher Education Loan Authority, a nonprofit corporation and instrumentality of the state, of millions of dollars in fees it would have earned for servicing the student loans. On the merits, the Court held that the Secretary had exceeded his authority under the HEROES Act. That statute permits the Secretary only "to make modest adjustments and additions" to statutes or regulations governing federal student loans, "not transform them." Previous modifications issued under the HEROES Act "implemented only minor changes, most of which were procedural." By contrast, the Secretary's debt relief plan "created a novel and fundamentally different loan forgiveness program" that replaced the "few narrowly delineated situations" in which Congress permitted the erasure of student loan debt with "expanded forgiveness to nearly every borrower in the country." The Court further held that the Secretary's plan triggered application of the "major questions doctrine" under *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The Court rejected the government's argument that the major questions doctrine applies only in cases implicating an agency's power to regulate, not to the provision of government benefits. The separation of powers concerns animating that doctrine do not "evaporate" simply because the government "is

awarding benefits rather than imposing obligations." The "economic and political significance of the Secretary's action is staggering by any measure" and would have a projected "economic impact" ten times as large as that of the Centers for Disease Control's eviction moratorium, which the Court analyzed under the major questions doctrine. "A decision of such magnitude and consequence on a matter of earnest and profound debate across the country must rest with Congress itself, or an agency acting pursuant to a clear delegation from a representative body." Here, the HEROES Act did not provide the "clear congressional authorization" required for the Secretary's program.

36. ***Dep't of Education v. Brown, et al.*, No. 22-535 (N.D. Tex., 2022 WL 16858525; cert. granted Dec. 12, 2022; argument Feb. 28, 2023). Related to *Biden v. Nebraska, et al.*, 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.**

Decided June 30, 2023 (600 U.S. __). N.D. Tex./Vacated and remanded. Justice Alito for a unanimous Court. The Court held that two individual plaintiffs lacked Article III standing to challenge the same student debt relief plan at issue in *Biden v. Nebraska*, which was argued and decided on the same day. One of those plaintiffs, Myra Brown, was not entitled to loan forgiveness under the plan because a commercial creditor, rather than federal government, held her student loans. The other plaintiff, Alexander Taylor, plaintiffs in this case, was eligible for relief, but only for $10,000, rather than the maximum of $20,000. Together, they alleged that the Department of Education lacked authority to issue the student debt relief plan under the HEROES Act and should have engaged in notice and comment rulemaking. And if the Department had followed those procedures, they alleged, they would have had the opportunity to convince the Department that the program was unlawful and that it should adopt a *different* loan forgiveness program under the Higher Education Act ("HEA") of 1965 that would be more generous to them. The Court held that plaintiffs could not show their alleged injury was fairly traceable to the Department's decision to grant loan relief under the HEROES Act. The Department's debt relief program operates independently of any separate relief program the Department might craft under the HEA. A decision by the Court that the Department's plan was unlawful would "have no effect" on the Department's ability to forgive plaintiffs' loans under the HEA. "Put differently, the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want."

37. ***New York v. New Jersey*, No. 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.**

Decided April 18, 2023 (598 U.S. __). Original Jurisdiction/New Jersey's motion granted. Justice Kavanaugh for a unanimous Court. The Court held that New Jersey may unilaterally withdraw from the Waterfront Commission Compact notwithstanding New York's opposition. The compact established a bistate agency to which New York and New Jersey each delegated their sovereign authority to conduct regulatory and law enforcement activities at the Port of New York and New Jersey. The interpretation of an interstate compact begins with its express terms. Because the compact was silent on unilateral withdrawal, the Court looked to background principles of contract law to elucidate the parties' understanding when they entered the compact. Under the default contract law rule, a contract that contemplates ongoing performance for an indefinite amount of time can be terminated at will by either party. Here, in entering the compact, New York and New Jersey delegated their authority to a bistate agency on an ongoing and indefinite basis. Accordingly, either state could unilaterally withdraw from the compact. "Parties to a contract that calls for ongoing and indefinite performance generally need not continue performance after the contractual relationship has soured, or when the circumstances that originally motivated the agreement's formation have changed." The conclusion that New Jersey could unilaterally withdraw was reinforced by the background principle that states do not surrender their sovereignty easily. The Court would not assume that New Jersey had permanently ceded its right to withdraw in the absence of the states' joint consent or congressional action to terminate the compact. The Court clarified that the rule it applied in this case did not govern interstate compacts setting boundaries, apportioning water rights, or conveying property interests.

March Calendar

38. ***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*.**

Decided June 22, 2023 (599 U.S. __). Ninth Circuit/Reversed. Justice Kavanaugh for a 5–4 Court (Thomas, J., concurring; Gorsuch, J., joined by Sotomayor, Kagan, and Jackson, JJ., dissenting). The Court held that the 1868 treaty between the United States and the Navajo Nation does not obligate the United States to take affirmative steps to secure water for the Navajos on their

reservation. The Navajo Nation brought a breach of trust claim seeking to compel the U.S. Department of the Interior and other federal parties "to determine the water required to meet the needs" of the Navajos in Arizona. To succeed on that claim, the tribe needed to establish that the text of a treaty, statute, or regulation imposed a duty on the United States to secure water—for example, by assessing the tribe's water needs and potentially building pipelines, pipes, wells, or other infrastructure on the Navajo reservation. Although the 1868 treaty required the United States to build schools, a chapel, and other buildings and to provide other enumerated benefits to the tribe, the treaty contained no "rights-creating" or "duty-imposing" language that required the federal government to secure water for the Navajo Nation. Nor did any such obligation arise from the "general trust relationship" between the United States and Indian tribes. The United States is a sovereign, not a private trustee, and the Court would not apply common law trust principles to infer duties not found in the text of a treaty, statute, or regulation. The task of updating the 1868 treaty to meet the modern-day needs of the Navajo Nation belongs to Congress and the President, not the federal courts. The Court declared it "particularly important" that the courts "stay in their proper constitutional lane" because allocating water among competing interests in "the arid regions of the American West is often a zero-sum situation" best left to the political branches.

39. ***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.**

Decided June 29, 2023 (600 U.S. __). Tenth Circuit/Vacated and remanded. Justice Alito for a Court 9–0 as to the judgment (Jackson, J., concurring; Sotomayor, J., joined by Roberts, C.J., Kagan, J., and Barrett, J., concurring in the judgment). The Court held that trademark infringement claims under the Lanham Act apply only where the claimed infringing "use in commerce" of a trademark occurs in the United States. The Lanham Act imposes liability on anyone who "use[s] in commerce" a trademark in a manner "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. §§ 1114(1)(a), 1117(a)–(c), 1125(a)(1). Hetronic, a U.S. company, sued Abitron, a group of foreign companies, alleging that Abitron sold products that infringed Hetronic's trademarks. Ninety-seven percent of Abitron's sales were made in foreign countries, to foreign buyers, for foreign use. The Court held that the Lanham Act's trademark infringement provisions did not reach those foreign sales. But the Court split 5–4 over what counts as a permissible "domestic application" of these provisions. The majority held that the provisions apply only when the allegedly infringing "use in commerce" occurs in U.S. territory. Four Justices would have instead adopted the federal government's position that foreign sales violate the Lanham Act's trademark infringement provisions so long as they are likely to cause consumer confusion in the United States—a position the majority expressly rejected. Justice Jackson, who provided the fifth vote for

the majority, concurred separately to suggest that a foreign company selling goods in a foreign country could still be engaged in domestic "use in commerce" if the buyer resells the goods in the United States, or if the foreign company engages in other conduct "in the internet age" that would constitute a "use in commerce" in the United States even without a "domestic physical presence."

40. ***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 nonfrivolous 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?**

    Decided June 23, 2023 (599 U.S. __). Ninth Circuit/Reversed. Justice Kavanaugh for a 5–4 Court (Jackson, J., joined by Sotomayor and Kagan, JJ., and in part by Thomas, J., dissenting). The Court held that an interlocutory appeal from the denial of a motion to compel arbitration automatically stays all litigation on the merits in district court. The Federal Arbitration Act ("FAA") authorizes interlocutory appeals from the denial of a motion to compel arbitration, 9 U.S.C. § 16(a), but the statute is silent as to whether litigation in district court must be stayed while the court of appeals determines the question of arbitrability. The Court therefore looked to the common law divestiture rule: An appeal generally "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Because the question in interlocutory appeals under the FAA is whether the case belongs in arbitration or instead in district court, the entire case is essentially "involved in the appeal" and subject to divestiture. The Court reasoned that allowing litigation to proceed in the district court while an interlocutory appeal was pending would defeat the purposes of § 16—defendants would be subjected to the very costs and burdens of litigation from which the interlocutory appeal was intended to spare them. The Court explained that discretionary stays are not an adequate substitute because parties would rarely be able to show irreparable harm from incurring litigation costs during the pendency of the interlocutory appeal.

41. ***Jack Daniel's Properties v. VIP Products LLC*, No. 22-148 (9th Cir., 2022 WL 1654040; cert. granted Nov. 21, 2022; argument 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; and (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).**

Decided June 8, 2023 (599 U.S. __). Ninth Circuit/Vacated and Remanded. Justice Kagan for a unanimous Court (Sotomayor, J., joined by Alito, J., concurring; Gorsuch, J., joined by Thomas and Barrett, JJ., concurring). The Court held that when an alleged infringer uses another's trademark to identify the source of its own goods, it uses the trademark "as a trademark" and is not entitled to invoke First Amendment protections against Lanham Act liability simply because the use is comedic or parodic. The Court did not decide whether the so-called *Rogers* test from the Second Circuit, which provides "expressive works" with First Amendment protections from trademark liability, might apply in other contexts. *See Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Rather, the Court clarified that the *Rogers* test has no application where the alleged infringer uses the trademark of another as a "source identifier." The Court also held that, in a separate claim for trademark dilution, the Lanham Act excludes only "noncommercial uses" from liability, such that even a parodic or humorous use of the mark for commercial purposes can lead to dilution liability. In a concurring opinion joined by Justices Thomas and Barrett, Justice Gorsuch questioned whether use of the *Rogers* test is ever appropriate but agreed the Court need not decide that question to resolve this case.

42. ***Amgen Inc. v. Sanofi*, No. 21-757 (Fed. Cir., 987 F.3d 1080; cert. granted Nov. 4, 2022; argument 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."**

Decided May 18, 2023 (598 U.S. __). Federal Circuit/Affirmed. Justice Gorsuch for a 9–0 Court. The Court held that the Patent Act's enablement requirement is satisfied only when a patent's specification allows persons skilled in the art to make and use the full scope of the invention without more than a "reasonable" amount of experimentation under the circumstances. The Patent Act requires a patent specification to describe "the manner and process of making and using" the invention in such a way "as to enable any person skilled in the art to which it pertains . . . to make and use the same." 35 U.S.C. § 112(a). Here, petitioner Amgen obtained a patent for an "entire genus" of antibodies that performed a specific function. The Court found the patent invalid as a matter of law because it covered potentially millions of antibodies but did not describe a method for reliably generating all of them. Although the patent described the amino acid sequence for 26 specific antibodies, the method it prescribed for making additional embodiments within the claimed class amounted to little more than "advice to engage in trial and error." A directive "to engage in painstaking experimentation to see what works . . . is not enablement." Instead, "[i]f a patent claims an entire class of processes, machines, manufactures, or compositions of matter, the patent's specification must enable a person skilled in the art to make and use the entire class" without more than a "reasonable" degree of experimentation.

43. ***United States v. Hansen*, No. 22-179 (9th Cir., 25 F.4th 1103; cert. granted Dec. 9, 2022; argument 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.**

Decided June 23, 2023 (599 U.S. __). Ninth Circuit/Reversed and remanded. Justice Barrett for a 7–2 Court (Thomas, J. concurring; Jackson, J., joined by Sotomayor, J., dissenting). The Court held that a federal statute that forbids "encourag[ing] or induc[ing]" illegal immigration is not unconstitutionally overbroad under the First Amendment. 8 U.S.C. § 1324(a)(1)(A)(iv). Petitioner Helaman Hansen argued, first, that the Court should give the words "encourage" and "induce" their "everyday" meanings. And he argued that, under his preferred reading, the statute would criminalize large swaths of speech protected by the First Amendment, such as "an op-ed or public speech criticizing the immigration system." The Court disagreed with Hansen's interpretation of the statutory text, citing treatises, legal dictionaries, and the law's drafting history to conclude that "clause (iv) uses 'encourages or induces' in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation." On the Court's narrower reading, the statute forbids only the purposeful solicitation and facilitation of unlawful acts (namely, illegal immigration). Hansen's facial First Amendment challenge failed because he could not show that the clause's "overbreadth is *substantial* relative to its plainly legitimate sweep." Justice Thomas wrote separately to express support for reconsidering the First Amendment's facial overbreadth doctrine.

44. ***Smith v. United States*, No. 21-1576 (11th Cir., 22 F.4th 1236; cert. granted Dec. 13, 2022; argument 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.**

Decided June 15, 2023 (599 U.S. __). Eleventh Circuit/Affirmed. Justice Alito for a unanimous Court. The Court held that the Constitution does not bar the retrial of a defendant following a trial conducted in an improper venue and before a jury drawn from the wrong district. Petitioner Timothy Smith moved to dismiss his criminal indictment for theft of trade secrets under the Venue Clause, art. III, §2, cl. 3, and the Vicinage Clause of the Sixth Amendment. After the district court denied the motion and the jury returned a guilty verdict, Smith moved for a judgment of acquittal based on improper venue. The Court rejected Smith's argument that acquittal was the proper remedy. When a conviction is reversed because of a trial error, the appropriate remedy in almost all circumstances (other than for speedy trial violations) is the award of a retrial, not a judgment barring reprosecution. The Court rejected Smith's argument

that the Venue Clause "aims to prevent the infliction of additional harm on a defendant who has already undergone the hardship of an initial trial in a distant and improper place." The Court reasoned that any criminal trial imposes hardship, "and any retrial after a reversal for trial error adds to that initial harm." Nor did the Court find any basis in the Vicinage Clause for affording Smith a broader remedy than the one available to him under the Venue Clause. The Vicinage Clause "concerns jury composition" and specifies that a jury must be drawn from "the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. But the Court previously held in *Glasser v. United States*, 315 U.S. 60, 85–87 (1942), that retrial is the proper remedy when a defendant is tried by a jury that does not reflect a fair cross-section of the community. "There is no reason to conclude that trial before a jury drawn from the wrong geographic area demands a different remedy than trial before a jury drawn inadequately from within the community."

45. ***Lora v. United States*, No. 20-33 (2d Cir., 2022 WL 453368; cert. granted Dec. 9, 2022; argument 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).**

Decided June 16, 2023 (599 U.S. __). Second Circuit/Vacated and remanded. Justice Jackson for a unanimous Court. On August 11, 2002, Efrain Lora shot and killed a rival drug dealer. In 2014, Lora was indicted on charges that he had violated 18 U.S.C. § 924(j)(1), which states that if a defendant "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," he "shall be punished by death or by imprisonment for any term of years or for life" if "the killing is a murder." A jury convicted Lora of aiding and abetting the killing in violation of § 924(j)(1) and of conspiracy to distribute drugs. Lora asked the district court to exercise its discretion to run the sentences concurrently, but the court applied Second Circuit precedent to hold that § 924(c)'s consecutive-sentence mandate also applies to convictions under § 924(j). The court sentenced Lora to 25 years on the conspiracy count and five years on the § 924(j) count, with the sentences running consecutively, and the Second Circuit affirmed. The Supreme Court vacated the sentence, relying on language in § 924(c) limiting its coverage to "term[s] of imprisonment imposed on a person under this subsection." By its "plain terms," the Court wrote, "Congress applied the consecutive-sentence mandate only to terms of imprisonment imposed under that subsection. And Congress put subsection (j) in a different subsection of the statute." Therefore, the federal criminal sentencing laws did not require Lora to receive consecutive, rather than concurrent, sentences. Following this decision, defendants sentenced to consecutive terms for subsection (j) convictions may now be eligible for new sentencing hearings. However, the Court's opinion did not establish what evidence would be necessary to establish a prima facie case of *Lora* error, particularly whether the defendant must establish, as Lora did, that the district

judge declined to exercise discretion specifically because of § 924(c)'s consecutive-sentence mandate.

46. ***Samia v. United States*, No. 22-196 (2d Cir., 2022 WL 1166623; cert. granted Dec. 12, 2022; argument 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.**

Decided Jun 16, 2023 (599 U.S. __). Second Circuit/Affirmed. Justice Thomas for a 6–3 Court (Barrett, J., concurring; Kagan J., joined by Sotomayor and Jackson, JJ., dissenting; Jackson, J., dissenting). The Court held that the Confrontation Clause of the Sixth Amendment does not forbid the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing defendant. Joseph Hunter, Carl Stillwell, and Adam Samia were tried jointly and convicted on five counts related to a murder-for-hire scheme. The district court permitted a federal agent to testify at trial to the content of Stillwell's confession, which implicated Samia, but in a way that eliminated Samia's name. When the prosecutor asked the agent, "Did Stillwell say where the victim was when she was killed?," the agent testified: "Yes. He described a time when the *other person* he was with pulled the trigger on that woman in a van." Samia challenged the admission of the confession, arguing that jurors would infer he was the "other person" to whom the agent referred. Samia argued his inability to cross-examine Stillwell, who declined to testify at trial, violated his Sixth Amendment right to confront witnesses against him. The Court found no Sixth Amendment violation, distinguishing this case from both *Bruton v. United States*, 391 U. S. 123 (1968), and *Gray v. Maryland*, 523 U. S. 185 (1998). Unlike in *Bruton*, Samia was not named in the relevant confession. And unlike in *Gray*, the redaction of Samia's name from the agent's testimony did not "simply replace[ ] a name with an obvious blank space or a word such as 'deleted.'" Under these circumstances, the jury instruction was sufficient to avert a Confrontation Clause problem. The Clause is "not violated by the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction."

47. ***Polselli v. IRS*, No. 21-1599 (6th Cir., 23 F.4th 616; cert. granted Dec. 9, 2022; argument 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.

Decided May 18, 2023 (598 U.S. 432). Sixth Circuit/Affirmed. Chief Justice Roberts for a unanimous Court (Jackson, J., joined by Gorsuch, J., concurring). The Court held that the IRS may summon records "in aid of the collection" of delinquent taxes without providing notice to persons "identified in the summons," 26 U.S.C. § 7609(a)(1), even if the taxpayer lacks a legal interest in the records sought by the IRS. When the IRS issues a summons for records that will help it determine a taxpayer's liability, it must provide "notice of the summons" to "any person . . . identified in the summons," who may then bring a motion to quash. *Id.* But the statute provides an exception to the notice requirement where an "assessment" or "judgment" has already been rendered against the taxpayer and the summons is issued "in aid of the collection of" the delinquent taxes. *Id.* § 7609(c)(2)(D). The Court rejected petitioner Remo Polselli's argument that the exception to the notice requirement applies "only where a delinquent taxpayer has a legal interest in accounts or records summoned by the IRS." None of the statutory preconditions for excusing the notice requirement "mentions a taxpayer's legal interest in records sought by the IRS, much less requires that a taxpayer maintain such an interest for the exception to apply." Tellingly, the "very next provision" of the statute establishes rates and conditions for reimbursing the recipient of a summons for costs incurred searching for records—*except* in cases where "the person with respect to whose liability the summons is issued has a proprietary interest in the records to be produced." The fact that the exception to the reimbursement provision expressly turns on the taxpayer's "proprietary interest" in the records, and the exception to the notice requirement does not, "strongly suggests" that Congress's choice was deliberate.

April Calendar

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

Decided Jun 22, 2023 (599 U.S. __). Fourth Circuit/Affirmed. Ninth Circuit/Reversed and remanded. Justice Kavanaugh for a 6–3 Court (Jackson, J., concurring; Sotomayor, J., joined by Gorsuch and in part by Kagan, JJ., dissenting). The Court held that an offense may "relat[e] to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S), even if the elements of the offense do not require a "pending" investigation or proceeding. Under the Immigration and Nationality Act, noncitizens convicted of an aggravated felony are removable from the United States. The statute in turn defines aggravated felonies to include an "offense relating to obstruction of justice . . . for which the term of imprisonment is at least one year." *Id.* The petitioners, noncitizens

ordered removed, argued that the state crimes for which they were convicted do not qualify as offenses "relating to obstruction of justice" for purposes of the immigration law because the elements of those offenses do "not require that an investigation or proceeding be *pending*." The Court rejected that view, concluding that an "extensive body of authority," including dictionaries, federal and state criminal laws, and the Model Penal Code, reflect a consensus that an individual "can obstruct the process of justice even when an investigation or proceeding is not pending." To give one example, "a murderer may threaten to kill a witness if the witness reports information to the police." Indeed, "obstruction of justice is often most effective when it prevents an investigation or proceeding from commencing in the first place." To the extent any doubt remained about whether § 1101(a)(43)(S) requires that an investigation or proceeding be pending, the Court concluded that the phrase "*relating to* obstruction of justice" resolves it. "The phrase 'relating to' ensures that this statute covers offenses that have a connection with obstruction of justice—which surely covers common obstruction offenses that can occur when an investigation or proceeding is not pending."

Gibson Dunn
Counsel for Petitioner
Slack Technologies

Partners
Thomas G. Hungar
Jacob T. Spencer
Michael D. Celio
Matthew S. Kahn

49. ***Slack Technologies, LLC v. Pirani*, No. 22-200 (9th Cir., 13 F.4th 940; cert. granted Dec. 13, 2022; argument 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.**

Decided June 1, 2023 (598 U.S. __). Ninth Circuit/Vacated and remanded. Justice Gorsuch for a unanimous Court. To state a claim under § 11 of the Securities Act of 1933, a plaintiff must plead and prove that he purchased shares "traceable" to an "allegedly defective registration statement." The 1933 Act requires companies to register the securities they intend to offer to the public and imposes strict liability for registration statements that contain material misstatements or misleading omissions. When petitioner Slack Technologies conducted a direct listing on the New York Stock Exchange, it filed a registration statement for a specified number of registered shares. At the same time Slack offered the registered shares in its direct listing, holders of *unregistered* shares were free to sell them to the public. Respondent purchased 250,000 Slack shares. When the value of the stock later dropped, respondent brought a class action lawsuit alleging that Slack violated §§ 11 and 12 of the 1933 Act by filing a materially misleading registration statement. The Court sustained Slack's argument that respondent failed to state a claim because § 11 authorizes suit only by those who hold shares issued pursuant to a false or misleading registration statement. Here, respondent may have purchased unregistered shares unconnected to Slack's registration statement. The Court relied on several textual clues in the 1933 Act to reach that conclusion, observing that several provisions "reference the particular registration statement alleged to be misleading." The Court also endorsed more than half a century of case law from the federal courts of appeals holding that § 11 requires that "the securities held by the plaintiff . . . be traceable to the particular registration statement" at issue. The Court rejected respondent's argument that

his contrary reading of § 11 would expand liability for falsehoods and therefore advance the purposes of the 1933 Act. "This Court does not presume that any result consistent with one party's account of the statute's overarching goal must be the law." The Court declined to address whether § 12 of the 1933 Act embodies a limitation similar to that in § 11, leaving that issue for the Ninth Circuit on remand.

50. ***Groff v. DeJoy*, No. 22-174 (3d Cir., 35 F.4th 162; cert. granted Jan. 13, 2023; argument 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.**

Decided June 29, 2023 (600 U.S. __). Third Circuit/Vacated and remanded. Justice Alito for a unanimous Court. To establish an "undue hardship" for purposes of Title VII of the Civil Rights Act of 1964, an employer must show that granting a religious accommodation would impose "substantial" increased costs in relation to the conduct of its business. Title VII prohibits employers from discriminating on the basis of religion unless accommodating an employee's religious observance would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Relying on *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), many lower courts had interpreted "undue hardship" to mean any accommodation for which the employer is forced "to bear more than a *de minimis* cost." But the Court expressed doubt that *Hardison* had intended this "single, . . . oft-quoted sentence" to serve as "the authoritative interpretation" of "undue hardship." The Court pointed to other passages in *Hardison* recognizing that an accommodation is not required when it entails "substantial" costs or expenditures. The Court also relied on the ordinary meaning of "undue hardship," observing that "a hardship is more severe than a mere burden" and "the modifier 'undue' means that the requisite burden, privation, or adversity must rise to an excessive or unjustifiable level." "What is most important is that 'undue hardship' in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test." The Court then went on to hold that a religious accommodation's effects on an employee's coworkers will satisfy the undue hardship standard only if they in turn affect the conduct of the employer's business. "A coworker's dislike of religious practice and expression in the workplace or the mere fact of an accommodation is not cognizable to factor into the undue hardship inquiry."

51. ***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 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.

Decided June 1, 2023 (598 U.S. __). Seventh Circuit/Reversed. Justice Thomas for a unanimous Court. The Court held that the False Claims Act's ("FCA") knowledge requirement turns on a defendant's knowledge and subjective beliefs at the time of the alleged conduct—not on an objectively reasonable interpretation the defendant may have developed after the fact. Many federal programs are subject to the FCA, including Medicare and Medicaid, which require pharmacies to disclose and charge the government their "usual and customary" prices for prescription drugs. Despite this, Safeway and SuperValu charged the government inflated prices that their personnel realized at the time likely did not constitute "usual and customary" prices. When sued, however, they contended that they had not "knowingly" violated the FCA, as their pricing strategy could have been justified under an objectively reasonable interpretation of then-existing law (and thus they could not have "known" with certainty that they had failed to charge usual and customary prices). The Court rejected this defense. Consistent with its decision in *United Health Services v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the Court looked to the FCA's text and common law principles to construe the relevant scienter requirement. In so doing, the Court concluded—consistent with the majority of circuits—that a defendant's subjective, contemporaneous knowledge that claims are false or substantially likely to be false suffices for FCA liability. By contrast, "post hoc interpretations that might have rendered . . . claims accurate" are irrelevant. The Court assumed without deciding that the FCA makes actionable only misrepresentations of fact, not misrepresentations of law. Here, the Court concluded that the pharmacies' conduct involved implicit misrepresentations of fact about the prices they actually charged, sufficing for FCA liability.

52. ***Counterman v. Colorado*, No. 22-138 (Ct. App. Colorado, 497 P.3d 1039; cert. granted Jan. 13, 2023; argument 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.**

Decided June 27, 2023 (600 U.S. __). Colorado Court of Appeals/Vacated and remanded. Justice Kagan for a 7–2 Court (Sotomayor, J., joined in part by Gorsuch, J., concurring in part and concurring in the judgment; Thomas, J., dissenting; Barrett, J., joined by Thomas, J., dissenting). The Court held that, when the government prosecutes a criminal defendant for disseminating a true threat, it must prove that the defendant had "some subjective understanding of the threatening nature of his statements." Although true threats lie outside the protection of the First Amendment, the Court recognized that criminal prosecutions for such threats could cause law-abiding speakers to censor

Gibson Dunn
Counsel for Amicus
Coles Whalen
(the victim)

Partners
Allyson N. Ho
Brad G. Hubbard

themselves in order "to steer wide of the unlawful zone." Out of concern for this potential chilling effect on protected speech, the Court rejected an objective standard that turned on how a reasonable observer would construe the alleged threat. Instead, the Court required the state to prove that the defendant issued the threat with a culpable mental state. "By reducing an honest speaker's fear that he may accidentally or erroneously incur liability, a *mens rea* requirement provides breathing room for more valuable speech." The Court went on to hold that the state could satisfy that mental state requirement with a showing of recklessness, which it defined as a conscious disregard for "a substantial and unjustifiable risk that the speech in question will cause harm to another." "In the threats context, it means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway." In the Court's view, that standard offers "breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats."

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

Decided May 25, 2023 (598 U.S. 729). Fourth Circuit/Vacated and Remanded. Justice Barrett for a 9–0 Court. The Court held that pure issues of law resolved at summary judgment do not have to be re-raised in motions under Federal Rules of Civil Procedure 50(a) and 50(b) in a jury trial in order to be preserved for appellate review. Here, petitioner raised an administrative exhaustion defense against respondent at summary judgment, which the district court denied, holding that there were no disputes of material fact but that petitioner's argument failed as a matter of law. Petitioner presented no evidence about this defense at trial, nor in post-trial motions under Rule 50, and when he tried to appeal the summary judgment denial after the jury verdict against him, the Fourth Circuit held that he had failed to preserve the issue by not including it in the required post-trial motions under Rule 50. The Supreme Court vacated and remanded, holding that for "purely legal" issues resolved on summary judgment—that is, "issues that can be resolved without reference to any disputed facts"—re-raising the issue again in post-trial motions was unnecessary to preserve it for appeal. Although denials of summary judgment based on disputed facts are not appealable after a jury trial (because sufficiency of the evidence claims are superseded by the evidence presented at trial and reviewed through Rule 50 motions), the same is not true for "purely legal" issues. The Court reasoned that the re-raising of such issues in post-trial motions usually consists of little more than "copy and paste" arguments from the summary judgment briefing and forces district courts to engage in "the tedium of saying no twice." "There is no reason to force litigants and district courts to undertake that empty exercise." The Court did not decide whether petitioner's administrative exhaustion defense was "purely legal" and left that question for the court of appeals to resolve on remand.

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

Decided June 15, 2023 (599 U.S. __). First Circuit/Affirmed. Justice Jackson for an 8–1 Court (Thomas, J., concurring; Gorsuch, J., dissenting). The Court held that the Bankruptcy Code expressly abrogates the sovereign immunity of federally recognized Indian tribes because they constitute "governmental unit[s]" as defined in 11 U.S.C. § 101(27). A bankrupt debtor who owed money to Lendgreen, a business owned by the Lac du Flambeau tribe, filed a motion in federal bankruptcy court to force Lendgreen to comply with the automatic stay and desist in its efforts to recover the debt. The tribe moved to dismiss on the ground that it enjoys sovereign immunity from suit. The Bankruptcy Code abrogates the immunity of "governmental unit[s]," 11 U.S.C. § 106(A), which the statute in turn defines to include the United States, states, commonwealths, districts, territories, municipalities, foreign states and, as relevant here, "other foreign or domestic government[s]," *id.* § 101(27). The Court concluded that, although the code's abrogation provision does not mention Indian tribes by name, the definition "exudes comprehensiveness from beginning to end" and is intended to cover all governments, "whatever their location, nature, or type." The Court rejected the tribe's argument that Indian tribes do not fall within the catchall provision for "foreign *or* domestic government[s]" because they have both foreign and domestic characteristics. Congress instructed that the word "or" as used in the Bankruptcy Code "is not exclusive," *id.* § 102(5), and the tribe failed to articulate an explanation for why the code would draw a rigid distinction between foreign and domestic governments. Regardless of whether federal bankruptcy law historically distinguished governmental entities like tribes from states and the United States, the Bankruptcy Code represented a comprehensive revision with a far broader definition of "governmental unit," such that Congress "categorically abrogated the sovereign immunity of any governmental unit that might attempt to assert it."

55. ***Yegiazaryan v. Smagin*, No. 22-381 (9th Cir., 37 F.4th 562; cert. granted Jan. 13, 2023; argument 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?**

Decided June 22, 2023 (599 U.S. __). Ninth Circuit/Affirmed. Justice Sotomayor for a 6–3 Court (Alito, J., joined by Thomas, J. and in part by Gorsuch, J., dissenting). The Court held that foreign plaintiffs can suffer an injury that is domestic depending on the facts and circumstances of the alleged RICO violation, as there is no rule that any injury suffered by a foreign plaintiff necessarily arises out of the United States. RICO provides a private right of action that authorizes "[a]ny person injured in his business or property by reason of" a substantive RICO violation to sue for treble damages. In *RJR*

Nabisco, Inc. v. European Community, 579 U.S. 325 (2016), the Supreme Court held that this private right of action extended only to domestic injuries, but did not address what constitutes a "domestic" injury. Here, the Court concluded that "in assessing whether there is a domestic injury, courts should engage in a case-specific analysis that looks to the circumstances surrounding the injury. If those circumstances sufficiently ground the injury in the United States, such that it is clear the injury arose domestically, then the plaintiff has alleged a domestic injury." The Court rejected "a rigid, residency-based test for domestic injuries," and reasoned that a fact-sensitive approach "is not unworkable . . . merely because it directs courts to consider the case-specific circumstances surrounding an injury when assessing where it arises."

Gibson Dunn
Counsel for Amicus
Professor Beth A. Colgan

Partner
Matthew S. Rozen

56. ***Tyler v. Hennepin County, Minnesota, et al.*, No. 22-166 (8th Cir., 26 F.4th 789; cert. granted Jan. 13, 2023; argument 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; and (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.**

Decided May 25, 2023 (598 U.S. __). Eighth Circuit/Reversed. Chief Justice Roberts for a unanimous Court (Gorsuch, J., joined by Jackson, J., concurring). The Court held that Hennepin County effected a taking when it sold petitioner Geraldine Tyler's condo for $40,000 to satisfy a $15,000 delinquent property tax bill and kept the excess $25,000 for itself. The Court rejected the county's argument that Tyler, age 94, had no property interest in the condo because state law provides that a homeowner forfeits her interest in real property when she falls behind on property taxes. Although state law provides one important source of property rights, the Court also looks to traditional property law principles, historical practice, and its own precedent to define property for purposes of the Fifth Amendment. The Court held that taxpayers have a right to be paid any surplus earned from the sale of their property in excess of the tax debt owed. The principle that government may not take more from a taxpayer than he owes traces its origins back to Magna Carta and is deeply rooted in this country's law. Because the Court found that Tyler had plausibly alleged a taking, and "relief under the Takings Clause would fully remedy her harm," it did not address whether Tyler had also alleged an excessive fine under the Eighth Amendment. Justice Gorsuch, joined by Justice Jackson, wrote separately to criticize the district court's Excessive Fines Clause analysis, which the Eighth Circuit adopted. Among other problems Justice Gorsuch identified, the district court concluded that Minnesota's tax forfeiture scheme is not a fine because its "primary purpose" is "remedial." Justice Gorsuch argued the "primary purpose" test "finds no support in our law," and that the Excessive Fines Clause applies so long as the law at issue "cannot fairly be said *solely* to serve a remedial purpose."

Cases Dismissed As Improvidently Granted

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

Cases Resolved Without Oral Argument

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 Sept. 2, 2021; dismissed pursuant to Rule 46, Feb. 21, 2023). 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. ***Arizona v. Mayorkas*, No. 22-592 (D.C. Cir.; cert. granted Dec. 27, 2022; removed from oral argument calendar Feb. 16, 2023; judgment vacated and case remanded with instructions to dismiss motion to intervene as moot (Jackson, J., dissenting; Gorsuch, J., issued statement)). Whether the State applicants may intervene to challenge the District Court's summary judgment order enjoining Title 42 regulations.**

3. ***Calcutt v. Federal Deposit Insurance Corp.*, No. 22-714 (6th Cir., 37 F.4th 293; cert. granted and reversed May 22, 2023). Whether *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and its progeny required the Sixth Circuit to remand the case to the FDIC after determining that the agency had applied the wrong legal standards.** Per Curiam. The Court held that after the Sixth Circuit concluded that the FDIC committed two legal errors, in failing to apply or address a proximate causation standard in adjudicating Petitioner's enforcement action, the Sixth Circuit should have remanded to the agency, rather than conducting its own review of the record and concluding that the FDIC's decision to impose sanctions was supported by substantial evidence. The Sixth Circuit's decision to review the record and propriety of sanctions under the proximate cause standard in the first instance violated the fundamental rule of *SEC v. Chenery Corp.* that courts review only the grounds invoked by the agency.

4. ***Carnahan v. Maloney*, No. 22-425 (D.C. Cir., 984 F.3d 50; cert. granted May 15, 2023; judgment vacated and remanded with instructions to dismiss the case June 26, 2023 (Jackson, J., dissenting)). Whether individual Members of Congress have Article III standing to sue an executive agency to compel it to disclose information that the Members have requested under 5 U.S.C. 2954.**

October Term 2023

October Calendar

Gibson Dunn
Counsel for Amici Curiae FAMM, American Civil Liberties Union, and National Association of Criminal Defense Lawyers

Partner
David Debold

Gibson Dunn
Counsel for Amici Curiae Former Members of Congress

Partners
Helgi C. Walker
Lucas C. Townsend
Russell Balikian

Of Counsel
Lochlan F. Shelfer

Gibson Dunn
Counsel for Respondents UBS Securities, LLC and UBS AG

Partners
Eugene Scalia
Thomas G. Hungar
Gabrielle Levin

1. ***Pulsifer v. United States*, No. 22-340 (8th Cir., 39 F.4th 1018; cert. granted Feb. 27, 2023; argument scheduled Oct. 2, 2023). The Question Presented is: Whether the "and" in the Federal Sentencing Statute, 18 U.S.C. § 3553(f)(1), means "and," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, and (C) a 2-point offense (as the Ninth Circuit holds), or whether the "and" means "or," so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3- point offense, or (C) a 2-point violent offense (as the Seventh and Eighth Circuits hold).**

2. ***Consumer Financial Protection Bureau v. Commercial Financial Services Association of America*, No. 22-448 (5th Cir., 51 F.4th 616; cert. granted Feb. 27, 2023; argument scheduled Oct. 3, 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, U.S. Const. Art. I,§ 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.**

3. ***Acheson Hotels, LLC v. Laufer*, No. 22-429 (1st Cir., 50 F.4th 259; cert. granted Mar. 27, 2023; argument scheduled Oct. 4, 2023). The Question Presented is: Whether a self-appointed Americans with Disabilities Act "tester" has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation.**

4. ***Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 22-500 (3d Cir., 47 F.4th 225; cert. granted Mar. 6, 2023; argument scheduled Oct. 10, 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.**

5. ***Murray v. UBS Securities, LLC*, No. 22-660 (2d. Cir., 43 F.4th 254; cert. granted May 1, 2023; argument scheduled Oct. 10, 2023). The Question Presented is: Whether, under the burden-shifting framework that governs Sarbanes-Oxley cases, a whistleblower must prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof.**

6. ***Alexander v. South Carolina State Conference of the NAACP*, No. 22-807 (D.S.C., 2023 WL 118775; direct appeal; probable jurisdiction noted May 15, 2023; argument scheduled for Oct. 11, 2023). The Questions Presented are: (1) Whether the district court erred when it failed to apply the presumption of good faith and to holistically analyze South Carolina Congressional District 1 and the South Carolina General Assembly's intent; (2) Whether the district court erred in failing to enforce the alternative-map requirement in this circumstantial case; (3) Whether the district court erred when it failed to disentangle race from politics; (4) Whether the district court erred in finding racial predominance when it never analyzed District 1's compliance with traditional districting principles; (5) Whether the district court clearly erred in finding that the General Assembly used a racial target as a proxy for politics when the record showed only that the General Assembly was aware of race, that race and politics are highly correlated, and that the General Assembly drew districts based on election data; and (6) Whether the district court erred in upholding the intentional-discrimination claim when it never even considered whether—let alone found that—District 1 has a discriminatory effect.**

Cases Awaiting Argument Date

1. ***Culley v. Marshall*, No. 22-585 (11th Cir., 2022 WL 2663643; cert. granted Apr. 17, 2023). The Question Presented is: Whether the Due Process Clause requires a state or local government to provide a post seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972), as held by the Eleventh Circuit or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) as held by at least the Second, Fifth, Seventh, and Ninth Circuits.**

2. ***O'Connor-Ratcliff v. Garnier*, No. 22-324 (9th Cir., 41 F.4th 115; cert. granted Apr. 24, 2023). The Question Presented is: Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.**

3. ***Lindke v. Freed*, No. 22-611 (6th Cir., 37 F.4th 1199; cert. granted Apr. 24, 2023). The Question Presented is: Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.**

4. ***Loper Bright Enterprises v. Raimondo*, No. 22-451 (D.C. Cir., 45 F.4th 359; cert. granted May 1, 2023). The Question Presented is: Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.**

5. ***Brown v. United States*, No. 22-6389 (3d Cir., 47 F.4th 147; cert. granted May 15, 2023), consolidated with *Jackson v. United States*, No. 22-6640 (11th Cir., 55 F.4th 846; cert. granted May 15, 2023). The Question Presented is: Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules that were in effect at the time of the prior state drug offense (as the Eleventh Circuit held below).**

6. ***Vidal v. Elster*, No. 22-704 (Fed. Cir., 26 F.4th 1328; cert. granted June 5, 2023). The Question Presented is: Whether the refusal to register a mark under Section 1052(c) violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure.**

7. ***Department of Agricultural Rural Development and Rural Housing Service v. Kirtz*, No. 22-846 (3d Cir., 46 F.4th 159; cert. granted June 20, 2023). The Question Presented is: Whether the civil-liability provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., unequivocally and unambiguously waive the sovereign immunity of the United States.**

8. ***Rudisill v. McDonough*, No. 22-888 (Fed. Cir., 55 F.4th 879; cert. granted June 26, 2023). The Question Presented is: Whether a veteran who has served two separate and distinct periods of qualifying service under the Montgomery GI Bill, 38 U.S.C. § 3001 et seq., and under the Post-9/11 GI Bill, 38 U.S.C. § 3301 et seq., is entitled to receive a total of 48 months of education benefits as between both programs, without first exhausting the Montgomery benefit in order to obtain the more generous Post-9/11 benefit.**

9. ***Moore v. United States*, No. 22-800 (9th Cir., 36 F.4th 930; cert. granted June 26, 2023). The Question Presented is: Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.**

10. ***Muldrow v. St. Louis, Missouri*, No. 22-193 (8th Cir., 30 F.4th 680; CVSG Jan. 9, 2023; cert. supported May 18, 2023; cert. granted June 30, 2023). The Question Presented: Whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.**

11. ***Wilkinson v. Garland*, No. 22-666 (3d Cir., 2022 WL 4298337; cert. granted June 30, 2023). The Question Presented is: Whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under § 1252(a)(2)(D), as three circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and two other circuits have concluded.**

12. ***Campos-Chaves v. Garland*, No. 22-674 (5th Cir., 54 F.4th 314; cert. granted June 30, 2023), consolidated with *Garland v. Singh*, 22-884 (9th Cir., 24 F.4th 1315; cert. granted June 30, 2023). The Question Presented is: Whether when the government serves an initial notice document that does not include the "time and place" of proceedings, followed by an additional document containing that information, the government has provided notice "required under" and "in accordance with paragraph (1) or (2) of section 1229(a)" such that an immigration court must enter a removal order in absentia and deny a noncitizen's request to rescind that order.**

13. ***McElrath v. Georgia*, No. 22-721 (Ga. Sup. Ct., 880 S.E.2d 518; cert. granted June 30, 2023). The Question Presented is: Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a crime of which a defendant was previously acquitted.**

14. ***Securities Exchange Commission v. Jarkesy*, No. 22-859 (5th Cir., 34 F.4th 446; cert. granted June 30, 2023). The Questions Presented are: (1) Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment; (2) Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; (3) Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.**

15. ***United States v. Rahimi*, No. 22-915 (5th Cir., 61 F.4th 443; cert. granted June 30, 2023). The Question Presented is: Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.**

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

1. ***Lake v. NextEra Energy*, 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.**

2. ***Georgia-Pacific Consumer Products LP v. International Paper Co.*, 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."**

3. ***Ohio v. CSX Transportation, Inc.*, No. 22-459 (Ohio Sup. Ct., 168 Ohio St. 3d, 543; CVSG Mar. 20, 2023). The Questions Presented are: (1) Whether Ohio's "Blocked Crossing Statute," which prohibits stopped trains from blocking public roads for longer than five minutes, is preempted by 49 U.S.C. § 10501(b), which grants the Federal Surface Transportation Board exclusive jurisdiction over railroad transportation; and (2) Whether 49 U.S.C. § 20106(a)(2), which expressly permits States to enforce laws "related to railroad safety" until "the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement," saves the "Ohio Blocked Crossing Statute."**

4. ***Cantero v. Bank of America, N.A.*, No. 22-529 (2d Cir., 49 F.4th 121; CVSG Mar. 27, 2023). The Question Presented is: Whether the National Bank Act preempts the application of state escrow-interest laws to national banks.**

5. ***Flagstar Bank v. Kivett*, No. 22-349 (9th Cir., No. 21-15667; CVSG Mar. 27, 2023). The Question Presented is: Whether the National Bank Act preempts state laws that, like California Civil Code § 2954.8(a), attempt to set the terms on which federally chartered banks may offer mortgage escrow accounts authorized by federal law.**

6. ***Highland Capital Management, L.P. v. NextPoint Advisors, L.P.*, No. 22-631 (5th Cir., 48 F.4th 419; CVSG May 15, 2023). The Question Presented is: Whether Section 524(e) of the Bankruptcy Code, as its text suggests, states only the effect of a discharge on third parties' liability for a debtor's own debts or instead, as the Fifth Circuit holds, constrains the power of a court when confirming a plan of reorganization.**

7. ***NextPoint Advisors, L.P. v. Highland Capital Management, L.P.*, No. 22-669. (5th Cir., 48 F.4th 419; CVSG May 15, 2023). The Questions Presented are: (1) Whether a bankruptcy court may exculpate third-party misconduct that falls short of gross negligence, on the theory that bankruptcy trustees have common-law immunity for such misconduct; and (2) Whether a bankruptcy court may exculpate parties from ordinary post-bankruptcy business liabilities.**

CVSG: Petitions In Which The Solicitor General Supported Certiorari

1. ***Teva Pharmaceuticals USA, Inc., v. GlaxoSmithKline, LLC*, No. 22-37 (Fed. Cir., 25 F.4th 949; CVSG Oct. 3, 2022; cert. supported Mar. 29, 2023; cert. denied May 15, 2023). 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; cert. supported Apr. 5, 2023; cert. denied May 15, 2023). 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; and (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. ***Tropp v. Travel Sentry, Inc.*, No. 22-22 (Fed. Cir., 2022 WL 443202; CVSG Oct. 17, 2022; cert. supported Apr. 5, 2023; cert. denied May 15, 2023). 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).**

4. ***Davis v. Legal Services of Alabama*, No. 22-231 (11th Cir., 19 F.4th 1261; CVSG Jan. 9. 2023; cert. supported May 18, 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.**

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.**

Gibson Dunn
Counsel for Amici
The Retail Litigation
Center, Inc. et al.

Partners
Eugene Scalia
Jacob T. Spencer

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; cert. denied Mar. 27, 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; cert. denied Apr. 24, 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; and (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.**

10. ***Midwest Air Traffic Control Service, Inc. v. Badilla*, No. 21-867 (2d Cir., 8 F.4th 105; CVSG Oct. 3, 2022; cert. opposed Apr. 17, 2023; cert. denied May 22, 2023). 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.**

11. ***Wells v. McCallister*, No. 21-1448 (9th Cir., 2021 WL 5755086; CVSG Oct. 11, 2022; cert. opposed Mar. 29, 2023; cert. denied May 1, 2023). 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.**

12. ***Buckner v. U.S. Pipe & Foundry, et al.*, No. 22-115 (Bankr. M.D. Fla. 599 B.R. 193; CVSG Dec. 12, 2022; cert. opposed May 23, 2023; cert. denied June 26, 2023). 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.**

13. ***ML Genius Holdings, LLC v. Google LLC*, et al., No. 22-121 (2d Cir., 2022 WL 710744; CVSG Dec. 12, 2022; cert. opposed May 23, 2023; cert. denied June 26, 2023). 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.**

14. ***Charter Day School, Inc. v. Peltier*, No. 22-238 (4th Cir., 37 F.4th 104; CVSG Jan. 9, 2023; cert. opposed May 22, 2023; cert. denied June 26, 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.**

15. ***Apple, Inc. v. California Institute of Technology*, No. 22-203 (Fed. Cir., 25 F.4th 976; CVSG Jan. 17, 2023; cert. opposed May 23, 2023; cert. denied June 26, 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."**

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 have presented oral argument; the firm has 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.