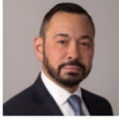


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GIBSON DUNN Supreme Court Round-Up



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OCTOBER TERM 2023

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.

Cases Scheduled for Oral Argument

October Calendar

1. ***Pulsifer v. United States*, No. 22-340 (8th Cir., 39 F.4th 1018; cert. granted Feb. 27, 2023; argument on 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. Community Financial Services Association of America*, No. 22-448 (5th Cir., 51 F.4th 616; cert. granted Feb. 27, 2023; argument on 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 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.

November Calendar

7. ***Culley v. Marshall*, No. 22-585 (11th Cir., 2022 WL 2663643; cert. granted Apr. 17, 2023; argument scheduled Oct. 30, 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.



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8. *O'Connor-Ratcliff v. Garnier*, No. 22-324 (9th Cir., 41 F.4th 115; cert. granted Apr. 24, 2023; argument scheduled Oct. 31, 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.
9. *Lindke v. Freed*, No. 22-611 (6th Cir., 37 F.4th 1199; cert. granted Apr. 24, 2023; argument scheduled Oct. 31, 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.
10. *Vidal v. Elster*, No. 22-704 (Fed. Cir., 26 F.4th 1328; cert. granted June 5, 2023; argument scheduled Nov. 1, 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.
11. *Department of Agricultural Rural Development Rural Housing Service v. Kirtz*, No. 22-846 (3d Cir., 46 F.4th 159; cert. granted June 20, 2023; argument scheduled Nov. 6, 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.
12. *United States v. Rahimi*, No. 22-915 (5th Cir., 61 F.4th 443; cert. granted June 30, 2023; argument scheduled Nov. 7, 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.
13. *Rudisill v. McDonough*, No. 22-888 (Fed. Cir., 55 F.4th 879; cert. granted June 26, 2023; argument scheduled Nov. 8, 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.

Cases Awaiting Argument Date



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14. *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.
15. *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).
16. *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.
17. *Muldrow v. St. Louis*, 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 is: Whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.
18. *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.
19. *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.

20. *McElrath v. Georgia*, No. 22-721 (Ga., 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.
21. *Securities and 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; and (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.
22. *Harrington v. Purdue Pharma L.P.*, No. 23-124 (2d Cir., 69 F.4th 45; cert. granted Aug. 10, 2023). The Question Presented is: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.
23. *Moody v. NetChoice, LLC*, No. 22-277 (11th Cir., 34 F.4th 1196), consolidated with *NetChoice, LLC v. Paxton*, No. 22-555 (5th Cir., 49 F.4th 439) (CVSG Jan. 23, 2023; cert. supported Aug. 14, 2023; cert. granted Sept. 29, 2023). The Questions Presented are: (1) Whether laws regulating social media platforms' content-moderation decisions comply with the First Amendment; and (2) Whether the laws' requirement to provide individualized explanations for certain forms of content moderation comply with the First Amendment.
24. *Smith v. Arizona*, No. 22-899 (Ariz. Ct. App., 2022 WL 2734269; cert. granted Sept. 29, 2023). The Question Presented is: Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion, and (b) the defendant did not independently seek to subpoena the analyst.
25. *De villier v. Texas*, No. 22-913 (5th Cir., 53 F.4th 904; cert. granted Sept. 29, 2023). The Question Presented is: Whether a person whose property is taken without compensation may seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action.

- 26. *Corner Post, Inc. v. Board of Governors*, No. 22-1008 (8th Cir., 55 F.4th 634; cert. granted Sept. 29, 2023).** The Question Presented is: Whether a plaintiff’s APA claim “first accrues” under 28 U.S.C. § 2401(a) when an agency issues a rule—regardless of whether that rule injures the plaintiff on that date (as the Eighth Circuit and five other circuits have held)—or when the rule first causes a plaintiff to “suffer[] legal wrong” or be “adversely affected or aggrieved” (as the Sixth Circuit has held).
- 27. *Sheetz v. County of El Dorado*, No. 22-1074 (Cal. Ct. App., 300 Cal. Rptr. 3d 308; cert. granted Sept. 29, 2023).** The Question Presented is: Whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation.
- 28. *Warner Chappell Music, Inc. v. Nealy*, No. 22-1078 (11th Cir., 60 F.4th 1325; cert. granted Sept. 29, 2023).** The Question Presented is: Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act’s statute of limitations for civil actions, 17 U. S. C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.
- 29. *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, No. 22-1165 (2d Cir., 2022 WL 17815767; cert. granted Sept. 29, 2023).** The Question Presented is: Whether the Second Circuit erred in holding—in conflict with the Third, Ninth, and Eleventh Circuits—that a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement.
- 30. *Federal Bureau of Investigation v. Fikre*, No. 22-1178 (9th Cir., 35 F.4th 762; cert. granted Sept. 29, 2023).** The Question Presented is: Whether respondent’s claims challenging his placement on the No Fly List are moot because the government removed him from the list and represented that he will not be placed back on the list based on currently available information.
- 31. *Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC*, No. 22-1238 (10th Cir., 2022 WL 3354682; cert. granted Sept. 29, 2023).** The Question Presented is: Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel* is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in United States Trustee districts during the period of disuniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in Bankruptcy Administrator districts.
- 32. *McIntosh v. United States*, No. 22-7386 (2d Cir., 58 F.4th 606; cert. granted Sept. 29, 2023).** The Question Presented is: Whether a district court may enter a criminal forfeiture order outside the time limitations set forth in Fed. R. Crim. P. 32.2.

33. *Bissonnette v. LePage Bakeries Park St, LLC*, No. 23-51 (2d Cir., 49 F.4th 655; cert. granted Sept. 29, 2023). The Question Presented is: Whether to be exempt from the Federal Arbitration Act, a class of workers that is actively engaged in interstate transportation must also be employed by a company in the transportation industry.

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

1. *Lake v. NextEra Energy Capital Holdings, Inc.*, No. 22-601 (5th Cir., 48 F.4th 306; CVSG Mar. 6, 2023). The Question Presented is: Whether, consistent with the Commerce Clause, States may exercise their core police power to regulate public utilities by recognizing a preference for allowing incumbent utility companies to build new transmission lines.
2. *Ohio v. CSX Transportation, Inc.*, No. 22-459 (Ohio, 200 N.E.3d 215; 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; (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.”
3. *Highland Capital Management, L.P. v. NexPoint 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.
4. *NexPoint 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; (2) Whether a bankruptcy court may exculpate parties from ordinary post-bankruptcy business liabilities.
5. *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corporation*, No. 22-886 (4th Cir., 53 F.4th 286; CVSG Oct. 2, 2023). The Question Presented is: Whether a foreign government’s procurement of goods for a military purpose, through a contract with a U.S. company, constitutes commercial activity within the meaning of the Foreign Sovereign Immunities Act.

6. *Dermody v. Massachusetts Executive Office of Health and Human Services*, No. 22-957 (Mass., 201 N.E.3d 285; CVSG Oct. 2, 2023). The Question Presented is: Whether an annuity that satisfies the condition in Section 1396p(c)(2)(B)(i) must name the State as the first remainder beneficiary in order to avoid Section 1396p(c)(1)’s transfer penalty.
7. *AstraZeneca UK Limited v. Atchley*, No. 23-9 (D.C. Cir., 22 F.4th 204; CVSG Oct. 2, 2023). The Questions Presented are: (1) Whether, in light of *Taamneh*, the Court should grant, vacate, and remand for further proceedings; (2) Whether plaintiffs plead proximate causation as required for ATA direct liability by alleging that defendants transacted with a foreign-government agency that was in turn infiltrated by the group that injured plaintiffs; and (3) Whether a U.S.-designated foreign terrorist organization “plan[s]” or “authorize[s]” a specific attack—as required for ATA aiding-and-abetting liability—by providing general support or inspiration to a different group that carries out the attack.

CVSG: Petitions In Which The Solicitor General Supported Certiorari

1. *Davis v. Legal Services Alabama, Inc.*, 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. *NetChoice, LLC v. Moody*, No. 22-393 (11th Cir., 34 F.4th 1196; CVSG Jan. 23, 2023; cert. opposed Aug. 14, 2023; cert. denied Oct. 2, 2023). The Question Presented is: Whether S.B. 7072, a Florida law regulating social-media companies, in its entirety, and its compelled disclosure provisions in particular, comply with the First Amendment.
2. *Georgia-Pacific Consumer Products LP v. International Paper Co.*, No. 22-465 (6th Cir., 32 F.4th 534; CVSG Mar. 6, 2023; cert. opposed Aug. 23, 2023; cert. denied Oct. 2, 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. ***Cantero v. Bank of America, N.A.*, No. 22-529 (2d Cir., 49 F.4th 121; CVSG Mar. 27, 2023; cert. opposed Aug. 30, 2023).** The Question Presented is: Whether the National Bank Act preempts the application of state escrow-interest laws to national banks.
4. ***Flagstar Bank v. Kivett*, No. 22-349 (9th Cir., No. 21-15667; CVSG Mar. 27, 2023; cert. opposed Aug. 30, 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.

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.

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