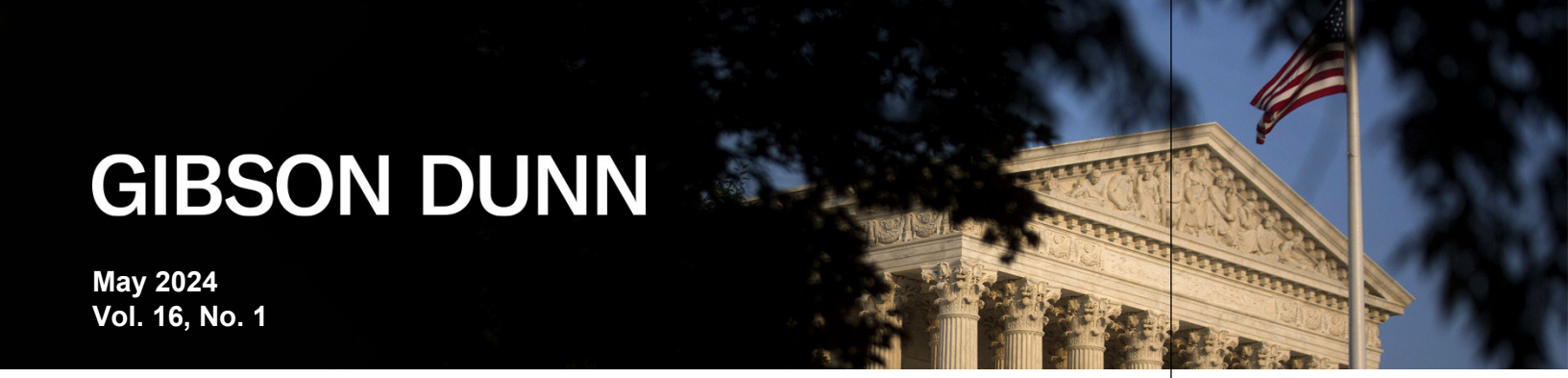

GIBSON DUNN

May 2024
Vol. 16, No. 1

U.S. Supreme Court Round-Up

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; argued Oct. 2, 2023).** The Question Presented is: Whether, in order for a defendant to qualify for an exception from a statutory minimum sentence under 18 U.S.C. § 3553(f)(1), a court must find that the defendant does not have more than four criminal history points (excluding any criminal history points resulting from a one-point offense); does not have a prior three-point offense; and does not have a prior two-point violent offense.

   Decided Mar. 15, 2024 (601 U.S. __). Eighth Circuit/Affirmed. Justice Kagan delivered the opinion of the Court (Gorsuch, J., joined by Sotomayor and Jackson, JJ., dissenting). The safety valve provision of the federal sentencing law, 18 U.S.C. § 3553(f), permits defendants convicted of drug offenses an escape from mandatory minimums if five conditions are met. One of those conditions concerns the defendant's criminal history. A defendant qualifies for relief under this provision if the court "finds at sentencing" that "the defendant does not have" more than four criminal history points, a prior three-point offense, and a prior two-point violent offense. The courts of appeals had split over whether this provision applies if the defendant does not have the combination of these three elements (the defendant-friendly reading) or does not have every one of those elements (the government's reading). Resolving the split, the Court adopted the government's view and held 6–3 that a defendant is eligible for safety valve relief only if he "does not have" all three items listed—that is, he does not have four criminal history points, does not have a prior three-point offense, and does not have a prior two-point violent offense. While the defendant's interpretation of the statute was grammatically plausible, the Court concluded it was foreclosed by statutory context. The defendant's reading, the Court reasoned, would render the four criminal history point criterion surplusage, as any defendant with a three-point offense

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and a two-point violent offense would always have more than four criminal history points. By contrast, under the interpretation embraced by the Court, each criterion does independent work disqualifying offenders based on particularly concerning aspects of their criminal history. The Court also dismissed the dissent's invocation of the rule of lenity because, when read in context, the statute was not genuinely ambiguous.

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; argued 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; argued 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.

   Decided Dec. 5, 2023 (601 U.S. 1). First Circuit/Vacated and remanded. Justice Barrett delivered the opinion of the Court (Thomas, J., and Jackson, J., separately concurring in the judgment). Plaintiff Deborah Laufer ran online searches to identify hotels that failed to provide accessibility information and would then sue them for failure to comply with the ADA. After the Court granted certiorari to decide whether Laufer—who has no intention of staying in those hotels—had Article III standing, Laufer voluntarily dismissed her pending suits with prejudice and filed a suggestion of mootness in the Supreme Court. Although the Court acknowledged that it could resolve the two jurisdictional issues—standing and mootness—in any order it chose, the Court dismissed on mootness grounds without reaching the standing question on which it granted review. Unlike the majority, which concluded that Laufer had not engaged in strategic litigation behavior by voluntarily dismissing her claims, Justice Thomas "would not reward Laufer's transparent tactic for evading . . . review" and would instead have held that Laufer lacked standing. As Justice Thomas reasoned, Laufer had not asserted a violation of her own rights, but had rather "cast[] herself in the role of a private attorney general" who sued to enforce compliance with the law. Separately concurring in the judgment, Justice Jackson urged the Court to reconsider its practice, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), of vacating a lower court judgment when a case has become moot on appeal, an invitation the majority expressly declined. Rather than automatically vacate a judgment in these circumstances, Justice Jackson would engage in "a particularized assessment of whether the conditions and circumstances of the particular case warrant vacatur of the lower court's judgment."

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; argued 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.

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Decided Feb. 21, 2024 (601 U.S. 65). Third Circuit/Reversed and remanded. Justice Kavanaugh delivered the opinion of the Court (Thomas, J., concurring). The Court held that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law. This presumption facilitates maritime commerce—which "traverses interstate and international boundaries"—by discouraging forum-shopping and reducing uncertainty about which jurisdiction's law governs potential disputes. The Court recognized that the presumption of enforceability admits of "narrow" exceptions. For example, "courts should disregard choice-of-law clauses in otherwise valid maritime contracts when the chosen law would contravene a controlling federal statute" or the contracting parties "can furnish no reasonable basis for the chosen jurisdiction." The Court declined, however, to create a new exception that would relieve the contracting parties of a choice-of-law provision when it would contravene the public policy of the state with the "greatest interest" in the contract dispute. "A federal presumption of enforceability would not be much of a presumption if it could be routinely swept aside based on 50 States' public policy determinations." The Court concluded that the inevitable "disuniformity" that would result from such an exception "would undermine the fundamental purpose of choice-of-law clauses in maritime contracts: uniform and stable rules for maritime actors."

5. ***Murray v. UBS Securities, LLC*, No. 22-660 (2d Cir., 43 F.4th 254; cert. granted May 1, 2023; argued 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.

Decided Feb. 8, 2024 (601 U.S. 23). Second Circuit/Reversed and remanded. Justice Sotomayor delivered the opinion of the Court (Alito, J., joined by Barrett, J., concurring). The Sarbanes-Oxley Act's whistleblower-protection provision provides that no covered employer may "discriminate against an employee in the terms and conditions of employment because of" protected whistleblowing activity. 18 U. S. C. § 1514A. The Court held that "retaliatory intent" on the part of an employer, understood to mean "something akin to animus," is not a required element of a whistleblower claim. The Court reasoned that, as ordinarily understood, to "discriminate against an employee" requires only a disparity in treatment, not animus. The Court further stated that requiring a showing of retaliatory intent would be inconsistent with the statutorily mandated burden-shifting framework, under which the plaintiff must first show that his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." The burden then shifts to the employer to show that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. The Court rejected concerns that the absence of a retaliatory intent requirement would sweep in innocent employers, explaining that liability could be avoided based on an affirmative showing that the same unfavorable personnel action would have been taken in the absence of the protected behavior. This "same-action" defense, which must be established by clear and convincing evidence, will prove a critical line of defense for employers in future cases. Further emphasizing that the statute provides guardrails for employers, Justice Alito, joined by Justice Barrett, wrote separately to underscore that the Court's "rejection of an 'animus' requirement does not read intent out of the statute." A whistleblower plaintiff "must still show intent to discriminate."

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6. ***Alexander v. South Carolina State Conference of the NAACP*, No. 22-807 (D.S.C., 649 F. Supp. 3d 177; direct appeal; probable jurisdiction noted May 15, 2023; argued 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; argued Oct. 30, 2023).** The Question Presented is: Whether courts should apply *Mathews v. Eldridge*, 424 U.S. 319 (1976), or *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether due process requires a post-seizure, prejudgment hearing to challenge the government's retention of property—a retention hearing—during a civil forfeiture proceeding.

Decided May 9, 2024 (601 U.S. __). Eleventh Circuit/Affirmed. Justice Kavanaugh delivered the opinion of the Court. (Gorsuch, J., joined by Thomas, J., concurring) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). Halima Culley loaned her car to her son, while Lena Sutton loaned her car to a friend. Police seized both cars after pulling over the borrowers and finding drugs. Alabama initiated civil forfeiture proceedings, which eventually resulted in the return of the cars to Culley and Sutton pursuant to the State's "innocent owner" defense. While the forfeiture proceedings were pending, Culley and Sutton each filed suit in federal court alleging that Alabama violated due process by retaining their cars during the forfeiture process without holding preliminary hearings focused on the "probable validity" of the seizures. Although due process requires a timely post-seizure forfeiture hearing when states seek civil forfeiture of personal property, the Court rejected Culley and Sutton's argument that due process requires states to hold a *separate* preliminary hearing before the forfeiture hearing. This conclusion followed from *United States v. Von Neumann*, 474 U.S. 242 (1986), where the Court concluded that "a timely forfeiture proceeding, without more, provides the post-seizure hearing required by due process to protect the plaintiff's property interest." The Court nevertheless went on to survey state and federal statutes dating back to the Founding that contained "similar forfeiture provisions" but "lacked anything resembling a separate preliminary hearing." Indeed, before the late 20th century, no "federal or state statutes" "required preliminary hearings in civil forfeiture cases." That consistent "historical practice," the Court concluded, "is weighty evidence that due process does not require such hearings." Justice Gorsuch, joined by Justice Thomas, concurred to emphasize that many aspects of

modern civil forfeiture practice appear to lack historical support and raise significant due process concerns. In dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, noted that civil forfeiture was "vulnerable to abuse" and especially burdened the poor and communities of color. Rather than adopting a categorical rule, Justice Sotomayor would have adopted a "context-specific due process test," which would "take into account all the component parts of an individual scheme."

8. ***Lindke v. Freed*, No. 22-611 (6th Cir., 37 F.4th 1199; cert. granted Apr. 24, 2023; argued 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.

Decided Mar. 15, 2024 (601 U.S. 187). Sixth Circuit/Vacated and remanded. Justice Barrett delivered the opinion of the Court. Defendant James Freed, the city manager of Port Huron, MI, maintained a Facebook account where he posted both personal and job-related content. After Freed deleted and then blocked comments from Kevin Lindke, one of his constituents, Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights. Because the First Amendment constrains only government action, the Court considered whether a local official like Freed engages in state or private action when he excludes speech from his social media page. The Court held that speech by a government official on social media is attributable to the state only if the official (1) possesses actual authority to speak on the state's behalf and (2) purports to exercise that authority. The Court rejected Lindke's argument that Freed's social media activity constituted state action simply because his Facebook page "looks and functions like an outlet for city updates and citizen concerns." Instead, an official must have "*actual* authority rooted in written law or longstanding custom to speak for the state." What is more, the official must purport to exercise that authority—that is, he must speak in his official capacity or use the speech "to fulfill his responsibilities pursuant to state law." The Court suggested that this test would be satisfied where the public official expressly invoked state authority in a social media post—e.g., "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." By contrast, the Court would be "far less likely" to find that the official was exercising the power of the state where he simply repeated or shared information available elsewhere—e.g. where he linked to the parking announcement on the city web site. In that situation, it is "more likely" that the official was exercising his own First Amendment right to engage in "private speech related to his employment" or "concerning information learned during that employment." Along with *Murthy v. Missouri*, No. 23-411, and *NRA v. Vullo*, No. 22-842, *Lindke* is one of several cases this Term in which the Court is attempting to draw a line between where state action ends and a public official's personal speech rights begin. In *Lindke*, the latter carried the day: "Freed did not relinquish his First Amendment rights when he became city manager."

9. ***O'Connor-Ratcliff v. Garnier*, No. 22-324 (9th Cir., 41 F.4th 115; cert. granted Apr. 24, 2023; argued 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.

Decided Mar. 15, 2024 (601 U.S. 205). Ninth Circuit/Vacated and remanded. In a per curiam opinion, the Court vacated the opinion of the Ninth Circuit and remanded for application of the test articulated in *Lindke v. Freed*.

10. ***Vidal v. Elster*, No. 22-704 (Fed. Cir., 26 F.4th 1328; cert. granted June 5, 2023; argued Nov. 1, 2023).** The Question Presented is: Whether the refusal to register a trademark 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; argued 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.

Decided Feb. 8, 2024 (601 U.S. 42). Third Circuit/Affirmed. Justice Gorsuch delivered the opinion of the Court. The Fair Credit Reporting Act ("FCRA") authorizes suits against "[a]ny person" who willfully or negligently fails to comply with the law's requirements. 15 U.S.C. §§ 1681n(a), 1681*o*(a). The act, in turn, defines a "person" to include "any . . . government or governmental subdivision or agency." *Id.* § 1681a. Plaintiff Reginald Kirtz sued the USDA under these provisions after the agency incorrectly reported to a credit agency that his account was past due, when he had in fact repaid his loan in full, and the USDA interposed a sovereign immunity defense. Resolving a circuit split, the Court held that the FCRA "effects a clear waiver of sovereign immunity" by defining "person" to include any governmental agency and then instructing courts to apply this definition throughout the relevant subchapter of the statute. The Court rejected the government's argument that this language was insufficient to effect a waiver, given that other sections of the FCRA waived sovereign immunity "in different and arguably even more obvious terms." That "Congress chose to use certain language to waive sovereign immunity in one amendment to the FCRA hardly means it was foreclosed from using different language to accomplish the same goal in a different set of amendments to the same law." The Court also was not persuaded by the government's argument that Congress must accompany any cause of action against the government with "a separate provision addressing sovereign immunity," holding that "a cause of action authorizing suit against the government may waive sovereign immunity even without a separate waiver provision."

12. ***United States v. Rahimi*, No. 22-915 (5th Cir., 61 F.4th 443; cert. granted June 30, 2023; argued 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.

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13. ***Rudisill v. McDonough*, No. 22-888 (Fed. Cir., 55 F.4th 879; cert. granted June 26, 2023; argued 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.

Decided Apr. 16, 2024 (601 U.S. 294). Federal Circuit/Reversed and remanded. Justice Jackson delivered the opinion of the Court (Kavanaugh, J., joined by Barrett, J., concurring) (Thomas, J., joined by Alito, J., dissenting). Captain James Rudisill served three distinct periods of active-duty service in the U.S. Army. His first period of service entitled him to 36 months of educational benefits under the Montgomery GI Bill, and his later periods of service separately provided him with 36 months of educational benefits under the Post-9/11 GI Bill, with both benefits subject to a 48-month aggregate cap. After using 25 months of the Montgomery benefits earning his undergraduate degree, Rudisill sought to use the Post-9/11 benefits to attend divinity school. The Department of Veterans Affairs ("VA") informed him, however, that he could draw on his Post-9/11 benefits only for the 11 months remaining in his unused Montgomery benefits period. The VA purported to apply a coordination-of-benefits statute, 38 U.S.C. § 3327, which provides that a servicemember who meets the criteria for Montgomery and Post-9/11 benefits based on the same overlapping period of service can elect to exchange Montgomery for Post-9/11 benefits, which are more generous. The Court rejected the VA's interpretation, explaining that the statute requires the agency to pay benefits up to the 48-month cap, with 36 months available under each program. Because Rudisill never made an election under the "coordination" provision of the Post-9/11 GI Bill, he was entitled to access both benefits, in whatever order he chose, up to the 48-month cap. The "coordination" provision, the Court explained, was applicable only to veterans seeking to "swap" Montgomery benefits for Post-9/11 benefits. By contrast, it had no applicability to veterans like Rudisill who were entitled to benefits under both programs.

DECEMBER CALENDAR

14. ***Brown v. United States*, No. 22-6389 (3d Cir., 47 F.4th 147; cert. granted May 15, 2023; argued Nov. 27, 2023), consolidated with *Jackson v. United States*, No. 22-6640 (11th Cir., 55 F.4th 846; cert. granted May 15, 2023; argued Nov. 27, 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).

15. ***McElrath v. Georgia*, No. 22-721 (Ga., 880 S.E.2d 518; cert. granted June 30, 2023; argued Nov. 28, 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.

Decided Feb. 21, 2024 (601 U.S. 87). Georgia Supreme Court/Reversed and remanded. Justice Jackson delivered the opinion of the Court (Alito, J., concurring). The Court held that a jury verdict finding that the defendant was not guilty by reason of insanity constituted an acquittal for purposes of the Double Jeopardy Clause, notwithstanding its inconsistency with other jury verdicts. Here, the jury found the defendant not guilty by reason of insanity on a charge of malice murder, while finding him guilty but mentally ill on a charge for felony murder for the same killing. The Georgia Supreme Court vacated both verdicts as repugnant based on their inconsistency and approved a retrial on the malice-murder charge. The Supreme Court reversed, explaining that whether an acquittal has occurred for Double Jeopardy purposes is a question of federal law. Looking to substance rather than labels, the Court concluded that the vacatur of the not guilty by reason of insanity verdict on state law repugnancy grounds did not alter its status as an acquittal barring retrial under the Double Jeopardy Clause.

16. ***Wilkinson v. Garland*, No. 22-666 (3d Cir., 2022 WL 4298337; cert. granted June 30, 2023; argued Nov. 28, 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 8 U.S.C. § 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.

Decided Mar. 19, 2024 (601 U.S. 209). Third Circuit/Reversed and remanded. Justice Sotomayor delivered the opinion of the Court (Jackson, concurring) (Roberts, C.J., dissenting) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting). A provision of the federal immigration law strips the federal courts of jurisdiction to review certain final orders or removal, but then restores jurisdiction to review "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D). The Court held that the application of a statutory legal standard—here, the "exceptional and extremely unusual hardship" standard—to an established set of facts is a quintessential mixed question of law and fact reviewable under this provision. The Court viewed that conclusion as dictated by *Guerrero-Lasprilla v. Barr*, 589 U. S. 221 (2020), which held that mixed questions of law and fact are always reviewable as questions of law under § 1252(a)(2)(D). That is true even if the mixed question "requires close engagement with the facts." The Court rejected the government's invitation to limit *Guerrero-Lasprilla* to judicially created standards, rather than statutory standards. "Nothing in *Guerrero-Lasprilla* or this Court's other precedents supports such a distinction." To the contrary, the Court has "frequently observed that the application of a statutory standard presents a mixed question of law and fact." *Wilkinson* is one of several cases this Term—along with *Department of Agricultural Rural Development Rural Housing Service v. Kirtz*, No. 22-846, *Corner Post, Inc. v. Board of Governors*, No. 22-1008, and *Harrow v. Department of Defense*—in which the United States has sought to avoid judicial review of agency action. In both *Wilkinson* and *Kirtz*, the Court adopted statutory constructions that preserved judicial review—a trend that appears likely to continue.

17. ***Securities and Exchange Commission v. Jarkesy*, No. 22-859 (5th Cir., 34 F.4th 446; cert. granted June 30, 2023; argued Nov. 29, 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.

18. ***Harrington v. Purdue Pharma L.P.*, No. 23-124 (2d Cir., 69 F.4th 45; cert. granted Aug. 10, 2023; argued Dec. 4, 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.

19. ***Moore v. United States*, No. 22-800 (9th Cir., 36 F.4th 930; cert. granted June 26, 2023; argued Dec. 5, 2023).** The Question Presented is: Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

20. ***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; argued Dec. 6, 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.

Decided Apr. 17, 2024 (601 U.S. __). Eighth Circuit/Vacated and remanded. Justice Kagan delivered the opinion of the Court (Thomas, Alito, and Kavanaugh, JJ., concurring separately in the judgment). The Court held that an employee challenging a job transfer as discriminatory under Title VII must show "some disadvantageous change" in the terms or conditions of her employment, but that the harm need not be "significant." The Court focused on the text of Title VII, which makes it illegal to "fail or refuse to hire," "discharge," or "discriminate" in the "terms" or "conditions" "of employment" on the basis of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). The word "discriminate," the Court reasoned, requires only a difference in treatment that injures an employee. Nothing in the text of Title VII requires that injury be "significant." The Court rejected the argument that because failing or refusing to hire and discharging cause significant harm, "discriminate" should be read to encompass only actions imposing a similar level of harm. The Court concluded that the requirement of an "employment action," not the presence of significant harm, unites the three prohibitions. The Court also rejected the employer's policy argument that a significance requirement was necessary to cabin liability. Concluding that the plaintiff's allegations regarding her transfer to a less prestigious job with a more erratic schedule and without a take-home car met the injury requirement, the Court vacated and remanded for a determination whether the plaintiff had forfeited or failed to support those allegations at summary judgment.

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21. ***Campos-Chaves v. Garland*, No. 22-674 (5th Cir., 54 F.4th 314; cert. granted June 30, 2023; argued Jan. 8, 2024), consolidated with *Garland v. Singh*, 22-884 (9th Cir., 24 F.4th 1315; cert. granted June 30, 2023; argued Jan. 8, 2024).** 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.

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22. ***Federal Bureau of Investigation v. Fikre*, No. 22-1178 (9th Cir., 35 F.4th 762; cert. granted Sept. 29, 2023; argued Jan. 8, 2024).** 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.

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Decided Mar. 19, 2024 (601 U.S. 234). Ninth Circuit/Affirmed. Justice Gorsuch delivered the opinion of the Court (Alito, J., joined by Kavanaugh, J., concurring). The Court held that a government declaration stating that the plaintiff "will not be placed on the No Fly List in the future based on the currently available information" was not sufficient to moot the plaintiff's challenge to his inclusion on the list. The Court explained that when a defendant voluntarily ceases a challenged practice, the defendant bears a "formidable burden" to show that the practice cannot reasonably be expected to recur. "To show that a case is truly moot, a defendant must prove 'no reasonable expectation' remains that it will return to its old ways." A less stringent standard, the Court reasoned, would permit defendants to strategically halt their conduct only to resume it again after a case had been mooted. Applying that standard, the Court concluded that the government's declaration—which stated that Fikre would not be placed on the No Fly List in the future "based on the currently available information"—did not suffice to moot the claims. Although the declaration might "mean that his past actions are not enough to warrant his relisting," it does not forswear that "the government might relist him if he does the same or similar things in the future." The fact that the government had not relisted Fikre since 2016 likewise did not close the gap.

23. ***Sheetz v. County of El Dorado*, No. 22-1074 (Cal. Ct. App., 300 Cal. Rptr. 3d 308; cert. granted Sept. 29, 2023; argued Jan. 9, 2024).** 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.

Decided Apr. 12, 2024 (601 U.S. __). California Court of Appeal/Reversed and Remanded. Justice Barrett delivered the opinion of the Court (Sotomayor, J., joined by Jackson, J., concurring) (Gorsuch, J., concurring) (Kavanaugh, J., joined by Kagan and Jackson, JJ., concurring). El Dorado County, California, enacted legislation requiring developers to pay a traffic impact fee as a condition of receiving a building permit. When plaintiff George Sheetz

applied for a permit to build a prefabricated home on his land, he paid the impact fee under protest and then sought relief in state court, claiming that conditioning the permit on payment of the traffic impact fee amounted to an unlawful "exaction" in violation of the Takings Clause. The Court's precedents in *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), set forth a two-part test for when permitting conditions are permissible: They must have (1) an "essential nexus" to the government's land use interests and (2) "rough proportionality" to the development's impact on the land use interest. Here, the California Court of Appeal held that the *Nollan-Dolan* test does not apply to "legislatively prescribed monetary fees" and instead extends only to permitting conditions imposed "on an individual and discretionary basis." Vacating that judgment, the Supreme Court held that legislative enactments are not exempt from scrutiny under the Takings Clause. The Court explained that the nothing in the Court's precedents, nor in the text or history of the Takings Clause or the Fourteenth Amendment, supported such a distinction. Indeed, for much of American history, the government exercised its eminent domain power primarily through direct legislation. The Court declined to address whether the *Nollan-Dolan* test operates differently when the permit condition applies to "a class of properties" rather than "a particular development." In a solo concurrence, Justice Gorsuch opined that nothing in that test "depends on whether the government imposes the challenged condition on a large class of properties or a single tract or something in between." Justice Kavanaugh, joined by Justices Kagan and Jackson, wrote separately to emphasize that the Court's opinion "does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development."

24. ***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; argued Jan. 9, 2024).** 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.

25. ***Smith v. Arizona*, No. 22-899 (Ariz. Ct. App., 2022 WL 2734269; cert. granted Sept. 29, 2023; argued Jan. 10, 2024).** The Question Presented is: Whether the Confrontation Clause of the Sixth Amendment permits the prosecutor in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a non-testifying 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.

26. ***Macquarie Infrastructure Corporation v. Moab Partners, L.P.*, No. 22-1165 (2d Cir., 2022 WL 17815767; cert. granted Sept. 29, 2023; argued Jan. 16, 2024).** 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 SEC regulations such as Item 303

can support a private claim under Section 10(b) of the Securities Exchange Act of 1934, even in the absence of an otherwise-misleading statement.

Decided Apr. 12, 2024 (601 U.S. 257). Second Circuit/Vacated and Remanded. Justice Sotomayor delivered the opinion of the Court. The Court held that pure omissions are not actionable under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5(b), even in the face of a duty to disclose. The Court started with the text of Rule 10b–5(b), which prohibits "untrue statement[s] of a material fact" and omissions of "material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b–5(b). Because the rule requires identifying "affirmative representations" before determining if other facts are necessary to make those statements "not misleading," the Court explained, the rule prohibits only lies and half-truths, not pure omissions. The Court further observed that Rule 10b–5(b) lacks language similar to that in § 11(a) of the Securities Act of 1933, which prohibits registration statements that "*omit* to state a material fact required to be stated therein." 15 U.S.C. § 77k(a) (emphasis added). The policy argument that issuers would enjoy "broad immunity" for omitting information the SEC requires them to disclose did not sway the Court, which reassured that the SEC retains authority to prosecute violations of its regulations.

27. ***Devillier v. Texas*, No. 22-913 (5th Cir., 53 F.4th 904; cert. granted Sept. 29, 2023; argued Jan. 16, 2024).** 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 created a cause of action.

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Decided Apr. 16, 2024 (601 U.S. 285). Fifth Circuit/Vacated and Remanded. Justice Thomas delivered the opinion of the Court. The Court declined to address whether the Takings Clause is "self-executing," that is, whether it provides a cause of action for just compensation. That question assumes that the property owner has no independent cause of action under which to bring a takings claim. Here, however, Texas law provides property owners with a cause of action to recover just compensation from the state. Accordingly, the Court vacated and remanded for the plaintiffs to amend their complaint to include a state-law inverse-condemnation claim.

28. ***Relentless, Inc. v. Department of Commerce*, No. 22-1219 (1st Cir., 62 F.4th 621; cert. granted Oct. 13, 2023; argued Jan. 17, 2024).** 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.

29. ***Loper Bright Enterprises v. Raimondo*, No. 22-451 (D.C. Cir., 45 F.4th 359; cert. granted May 1, 2023; argued Jan. 17, 2024).** 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.

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30. ***Trump v. Anderson*, No. 23-719 (Colo., 2023 WL 8770111; cert. granted Jan. 5, 2024; argued Feb. 8, 2024).** The Question Presented is: Whether the Colorado Supreme Court erred in ordering former President Trump excluded from the 2024 presidential primary ballot.

Decided Mar. 4, 2024 (601 U.S. 100). Colorado Supreme Court/Reversed. Per Curiam opinion (Barrett, J., concurring in part and concurring in the judgment) (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment). Section 3 of the Fourteenth Amendment bars those who, "having previously taken an oath . . . to support Constitution of the United States, . . . have engaged in insurrection or rebellion" from holding various offices. The Court held that states lack power to enforce § 3 with respect to federal offices and may disqualify persons only from holding state office. The responsibility for enforcing § 3 with respect to federal office lies with Congress, which may exercise that power through legislation pursuant to § 5 of the Fourteenth Amendment. The Court reasoned that the Fourteenth Amendment was enacted to curb rather than expand state power. While history showed that states barred individuals from holding state office in the period following ratification of the Fourteen Amendment, no similar historical tradition existed with respect to state enforcement against federal officeholders or candidates. Instead, Congress enacted implementing legislation permitting federal district attorneys to bring actions to remove federal officers. Power over federal officials, the Court emphasized, must be specifically delegated to the states—which neither the Fourteenth Amendment nor any other provision of the Constitution did. The Court concluded, finally, that state enforcement of § 3 with respect to the presidency raised "heightened concerns" because states could reach conflicting outcomes concerning the same candidate, with the result that the candidate would be eligible to appear on the ballot in some states but not others based on the same underlying conduct. This uneven "patchwork" would in turn "sever the direct link the Framers found so critical between the National Government and the people of the United States as a whole." Although the Court emphasized that all nine Justices agreed with the result—that the Colorado Supreme Court's judgment excluding former President Trump from the ballot should be reversed—four Justices criticized the majority for deciding more than the question presented. In a solo concurrence, Justice Barrett argued that the Court did not need to reach "the complicated question whether federal legislation is the exclusive vehicle through which Section 3 can be enforced" and urged that "the volatile season of a Presidential election" is "not the time to amplify disagreement with stridency." Justices Sotomayor, Kagan, and Jackson jointly filed a separate concurring opinion echoing the view that the majority opinion "decides momentous and difficult issues unnecessarily."

31. ***Corner Post, Inc. v. Board of Governors*, No. 22-1008 (8th Cir., 55 F.4th 634; cert. granted Sept. 29, 2023; argued Feb. 20, 2024).** 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).

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32. ***Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (2d Cir., 49 F.4th 655; cert. granted Sept. 29, 2023; argued Feb. 20, 2024).** 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.

Decided Apr. 12, 2024 (601 U.S. 246). Second Circuit/Reversed and Remanded. Chief Justice Roberts delivered the opinion of the Court. The Court held that a transportation worker need not work in the transportation industry to be exempt from arbitration under § 1 of the Federal Arbitration Act. The text exempting any "class of workers engaged in foreign or interstate commerce," the Court explained, focuses on the work of the employee, not the industry of the employer. The Court noted that determining whether an employer was in the transportation industry often would be arcane and fact-intensive. The Court rejected policy arguments that an industry-based approach was necessary to limit the statute's scope, explaining that the requirement that a worker "play a direct and necessary role in the free flow of goods across borders" sufficed to narrow the statute. The Court consequently revered the Second Circuit's decision compelling arbitration on the basis that petitioners work in the bakery industry.

33. ***Ohio v. EPA*, No. 23A349 (D.C. Cir., 2023 WL 6285159; consideration of application for stay deferred pending oral argument Dec. 20, 2023; argued Feb. 21, 2024), consolidated with *Kinder Morgan, Inc. v. EPA*, No. 23A350 (D.C. Cir., 2023 WL 6285159; consideration of application for stay deferred pending oral argument Dec. 20, 2023; argued Feb. 21, 2024), *American Forest & Paper Association v. EPA*, No. 23A351 (D.C. Cir., 2023 WL 6285159; consideration of application for stay deferred pending oral argument Dec. 20, 2023; argued Feb. 21, 2024), and *U.S. Steel Corporation v. EPA*, No. 23A384 (D.C. Cir., 2023 WL 6285159; consideration of application for stay deferred pending oral argument Dec. 20, 2023; argued Feb. 21, 2024).** The Question Presented is: Whether the emissions controls for large industrial polluters imposed by the EPA Rule are reasonable regardless of the number of States subject to the Rule.

34. ***Warner Chappell Music, Inc. v. Nealy*, No. 22-1078 (11th Cir., 60 F.4th 1325; cert. granted Sept. 29, 2023; argued Feb. 21, 2024).** 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.

Decided May. 9, 2024 (601 U.S. __). Eleventh Circuit/Affirmed. Justice Kagan delivered the opinion of the Court. (Gorsuch, J., joined by Thomas and Alito, JJ., dissenting). Independent record-label owner Sherman Nealy sued Warner Chappell Music, Inc. for alleged copyright infringement roughly a decade after the alleged infringement began, and almost three years after he allegedly discovered the infringement. Warner Chappell accepted that the claim accrued when the alleged infringement was discovered but argued that Nealy could recover damages or profits only for infringement that occurred in the past three years, citing *Petrella v. Metro-Goldwyn-Mayer*, 572 U.S. 663 (2014). The Eleventh Circuit assumed that the discovery rule governed the timeliness of the claim and held that the Copyright Act does not limit the time for collecting damages. Assuming (without deciding) that a copyright

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infringement claim is timely if brought three years after the plaintiff discovered the alleged infringement, the Court held that the plaintiff may recover damages even for copyright infringement that occurred more than three years before a lawsuit's filing. The Court noted that nothing in the text of the Copyright Act's remedial provisions specified any time limit for recovering damages and lost profits. 17 U.S.C. § 504(a)-(c). The Court acknowledged that some language in the Court's decision in *Petrella* could be read out of context to suggest a limit on the time a copyright plaintiff can recover retrospective relief. However, the Court explained that in the context of that case, the plaintiff had sued "only for infringements that occurred in the three years before her suit." Therefore, the Court concluded, "a copyright owner possessing a timely claim for infringement is entitled to damages, no matter when the infringement occurred." Justice Gorsuch, joined by Justices Thomas and Alito, dissented and would have dismissed the case as improvidently granted rather than "expound on the details of" the discovery rule, which "very likely does not exist."

35. ***Moody v. NetChoice, LLC*, No. 22-277 (11th Cir., 34 F.4th 1196; CVSG Jan. 23, 2023; cert. supported Aug. 14, 2023; cert. granted Sept. 29, 2023; argued Feb. 26, 2024).** 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.

36. ***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; argued Feb. 26, 2024).** 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.

37. ***McIntosh v. United States*, No. 22-7386 (2d Cir., 58 F.4th 606; cert. granted Sept. 29, 2023; argued Feb. 27, 2024).** 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.

Decided Apr. 17, 2024 (601 U.S. __). Second Circuit/Affirmed. Justice Sotomayor delivered the opinion of the Court. In cases where the government seeks forfeiture as part of a criminal sentence, Federal Rule of Criminal Procedure 32.2(b) provides that district courts must enter a "preliminary order" of forfeiture "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications," unless doing so is "impractical." The Court held that the district court retained its power to order criminal forfeiture even though it failed to enter a preliminary order before the defendant's sentencing. The parties had disputed whether Rule 32.2's time limit was (1) a mandatory claim-processing rule or simply a (2) time-related directive. Filing deadlines are "quintessential claim-processing rules," and non-compliance is "presumed to be prejudicial." Time-related directives, on the other hand, "seek speed by directing a judge or other public official to act by a certain time," but "[m]issing that kind of deadline does not deprive the official of the power to take the action to which the deadline applies." The Court concluded that Rule 32.2 embodied a time-related directive that "functions as a spur to

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prompt action, not as a bar to tardy completion of business." This conclusion flowed from the plain language of the rule, which "contemplates flexibility" by noting that a preliminary forfeiture order should be entered before sentencing unless "impractical." The Court further reasoned that rule was directed to the district court, rather than the parties, and lacked "'explicit language' specifying a sanction" for non-compliance. It therefore deemed a court's non-compliance with Rule 32.2 "a procedural error subject to harmlessness review" on appeal.

38. ***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; cert granted Oct. 13, 2023; argued Feb. 27, 2024).** The Question Presented is: Whether the National Bank Act preempts the application of state escrow-interest laws to national banks.

39. ***Garland v. Cargill*, No. 22-976 (5th Cir., 57 F.4th 447; cert. granted Nov. 3, 2023; argued Feb. 28, 2024).** The Question Presented is: Whether a bump stock device is a "machinegun" as defined in 26 U.S.C. § 5845(b) because it is designed and intended for use in converting a rifle into a machinegun, *i.e.*, into a weapon that fires "automatically more than one shot . . . by a single function of the trigger."

40. ***Coinbase, Inc. v. Suski*, No. 23-3 (9th Cir., 55 F.4th 1227; cert. granted Nov. 3, 2023; argued Feb. 28, 2024).** The Question Presented is: Whether, when parties enter into an arbitration agreement with a delegation clause, an arbitrator or a court should decide that the arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation.

MARCH CALENDAR

41. ***Murthy v. Missouri*, No. 23-411 (5th Cir., 83 F.4th 350; cert. granted Oct. 20, 2023; argued Mar. 18, 2024).** The Questions Presented are: (1) Whether respondents have Article III standing; (2) Whether the government's interactions with private social media companies concerning their content-moderation decisions transformed those decisions into state action and violated respondents' First Amendment rights; and (3) Whether the scope of the preliminary injunction is proper.

42. ***National Rifle Association of America v. Vullo*, No. 22-842 (2d Cir., 49 F.4th 700; cert. granted Nov. 3, 2023; argued Mar. 18, 2024).** The Question Presented is: Whether the First Amendment allows a government regulator to discourage regulated entities from doing business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy.

43. ***Diaz v. United States*, No. 23-14 (9th Cir., 2023 WL 314309; cert. granted Nov. 13, 2023; argued Mar. 19, 2024).** The Question Presented is: Whether in a prosecution for drug trafficking—where an element of the offense is that the defendant knew she was carrying illegal drugs—Federal Rule of Evidence 704(b) permits a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters.

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44. ***Truck Insurance Exchange v. Kaiser Gypsum Company, Inc.*, No. 22-1079 (4th Cir., 60 F.4th 73; cert. granted Oct. 13, 2023; argued Mar. 19, 2024).** The Question Presented is: Whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may object to a Chapter 11 plan of reorganization.

45. ***Gonzalez v. Trevino*, No. 22-1025 (5th Cir., 42 F.4th 487; cert. granted Oct. 13, 2023; argued Mar. 20, 2024).** The Questions Presented are: (1) Whether the *Nieves* exception permitting a retaliatory arrest suit despite the existence of probable cause can be satisfied by objective evidence other than specific examples of arrests that never happened; and (2) Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests.

46. ***Texas v. New Mexico*, No. 22O141 (Original Jurisdiction; exceptions set for oral argument Jan. 22, 2024; argued Mar. 20, 2024).** The Questions Presented are: (1) Whether the proposed Consent Decree resolves an ambiguity regarding the apportionments to the States below Elephant Butte Reservoir in a manner that is consistent with the Rio Grande Compact; (2) Whether the United States has a valid claim to an apportionment independent of the State of Texas; (3) Whether the Court should allow the United States to expand the scope of this original action to pursue claims that could be brought in a lower court; and (4) Whether the proposed Consent Decree imposes new obligations on the United States beyond its preexisting duty to conduct Project operations consistent with the Compact.

47. ***Becerra v. San Carlos Apache Tribe*, No. 23-250 (9th Cir., 53 F.4th 1236; cert. granted Nov. 20, 2023; argued Mar. 25, 2024), consolidated with *Becerra v. Northern Arapaho Tribe*, 23-253 (10th Cir., 61 F.4th 810; cert. granted Nov. 20, 2023; argued Mar. 25, 2024).** The Question Presented is: Whether the Indian Health Service must pay "contract support costs" not only to support service-funded activities, but also to support a tribe's expenditure of income collected from third parties.

48. ***Harrow v. Department of Defense*, No. 23-21 (Fed. Cir., 2023 WL 1987934; cert. granted Dec. 8, 2023; argued Mar. 25, 2024).** The Question Presented is: Whether the 60-day deadline imposed by 5 U.S.C. § 7703(b)(1)(A) to petition for review of a final decision of the Merit Systems Protection Board is jurisdictional.

49. ***FDA v. Alliance for Hippocratic Medicine*, No. 23-235 (5th Cir., 78 F.4th 210; cert. granted Dec. 13, 2023; argued Mar. 26, 2024), consolidated with *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, No. 23-236 (5th Cir., 78 F.4th 210; cert. granted Dec. 13, 2023; argued Mar. 26, 2024).** The Questions Presented are: (1) Whether respondents have Article III standing to challenge FDA's 2016 and 2021 actions with respect to mifepristone's approved conditions of use; (2) Whether FDA's 2016 and 2021 actions were arbitrary and capricious; (3) Whether the district court properly granted preliminary relief; and (4) Whether the Fifth Circuit erred in upholding the preliminary injunction based on the court's review of an incomplete administrative record.

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50. ***Erlinger v. United States*, No. 23-370 (7th Cir., 77 F.4th 617; cert. granted Nov. 20, 2023; argued Mar. 27, 2024).** The Question Presented is: Whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

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51. ***Connelly v. United States*, No. 23-146 (8th Cir., 70 F.4th 412; cert. granted Dec. 13, 2023; argued Mar. 27, 2024).** The Question Presented is: Whether the proceeds of a life-insurance policy taken out by a closely held corporation on a shareholder in order to facilitate the redemption of the shareholder's stock should be considered a corporate asset when calculating the value of the shareholder's shares for purposes of the federal estate tax.

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APRIL CALENDAR

52. ***Snyder v. United States*, No. 23-108 (7th Cir., 71 F.4th 555; cert. granted Dec. 13, 2023; argued Apr. 15, 2024).** The Question Presented is: Whether 18 U.S.C. § 666(a)(1)(B), which makes it a federal crime for a state or local official to "corruptly solicit[,] demand[,] . . . or accept[] . . . anything of value from any person, intending to be influenced or rewarded in connection with any" government business "involving any thing of value of $5,000 or more," criminalizes payments in recognition of actions the official has already taken or committed to take, without any quid pro quo agreement to take those actions.

53. ***Chiaverini v. City of Napoleon*, No. 23-50 (6th Cir., 2023 WL 152477; cert. granted Dec. 13, 2023; argued Apr. 15, 2024).** The Question Presented is: Whether Fourth Amendment malicious prosecution claims are governed by the "charge-specific" rule, as the Second, Third, and Eleventh Circuits hold, or by the "any-crime" rule, as the Sixth Circuit holds.

54. ***Fischer v. United States*, No. 23-5572 (D.C. Cir., 64 F.4th 329; cert. granted Dec. 13, 2023; argued Apr. 16, 2024).** The Question Presented is: Whether the D.C. Circuit erred in construing 18 U.S.C. § 1512(c), which prohibits obstruction of congressional inquiries and investigations, to include acts unrelated to investigations and evidence.

55. ***Thornell v. Jones*, No. 22-982 (9th Cir., 52 F.4th 1104; cert. granted Dec. 13, 2023; argued Apr. 17, 2024).** The Question Presented is: Whether the Ninth Circuit employed a flawed methodology for assessing *Strickland* prejudice when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the State's rebuttal when it reversed the district court and granted habeas relief.

56. ***City of Grant Pass v. Johnson*, No. 23-175 (9th Cir., 72 F.4th 868; cert. granted Jan. 12, 2024; argued Apr. 22, 2024).** The Question Presented is: Whether the enforcement of generally applicable laws regulating camping on public property constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

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57. ***Smith v. Spizzirri*, No. 22-1218 (9th Cir., 62 F.4th 1201; cert. granted Jan. 12, 2024; argued Apr. 22, 2024).** The Question Presented is: Whether Section 3 of the Federal Arbitration Act requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration.

58. ***Department of State v. Muñoz*, No. 23-334 (9th Cir., 50 F.4th 906; cert. granted Jan. 12, 2024; argued Apr. 23, 2024).** The Questions Presented are: (1) Whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen; and (2) Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) suffices to provide any process that is due.

59. ***Starbucks Corporation v. McKinney*, No. 23-367 (6th Cir., 77 F.4th 391; cert. granted Jan. 12, 2024; argued Apr. 23, 2024).** The Question Presented is: Whether courts must evaluate the National Labor Relation Board's requests for section 10(j) injunctions under the traditional, stringent four-factor test for preliminary injunctions or under some other more lenient standard.

60. ***Moyle v. United States*, No. 23-726 (9th Cir., 82 F.4th 1296; cert. granted Jan. 5, 2024; argued Apr. 24, 2024), consolidated with *Idaho v. United States*, No. 23-727 (9th Cir., 82 F.4th 1296; cert. granted Jan. 5, 2024; argued Apr. 24, 2024).** The Question Presented is: Whether the Emergency Medical Treatment and Labor Act preempts state laws that protect human life and prohibit abortions, like Idaho's Defense of Life Act.

61. ***Trump v. United States*, No. 23-939 (D.C. Cir., 91 F.4th 1173; cert. granted Feb. 28, 2024; argued Apr. 25, 2024).** The Question Presented is: Whether to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

CASES TO BE ARGUED NEXT TERM

1. ***Williams v. Washington*, No. 23-191 (Ala., 2023 WL 4281620; cert. granted Jan. 12, 2024).** The Question Presented is: Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court.

2. ***Glossip v. Oklahoma*, No. 22-7466 (Okla. Crim. App., 529 P.3d 218; cert. granted Jan. 12, 2024).** The Questions Presented are: (1) Whether the State's suppression of the key prosecution witness's admission he was under the care of a psychiatrist and failure to correct that witness's false testimony about that care and related diagnosis violate due process; (2) Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims; (3) Whether due process requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it; and (4) Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded

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post-conviction relief is an adequate and independent state-law ground for the judgment.

3. ***Lackey v. Stinnie*, No. 23-621 (4th Cir., 77 F.4th 200; cert. granted Apr. 22, 2024).** The Questions Presented are: (1) Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under 42 U.S.C. § 1988.

4. ***Garland v. VanDerStok*, No. 23-852 (5th Cir., 86 F.4th 179; cert. granted Apr. 22, 2024).** The Questions Presented are: (1) Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive," 27 C.F.R. § 478.11, is a "firearm" regulated by the Gun Control Act of 1968; and (2) Whether "a partially complete, disassembled, or nonfunctional frame or receiver" that is "designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver," 27 C.F.R. § 478.12(c), is a "frame or receiver" regulated by the Act.

5. ***Medical Marijuana, Inc. v. Horn*, No. 23-365 (2d Cir., 80 F.4th 130; cert. granted Apr. 29, 2024).** The Question Presented is: Whether economic harms resulting from personal injuries are injuries to "business or property by reason of" the defendant's acts for purposes of civil RICO.

6. ***Bouarfa v. Mayorkas*, No. 23-583 (11th Cir., 75 F.4th 1157; cert. granted Apr. 29, 2024).** The Question Presented is: Whether a visa petitioner may obtain judicial review when an approved petition is revoked on the basis of nondiscretionary criteria.

7. ***Royal Canin U.S.A. v. Wullschleger*, No. 23-677 (8th Cir., 75 F.4th 918; cert. granted Apr. 29, 2024).** The Questions Presented are: (1) Whether a post-removal amendment of a complaint can defeat federal question subject-matter jurisdiction; and (2) Whether such a post-removal amendment of a complaint precludes a district court from exercising supplemental jurisdiction over the plaintiff's remaining state-law claims pursuant to 28 U.S.C. § 1367.

8. ***Bufkin v. McDonough*, No. 23-713 (Fed. Cir., 75 F.4th 1368; cert. granted Apr. 29, 2024).** The Question Presented is: Whether the Veterans Court must ensure that the benefit-of-the-doubt rule was properly applied during the claims process in order to satisfy 38 U.S.C. § 7261(b)(1), which directs the Veterans Court to "take due account" of VA's application of that rule?

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

1. ***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; cert. denied Apr. 29, 2024).** 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.

2. ***E.M.D. Sales, Inc. v. Carrera*, No. 23-217 (4th Cir., 75 F.4th 345; CVSG Dec. 11, 2023; summary reversal recommended May 7, 2024).** The Question Presented is: Whether the burden of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a mere preponderance of the evidence, as six circuits hold, or clear and convincing evidence, as the Fourth Circuit holds.

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. ***Flagstar Bank v. Kivett*, No. 22-349 (9th Cir., 2022 WL 1553266; 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.

4. ***Lake v. NextEra Energy Capital Holdings, Inc.*, No. 22-601 (5th Cir., 48 F. 4th 306; CVSG Mar. 6, 2023; cert. opposed Oct. 23, 2023; cert. denied**

Dec. 11, 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.

5. ***Highland Capital Management, L.P. v. NexPoint Advisors, L.P.*, No. 22-631 (5th Cir., 48 F.4th 419; CVSG May 15, 2023; hold recommended Oct. 19, 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.

6. ***NexPoint Advisors, L.P. v. Highland Capital Management, L.P.*, No. 22-669 (5th Cir., 48 F.4th 419; CVSG May 15, 2023; hold recommended Oct. 19, 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.

7. ***Ohio v. CSX Transportation, Inc.*, No. 22-459 (Ohio, 200 N.E.3d 215; CVSG Mar. 20, 2023; cert. opposed Nov. 21, 2023; cert. denied Jan. 8, 2024).** 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."

8. ***United States Soccer Federation, Inc. v. Relevent Sports, LLC*, No. 23-120 (2d Cir., 61 F.4th 299; CVSG Nov. 13, 2023; cert. opposed Mar. 14, 2024; cert. denied Apr. 22, 2024).** The Question Presented is: Whether allegations that members of an association agreed to adhere to the association's rules, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act.

9. ***Dermody v. Massachusetts Executive Office of Health and Human Services*, No. 22-957 (Mass., 201 N.E.3d 285; CVSG Oct. 2, 2023; cert. opposed May 9, 2024).** 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.

10. ***Blenheim Capital Holdings Ltd. v. Lockheed Martin Corporation*, No. 22-886 (4th Cir., 53 F.4th 286; CVSG Oct. 2, 2023; cert. opposed May 14, 2024).** 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.

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. 15 current Gibson Dunn lawyers have argued before the Supreme Court, and during the Court's eight most recent Terms, the firm has argued a total of 21 cases, 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 36 petitions for certiorari since 2006.

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