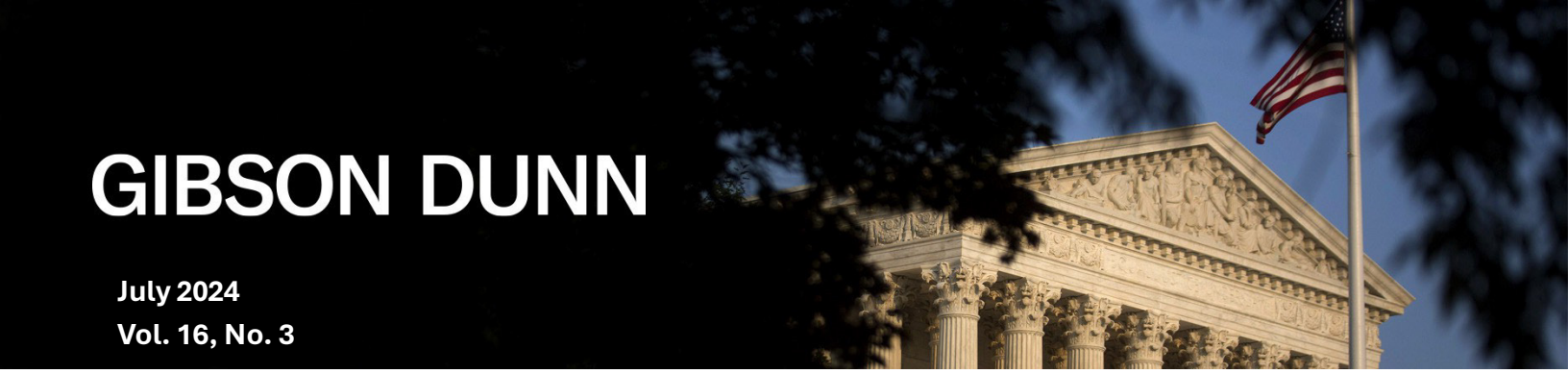
GIBSON DUNN

July 2024
Vol. 16, No. 3



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.

Argued Cases

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. 124). 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 a 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

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

Partner
David Debold

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 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.

Decided May 16, 2024 (601 U.S. 416). Fifth Circuit/Reversed and remanded. Justice Thomas delivered the opinion of the Court (Kagan, J., joined by Sotomayor, Kavanaugh, and Barrett, JJ., concurring) (Jackson, J., concurring) (Alito, J., joined by Gorsuch, J., dissenting). The Appropriations Clause states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. Const. art. I, § 9, cl. 7. When Congress created the Consumer Financial Protection Bureau ("CFPB") in 2010, it determined that the CFPB would not receive its funding through an annual appropriation law, as most agencies do. Instead, the CFPB would receive funding directly from the Federal Reserve each year in an amount that the CFPB Director deems "reasonably necessary" up to an inflation-adjusted cap. 12 U.S.C. §§ 5497(a)(1)–(2). The Federal Reserve, in turn, is also funded outside the ordinary appropriations process. *Id.* § 243. The Community Financial Services Association is an association of lenders that challenged a CFPB regulation on the ground that the CFPB's funding structure violated the Appropriations Clause. The Fifth Circuit agreed and vacated the regulation. The Court reversed, holding that the CFPB's funding mechanism complies with the Appropriations Clause. Reviewing evidence from the Founding era, the Court held that "appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause." Thus, the statute authorizing the CFPB's funding qualifies as an "appropriation" because it specifies the amount (in the form of a cap), source, and purpose of the public funds. The Court observed that unspecified but capped appropriations were commonplace after the Founding, and that the Constitution's two-year limit for appropriations for

Gibson Dunn
Counsel for Amici Curiae Former Members of Congress

Partners
Helgi C. Walker
Lucas C. Townsend
Russell B. Balikian

Of Counsel
Lochlan F. Shelfer

the Army, U.S. Const. art. I, § 8, cl. 12, implies authority to make standing appropriations in other contexts, as confirmed by Founding-era appropriations for the Customs Service and Post Office. Responding to the dissent, the Court noted that there "may be other constitutional checks on Congress' authority to create and fund an administrative agency," but those limits do not find their source in the Appropriations Clause. Justice Kagan, joined by Justices Sotomayor, Kavanaugh, and Barrett, concurred to note that the CFPB's funding scheme is consistent not only with Founding-era practices, but also with practices "at any other time in our Nation's history" up through the present day. Justice Jackson concurred separately, asserting that "[w]hen the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one." Justice Alito dissented, joined by Justice Gorsuch, concluding that "the CFPB's unprecedented combination of funding features affords it the very kind of financial independence that the Appropriations Clause was designed to prevent." The Court's decision to uphold the CFPB's funding scheme draws the curtain on the last major challenge to the CFPB's constitutional authority, which has been extensively litigated with significant success, *see Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), since the agency's inception.

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 never had any intention of staying in those hotels—had Article III standing when she brought the suits, 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 had 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.*, 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.

Decided Feb. 21, 2024 (601 U.S. 65). Third Circuit/Reversed. 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.

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

Partners
Eugene Scalia
Thomas G. Hungar
Gabrielle Levin

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."

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.

   Decided May 23, 2024 (602 U.S. _). District of South Carolina/Reversed in part and remanded in part. Justice Alito delivered the opinion of the Court (Thomas, J., concurring in part) (Kagan, J., joined by Sotomayor and Jackson, JJ., dissenting). South Carolina redrew its congressional districts after the 2020 Census. In doing so, the Republican-controlled state legislature sought to "create a stronger Republican tilt" in District 1, which had recently elected a Democrat. The redrawn District 1 moved Republicans in and Democrats (many of whom were black) out. Ultimately, the new District 1 had a slightly higher projected Republican vote share (an increase from 53.03% to 54.39%) and a slightly higher "black voting-age population" ("BVAP") (16.56% to 16.72%). The NAACP sued, alleging that District 1 was a racial gerrymander and diluted the

electoral power of the State's black voters. A three-judge district court ruled for the challengers on both claims, permanently enjoining the use of the district after determining that the State drew District 1 with a 17% BVAP "target" in mind. On appeal (as part of its mandatory, not certiorari, jurisdiction), the Supreme Court reversed, holding that the district court's factual findings were clearly erroneous and that the challengers had not met their burden of establishing that the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations." The Court cautioned that when race and partisanship are highly correlated, as they are in South Carolina, challengers must "disentangle race and politics" to prove that the legislature was motivated by race as opposed to partisanship. The Court explained that the district court failed to evaluate the evidence reflecting the correlation between race and politics with the necessary presumption of legislative good faith. The district court also erred in relying on methodologically flawed expert reports that failed to consider variables such as contiguity and compactness. Finally, the district court went astray by failing to properly account for the challengers' failure to produce an alternative map that could achieve the same partisan tilt with a significantly higher BVAP. Having concluded that the district court's factual findings were clearly erroneous, the Court reversed as to the racial discrimination claim and remanded for fresh consideration of the vote dilution claim. Justice Thomas wrote separately to urge the Court to hold that the drawing of political districts is a non-justiciable political question because there are "no judicially manageable standards for resolving claims about districting, and, regardless, the Constitution commits those issues exclusively to the political branches." In dissent, Justice Kagan, joined by Justices Sotomayor and Jackson, chided the majority for ignoring precedent requiring significant deference to the district court's factual findings and for imposing a presumption of good faith and an alternative map requirement.

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. 377). 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 constitutes 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 website. 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 15 U.S.C. § 1052(c) violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure.

Decided June 13, 2024 (602 U.S. 286). Federal Circuit/Reversed. Justice Thomas announced the judgment of the Court and delivered the opinion of the Court in part (Kavanaugh, J., joined by Roberts, C.J., concurring in part) (Barrett, J., joined by Kagan, J., and in part by Sotomayor and Jackson, JJ., concurring in part) (Sotomayor, J., joined by Kagan and Jackson, JJ., concurring in judgment). The Lanham Act, which governs federal trademark registration, prohibits marks that include "a name, portrait, or signature identifying a particular living individual except by his written consent." 15 U.S.C. § 1052(c). On the basis of this so-called "names clause," the Patent and Trademark office rejected Steven Elster's application to register the mark "Trump too small." Elster petitioned for review, and the Federal Circuit held that, in the context of speech critical of government officials, the names clause violated Elster's right to free speech under the First Amendment. In a splintered decision, the Supreme Court reversed, holding that the names clause does not violate the First Amendment. The Court declined to adopt a *per se* rule that heightened scrutiny applies to restrictions, including the names clause, that are content-based but viewpoint-neutral. Instead, it held that the names clause survived First Amendment scrutiny in light of the history of tradition of "restricting the trademarking of names." The Court cautioned, however, that the government may "innovate when it comes to trademark law," and it suggested that a different approach may be warranted when analyzing a content-based trademark restriction "without a historical analogue." Concurring in part, Justice Kavanaugh, joined by the Chief Justice, emphasized that "a viewpoint-neutral, content-based trademark restriction might well be constitutional even absent such a historical pedigree." Justice Barrett, joined by Justice Kagan and partially joined by Justices Sotomayor and Jackson, also concurring in part, disagreed that "history and tradition" settle the question of the names clause's constitutionality and instead expressed the view that content-based trademark restrictions "do not abridge the right to free speech so long as they reasonably relate to the preservation of the mark owner's goodwill and the prevention of consumer confusion." Separately concurring in the judgment, Justice Sotomayor, joined by Justices Kagan and Jackson, proposed a test drawn from the context of withheld government benefits—that a "content-based, viewpoint-neutral" trademark restriction "does not violate the Free Speech Clause when the applied criteria are reasonable and the scheme is necessarily content based."

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), 1681o(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.

Decided June 21, 2024 (602 U.S. ___). Fifth Circuit/Reversed and remanded. Chief Justice Roberts delivered the opinion of the Court (Sotomayor, J., joined by Kagan, J., concurring) (Gorsuch, Kavanaugh, Barrett, and Jackson, JJ., separately concurring) (Thomas, J., dissenting). A Texas court entered a civil protective order against Zackey Rahimi after he pushed his then-girlfriend into his car, causing her to hit her head on the dashboard, and fired his gun at a witness. Based on his involvement in multiple other shootings, officers obtained a warrant to search his home, where they found a rifle, a pistol, and a copy of the protective order. Federal prosecutors charged Rahimi with possessing a firearm while subject to an order finding that he "represents a credible threat to the physical safety of [an] intimate partner." 18 U.S.C. § 922(g)(8). The Fifth Circuit reversed Rahimi's conviction, concluding that § 922(g)(8) on its face transgressed

Gibson Dunn
Counsel for Amicus Curiae
Giffords Law Center to
Prevent Gun Violence

Partners
Scott A. Edelman
Katherine Marquart

the Second Amendment, as interpreted in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). The Supreme Court reversed, holding that a person found to pose a credible threat to the physical safety of an intimate partner may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. The Court expounded on the test announced in *Bruen*, instructing that a "court must ascertain whether the new law is 'relevantly similar'" to historical firearm restrictions, but need not identify "a 'dead ringer' or a 'historical twin.'" And the Court rejected arguments that the Second Amendment law is "trapped in amber." Applying these principles, the Court concluded that § 922(g)(8) was sufficiently analogous to Founding-era surety laws (which could be invoked to prevent "spousal abuse" and required "individuals suspected of future misbehavior to post a bond") and "going armed" laws (which prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land") to uphold the statute from facial challenge. Together these historical examples, though not "identical" to § 922(g), "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." The Court also faulted the Fifth Circuit for conducting a facial inquiry focused on "hypothetical scenarios" that could raise "constitutional concerns," "[r]ather than consider[ing] the circumstances in which § 922(g)(8) was most likely to be constitutional." The opinion drew numerous separate writings. In concurrence, Justice Sotomayor, joined by Justice Kagan, sought to cast the approach adopted by the Court as permitting "a historical inquiry calibrated to reveal something useful and transferable to the present day," rather than a "too-sensitive alarm that sounds whenever a regulation did not exist in an essentially identical form at the founding." Justice Gorsuch emphasized that the case involved a facial rather than as-applied challenge and reiterated that originalism was the least imperfect approach to adjudicating constitutional rights. Justice Kavanaugh expounded his view that in interpreting vague constitutional provisions, a judge should be guided by history and precedent rather than his individual policy preferences. Justice Barrett underscored that "[h]istorical regulations reveal a principle, not a mold" for constitutionality and cautioned that courts should not assume that "founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority." Justice Jackson noted her disagreement with Bruen and claimed that the majority's effort to clarify the Bruen test is "a tacit admission" of the test's unworkability. In dissent, Justice Thomas argued that the surety and "going armed" laws were insufficiently analogous to uphold § 922(g)(8). Rahimi (and its many separate opinions) provides an important window into how the Court and individual Justices view constitutional interpretation.

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).

Decided May 23, 2024 (602 U.S. _). Third and Eleventh Circuits/Affirmed. Justice Alito delivered the opinion of the Court (Jackson, J., joined by Kagan, J., and in part by Gorsuch, J., dissenting). The Armed Career Criminal Act imposes a 15-year mandatory minimum sentence on defendants convicted of illegally possessing a firearm after "three previous convictions" for "a serious drug offense." 18 U.S.C. § 924(e)(1). For a state crime to qualify as a "serious drug offense," it must "involv[e] . . . a controlled substance . . . as defined in section 102 of the Controlled Substances Act." *Id.* § 924(e)(2)(A)(ii). A state drug offense meets that standard only if the State's definition of the drug in question "matche[s]" the definition under federal law. *Shular v. United States*, 589 U.S. 154, 158 (2020). Justin Rashaad Brown and Eugene Jackson both pleaded guilty to illegally possessing a firearm as a felon. Both had long rap sheets including numerous state drug convictions. At the time of their drug convictions, the federal and state drug definitions matched. However, the federal government later narrowed the relevant drug definitions—for example, by excluding "hemp" from the marijuana definition and "[^{123}I]ioflupane" from the cocaine definition. Brown and Jackson argued that because the state and federal definitions no longer match, they could not be subject to the Act's mandatory minimum sentence. Resolving a circuit split, the Court held that in determining whether the state and federal drug definitions match, judges must look to the federal definition in place at the time when the defendant committed the state drug offense. The Court emphasized precedent holding that the Act is a "backwardlooking" "recidivist statute." Turning to context, the Court zeroed in on the related definition of "serious drug offense" covering *federal* offenses, which was unaffected by subsequent amendments to the federal drug definitions. It would be strange, the Court reasoned, if a federal drug offense remained a "serious drug offense" despite a subsequent change in the federal definition while a state drug offense did not. Finally, the Court noted that its interpretation best served the Act's purpose because a subsequent technical redefinition of a drug has little bearing on the future dangerousness of traffickers convicted under the original definition. The Court rejected the dissent's invocation of the "cross reference canon," explaining that none of the cases cited by the dissent stand for the broad proposition that "all cross-references 'plug [in] the referenced provision' as it exists 'at the time of the statute's interpretation.'" Rather than adopting "a one-size-fits-all approach to cross-

references," the Court's precedent makes clear that the interpretation of a cross reference (like any other question of interpretation) turns on "text and context."

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 in part, vacated in part, and remanded. Justice Sotomayor delivered the opinion of the Court (Jackson, J., concurring in judgment) (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 for 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

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.

Decided June 27, 2024 (603 U.S. _). Fifth Circuit/Affirmed and remanded. Chief Justice Roberts delivered the opinion of the Court (Gorsuch, J., joined by Thomas, J., concurring) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). After an SEC administrative law judge found that George Jarkesy committed securities fraud, the SEC ordered Jarkesy to pay civil penalties and disgorgement. The Fifth Circuit held that the Seventh Amendment right to a jury trial barred the SEC's use of administrative proceedings to impose civil penalties. The Supreme Court affirmed, holding that the Seventh Amendment entitles defendants to a jury trial in federal court for SEC fraud actions seeking civil penalties. The Court explained that "if a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." The Court emphasized that the form of relief the SEC sought in this case—civil penalties, which by their statutory terms were designed to be punitive and not remunerative—was "all but dispositive" on the issue of whether the Seventh Amendment applied because civil penalties are "a type of remedy at common law that could only be enforced in courts of law." The Court also noted the "close relationship" between the SEC's fraud claims and common law fraud actions. And the Court rejected the argument that its precedent authorized sweeping application of the public rights exception that allows regulatory penalties to be adjudicated by federal agencies. Thus, going forward, if an agency seeks civil penalties on a claim that resembles a traditional common law action, the agency very likely must proceed only in federal court, not in the administrative court. Defendants facing agency enforcement actions therefore should carefully consider the nature of the agency's claims and requested penalties and assert their constitutional rights to a jury trial. Justice Gorsuch, joined by Justice Thomas, filed a concurrence emphasizing that, in addition to the Seventh Amendment, Article III and the Fifth Amendment's due process

clause require a jury trial before the government can deprive a citizen of money. In dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, accused the majority of making a "massive sea change" in the law that conflicted with numerous statutes allowing agencies to impose civil penalties. Justice Sotomayor argued that the public rights exception should be broadly construed to encompass cases in which a "statutory right is . . . closely intertwined with a federal regulatory program" or belongs to the federal government.

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.

Decided June 27, 2024 (603 U.S. __). Second Circuit/Reversed and remanded. Justice Gorsuch delivered the opinion of the Court (Kavanaugh, J., joined by Roberts, C.J., and Sotomayor and Kagan, JJ., dissenting). Facing trillions in potential civil liability for its role in the opioid crisis, Purdue Pharma, owned by the Sackler family, declared bankruptcy. The bankruptcy court approved a plan that would release the (non-bankrupt) Sacklers from all opioid-related liability in exchange for their payment of several billion dollars into the bankruptcy estate. Relying on precedent approving such "third-party releases," the Second Circuit approved the plan. The Court reversed, holding that the federal bankruptcy code does not permit non-consensual third-party releases. The Court focused on 11 U.S.C. § 1123(b)(6), the statutory section on which plan proponents and the Second Circuit relied, which permits a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." Under the canon of *ejusdem generis*, that provision, the Court reasoned, must be construed in light of the five proceeding provisions—which "concern the debtor—its rights and responsibilities, and its relationship with its creditors." And any "appropriate provision" under the "catchall" in § 1123(b)(6) "should be similarly constrained." Consequently, the provision could not be construed to authorize "the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." Context, in the Court's view, confirmed that conclusion. *First*, non-consensual third-party releases would defy provisions that permit only a debtor to be discharged. *Second*, third-party releases do not comport with provisions requiring a debtor to come forward with virtually all of its assets to receive a discharge, nor with the exclusion of certain types of claims (such as those based on fraud) from a discharge. *Finally*, the explicit grant of third-party release authority in the asbestos context, but only in that "one context," suggested the authority had not been granted more broadly. Although the Court noted concerns that "reversing the Second Circuit may cause Purdue's current reorganization plan to unravel," it explained that policy arguments should be left to Congress. In its conclusion, the Court explicitly noted that "[n]othing" in its opinion "should be construed to call into question consensual third-party releases," which "may rest on different legal grounds," and the Court also

did not address whether its "reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been essentially consummated" (the plan in *Harrington* had been stayed). In dissent, Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor and Kagan, described the ruling as "wrong on the law and devastating for more than 100,000 opioid victims and their families." "Given the broad statutory text—'appropriate'—and the history of bankruptcy practice approving non-debtor releases in mass-tort bankruptcies," Justice Kavanaugh concluded, "there is no good reason for the debilitating effects that the decision today imposes on the opioid victims in this case and on the bankruptcy system at large." The opinion will mark a significant change in practice for those bankruptcy courts (which had long permitted third-party releases), and likely will make it more difficult to bring about settlements in mass-tort bankruptcies.

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.

Decided June 20, 2024 (602 U.S. _). Ninth Circuit/Affirmed. Justice Kavanaugh delivered the opinion of the Court (Jackson, J., concurring) (Barrett, J., joined by Alito, J., concurring in judgment) (Thomas, J., joined by Gorsuch, J., dissenting). In 2017, Congress enacted a one-time mandatory repatriation tax ("MRT") on U.S. shareholders who owned at least 10% of an American-controlled foreign corporation. The MRT attributed the undistributed income of the foreign corporations to their American shareholders and then taxed those shareholders on their pro rata shares—even though the shareholders themselves had not realized the earnings. Charles and Kathleen Moore incurred a $15,000 tax liability under the MRT based on their minority ownership in an Indian company. The Moores paid the tax and sued for a refund, claiming it violated the Constitution's Direct Tax Clause. Congress' taxation power includes two classes of tax—direct and indirect. Direct taxes are those imposed on persons or property and, under the Direct Tax Clause, must be apportioned among the States according to their population. *See* U.S. Const. art. I, § 9, cl. 4. Indirect taxes include income taxes and, under the Sixteenth Amendment, need not be apportioned. The Moores argued that a tax qualifies as an income tax only if the income has been realized—and that they had not realized any income through a dividend or sale or shares. But the Supreme Court noted the MRT does tax realized income—albeit income realized by the corporation, rather than individual shareholders. Relying on precedent, the Court held that Congress may attribute an entity's undistributed income to its shareholders and tax those shareholders on a pro rata basis. The Court thus declined to reach the question of whether the Sixteenth Amendment requires income to be "realized" at all before it may be taxed. The Court further declined to decide whether the Sixteenth Amendment would permit various "wealth taxes" (i.e., taxes on the unrealized appreciation of property, savings accounts, or retirement plans). The Court also did not decide whether Congress could tax "both the entity and the shareholders or partners on the entity's

Gibson Dunn
Counsel for Amicus Curiae Small Business and Entrepreneurship Council

Partners
Jonathan C. Bond
Michael J. Desmond
Lucas C. Townsend
Saul Mezei

Of Counsel
Anne O. Devereaux

undistributed income." The Court acknowledged that the Due Process Clause limits Congress's ability to attribute income from one entity or person to another and that Congress may not make "arbitrary" attribution decisions. Four Justices would have held that the Sixteenth Amendment requires that income be realized before it may be taxed [NB: Four Justices said income needs to be realized; only two said it needs to be realized by the individual taxpayer], a conclusion that would bar direct wealth taxes or other similar taxes on unrealized appreciation. Justice Thomas, joined by Justice Gorsuch, dissented and would have struck down the mandatory repatriation tax on the ground that it "is imposed merely based on the ownership of shares in a corporation," rather than on income.

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.

Gibson Dunn
Counsel for Amici Curiae
U.S. Chamber of Commerce
et al.

Partners
Jason C Schwartz
Lucas C. Townsend
Molly T. Senger

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.

JANUARY CALENDAR

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*, No. 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.

Gibson Dunn
Counsel for Amici Curiae Forty-Two Former Immigration Judges and Members of the BIA

Partner
Richard W. Mark

Decided June 14, 2024 (602 U.S. __). Fifth Circuit/Affirmed; Ninth Circuit/Reversed and vacated and remanded. Justice Alito delivered the opinion of the Court (Jackson, J., joined by Sotomayor, Kagan, and Gorsuch, JJ., dissenting). Immigration law provides for two types of notice of removal hearings—an initial notice to appear under 8 U.S.C. § 1229(a)(1), and in the case of "any change or postponement in the time and place" of the removal proceedings, a notice of hearing under § 1229(a)(2). Aliens who fail to attend proceedings "after written notice required under paragraph (1) or (2)," "shall be ordered removed in absentia" if the government makes certain showings. *Id.* § 1229a(b)(5)(A). An in absentia removal order, however, can be rescinded if "the alien did not receive notice in accordance with paragraph (1) or (2)." *Id.* § 1229a(b)(5)(C)(ii). Here, the government failed to provide Moris Esmelis Campos-Chaves and two other aliens with initial notices specifying the time and date to appear, as required by paragraph (1), but subsequently provided each of them with a notice specifying the time and place of the removal hearing under paragraph (2). The aliens failed to appear at their respective hearings, were ordered removed in absentia, and unsuccessfully sought to rescind their removal orders on the ground that they had not received notice in accordance with paragraph (1). Resolving a circuit split, the Court held that an alien can have his in absentia removal order rescinded only if he can demonstrate that he "did not receive a paragraph (1) notice or a paragraph (2) notice—whichever corresponds to the hearing at which he was ordered removed in absentia." The Court rejected the argument that because of the defects in the initial notices, the later notices were defective as well—i.e., they did not "change" and provide a "new time or place" for the proceedings, 8 U.S.C. § 1229(a)(2), because there was no "time or place" set forth in the initial notices to change. The Court thus construed paragraph (2) to permit replacement notices, substituting a "TBD" in the original notices with a "new" time and place.

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.

Gibson Dunn
Counsel for Amici Curiae Cato Institute

Partner
Russ Falconer

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. 267). California Court of Appeal/Vacated 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 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.

Decided June 14, 2024 (602 U.S. __). Tenth Circuit/Reversed and remanded. Justice Jackson delivered the opinion of the Court (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring). For historical reasons, 88 of the nation's 94 bankruptcy districts are administered by the U.S. Trustee Program, while the remaining six are administered by the Bankruptcy Administrator Program. Between 2018 and 2021, fees in Trustee districts were higher than in Administrator districts. In *Siegel v. Fitzgerald*, 596 U.S. 464 (2022), the Supreme Court held that the statute permitting the disparity violated the Bankruptcy Clause's uniformity requirement. By the time *Siegel* reached the Court, Congress had prospectively equalized the fees between districts. John Q. Hammons Fall 2007, LLC and related entities sought a refund of the fees paid in excess of those paid by debtors in Administrator districts. The Tenth Circuit ordered such a refund. The Supreme Court reversed, holding that the prospective equalization of fees sufficed to remedy the constitutional violation. The Court emphasized that the "touchstone for any decision about remedy is legislative intent." The Court noted that the constitutional violation "was nonuniformity, not high fees"; that the disparity "was short lived"; and that "the disparity was small," affecting only 50 of more than 2,000 Chapter 11 cases that were filed in the low-fee districts. Given the significant disruption that would flow from attempting to provide hundreds of millions of dollars in refunds, and Congress's strong "commitment" to keeping the U.S. Trustee Program "self-funded," the Court declined to require a refund. The Court also rejected the respondents' argument that due process required a refund, explaining that their opportunity to challenge the fees before they paid them provided all the process due. In dissent, Justice Gorsuch rejected the premise that the appropriate remedy turned on congressional intent and emphasized that the

prospective remedy adopted was, for the respondents, no relief at all. For centuries, he argued, the Court has held that "the appropriate remedy for duties or taxes erroneously . . . assessed is . . . restitution or compensation."

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.

Decided June 21, 2024 (602 U.S. __). Arizona Court of Appeals/Vacated and remanded. Justice Kagan delivered the opinion of the Court (Thomas, J., concurring in part) (Gorsuch, J., concurring in part) (Alito, J., joined by Roberts, C.J., concurring in judgment). The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial hearsay," unless the witness is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). In other words, to be covered by the Clause, evidence must be both "testimonial" and "offered 'to prove the truth of the matter asserted.'" Here, a forensic technician (Rast) performed lab tests identifying substances found alongside Jason Smith as drugs. The technician recorded her conclusions in typed notes and a signed report. But after Rast stopped working at the lab, Arizona prosecutors opted to call another technician (Longoni) to testify at Smith's trial. Relying on Rast's report and notes, Longoni shared his conclusion that the testing had been properly conducted. He also offered his "independent opinion" that the substances at issue were drugs. Smith challenged his conviction on Confrontation Clause grounds, but the Arizona Court of Appeals concluded that there was no violation because when Longoni informed the jury of Rast's statements, those statements were not being introduced for the truth of the matter asserted but merely to convey why Longoni believed what he believed. The Supreme Court reversed, holding that when an expert "conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." The Court concluded that there is "no meaningful distinction between disclosing an out-of-court statement to explain the basis of an expert's opinion and disclosing that statement for its truth." Thus, while holding that Longoni's testimony contained hearsay, the Court declined to determine whether Rast's underlying statements where sufficiently "testimonial" to trigger the Confrontation Clause. In assessing whether a statement was testimonial on remand, the Court instructed the Arizona courts to first determine "exactly which of Rast's statements are at issue," and then assess whether the "statements' primary purpose" was to assist in "a future criminal proceeding." Justice Thomas, concurring in part, reiterated his belief that only "'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" and "'technically

informal statements . . . used to evade the formalized process'" are testimonial. Justice Gorsuch, also concurring in part, expressed concerns with the majority's "primary purpose" test for testimonial hearsay but did not suggest an alternative. In a concurrence in the judgment, Justice Alito accused the majority of "inflict[ing] a needless, unwarranted, and crippling wound on modern evidence law." Treating all testimony explaining the basis for an expert opinion as introduced for the truth of the matter asserted, Justice Alito feared, would "blow up the Federal Rules." Rather, on the question of whether evidence is hearsay, Justice Alito viewed "the Federal Rules and the requirements of the Confrontation Clause" as the "same."

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.

Gibson Dunn
Counsel for Amicus Curiae
Professor Ernest A. Young

Partner
Gregg J. Costa

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

Gibson Dunn
Counsel for Amicus Curiae
U.S. Chamber of Commerce

Partners
Helgi C. Walker
Russell B. Balikian

Decided June 28, 2024 (603 U.S. _). First Circuit and D.C. Circuit/Vacated and remanded. Chief Justice Roberts delivered the opinion of the Court (Thomas, J., and Gorsuch, J., separately concurring) (Kagan, J., joined by Sotomayor and Jackson, JJ., dissenting). The Supreme Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), instructed courts to apply a two-step framework when reviewing administrative agencies' interpretations of statutes that they administer. At step one, courts determined whether the statute had an unambiguous meaning using the traditional tools of statutory construction. If not, then courts proceeded to step two, at which they deferred to the agency's interpretation, so long as it was reasonable. Loper Bright Enterprises and Relentless, Inc. are small businesses engaged in herring fishing off the Atlantic coast. They brought two lawsuits challenging a rule promulgated by the Department of Commerce that required them to pay for government-approved fishing monitors. Applying *Chevron*, the D.C. Circuit and First Circuit both held that the agency had reasonably interpreted the statute. The Court vacated both decisions, overruling *Chevron* and holding that judges must independently interpret statutes without deference to an agency's reading of the law. The Court rested its decision on the plain language of the Administrative Procedure Act ("APA"), which provides that a court reviewing agency action "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706. *Stare decisis*, the principle that courts should generally adhere to their past cases, did not provide a reason to retain the *Chevron* doctrine. That was so, the Court reasoned, because the *Chevron* opinion had not grappled with the text of the APA and because it is so difficult to determine whether a statute is ambiguous that the doctrine is "unworkable." Going forward, agencies' interpretation of statutes may still be entitled to a lesser degree of "respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), insofar as the agencies' views are persuasive. Persuasiveness will depend on factors such as whether the agency adopted the interpretation close in time to the statute's enactment and how consistently the agency has adhered to that interpretation since. The Court concluded by emphasizing that a prior case's reliance on Chevron, standing alone, does not provide sufficient justification to overrule it. The Court also noted that "particular" statutes may delegate discretionary "authority to an agency," and a court's role is to ensure that the

delegation is "consistent with constitutional limits" and that the "agency acts within it," thereby implying that the nondelegation doctrine may be the next front for evaluating agency authority. In concurrence, Justice Thomas explained his view that Chevron also violates the Constitution's separation of powers by abdicating judges' duty to exercise independent judgment and impermissibly conferring that judicial power on the Executive Branch. Justice Gorsuch concurred separately to emphasize his view that, properly understood, stare decisis mandated Chevron's demise rather than preservation. Justice Kagan dissented, joined by Justices Sotomayor and Jackson, predicting that the ruling "will cause a massive shock to the legal system." The decision continues a trend of Supreme Court decisions reining in administrative agency action.

FEBRUARY CALENDAR

29. ***Trump v. Anderson*, No. 23-719 (Colo., 543 P.3d 283; 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 opinion concurring in the judgment, echoing the view that the majority opinion "decides momentous and difficult issues unnecessarily."

30. ***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

Gibson Dunn
Counsel for Amici Curiae Capitol Police Officers Present at the U.S. Capitol on January 6, 2021

Partners
Lauren M. Blas
Katherine Marquart
Lee R. Crain
Connor S. Sullivan

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).

Decided July 1, 2024 (603 U.S. ___). Eighth Circuit/Reversed and remanded. Justice Barrett delivered the opinion of the Court (Kavanaugh, J., concurring) (Jackson, J., joined by Sotomayor and Kagan, JJ., dissenting). The Administrative Procedure Act ("APA") permits suit by any person who has suffered a "legal wrong" or been "adversely affected" by an agency rule. 5 U.S.C. § 702. An APA challenge to an agency rule is subject to the general federal statute of limitations—it must be "filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). In 2011, the Federal Reserve Board promulgated Regulation II, which caps the interchange fees that payment processing networks can charge merchants on debit-card transactions. The D.C. Circuit rejected a challenge under the APA to Regulation II in 2014. In 2018, a convenience store called Corner Post opened its doors and first paid fees governed by Regulation II. Three years later, Corner Post filed an APA claim challenging Regulation II as allowing higher fees than the statute under which it was promulgated. The Eighth Circuit held that Corner Post's suit was untimely because "facial" challenges to agency regulations must be brought within six years of the rule's promulgation, even if the plaintiff could not have filed its own claim within that initial six-year period. Resolving a circuit split, the Supreme Court reversed, holding that an APA claim accrues, and the six-year statute of limitations begins to run, only when an agency rule injures the plaintiff. The Court relied on the well-established meaning of "accrues"—"a right accrues when it comes into existence," "i.e., when the plaintiff has a complete and present cause of action." The Court also drew support from the APA's "basic presumption" of judicial review and the "deep-rooted historic tradition that everyone should have his own day in court." In concurrence, Justice Kavanaugh noted that Corner Post could "obtain relief in this case only because the APA authorizes vacatur of agency rules," since Corner Post itself was not subject to Regulation II but merely felt its "adverse downstream effects." (The majority, while noting debate on the issue, "assume[d] without deciding that vacatur is available under the APA.") Justice Kavanaugh argued that the language of § 706 of the APA empowering courts to "set aside" unlawful agency action necessarily authorized vacatur and rejected contrary arguments by the government. Justice Jackson dissented, joined by Justices Sotomayor and Kagan, arguing that "'accrues' lacks any fixed meaning," and instead takes on different meanings depending on the context. In "the administrative-law context," she concluded, "the limitations period begins not when a plaintiff is injured, but when a rule is finalized." The Court's decision in *Corner Post* amplifies the impact of its decision in *Loper Bright*, as persons who only recently became subject to longstanding regulations now will be able to challenge them without deference to the promulgating agency.

31. ***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/Vacated 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 reversed the Second Circuit's decision compelling arbitration on the basis that petitioners work in the bakery industry.

32. ***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.

Decided June 27, 2024 (603 U.S. ___). D.C. Circuit/Stay applications granted. Justice Gorsuch delivered the opinion of the Court (Barrett, J., joined by Sotomayor, Kagan, and Jackson, JJ., dissenting). The Clean Air Act directs each state to develop plans to implement air-quality standards. If a state's plan fails to meet the relevant requirements, the EPA can reject that plan and impose a federal plan instead. One requirement in the Act is a "Good Neighbor" provision, which requires upwind states to reduce emissions to account for pollution exported to downwind states. In 2022, the EPA proposed to reject the plans of 23 upwind states and impose a single, coordinated federal plan for all 23 states. The EPA ultimately disapproved 21 states' plans. Before the federal plan was final, several courts of appeals held that the EPA had likely violated the Act in disapproving certain states' plans and granted stays of the disapprovals pending review. In June 2023, the EPA nonetheless finalized the proposed federal "Good Neighbor" plan. Since then, several other states have obtained stays of the EPA's state-plan

Gibson Dunn
Counsel for Amicus Curiae Independent Bakers Association

Partners
Thomas H. Hungar
Russell B. Balikian

disapprovals. The Good Neighbor plan now applies to only 11 states, far fewer than the plan's stated intent. The D.C. Circuit declined to grant a stay of the Good Neighbor plan pending review. After hearing oral argument, the Supreme Court granted a stay. Because the Court concluded that the "harms and equities" relevant to a stay of the enforcement of a federal regulation were "very weighty on both sides," it held that the propriety of the stay turned on the likelihood of success on the merits. The Court emphasized that the "long-settled standards" of federal rulemaking require the agency to explain its response to all material comments raised during the notice and comment period. Stringently applying that requirement, the Court faulted the EPA for failing "to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the States it originally intended to cover." In dissent, Justice Barrett, joined by Justices Sotomayor, Kagan, and Jackson, expressed skepticism about whether the challengers raised with "reasonable specificity" during the notice and comment process that the exclusion of some States from the plan would undermine the EPA's emissions controls. Even if they had, the dissenting Justices concluded that the EPA likely "would have promulgated the same plan even if fewer States were covered," meaning the "alleged procedural error . . . likely had no impact on the plan." The decision (and the dissent's arguments) underscores the importance of clearly articulating arguments against a proposed rule during the notice and comment process.

33. ***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. 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 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 v. Metro-Goldwyn-Mayer*, 572 U.S. 663 (2014), 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 "likely does not exist."

34. ***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), issued together 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; argued Feb. 26, 2024)**. The Questions Presented are: (1) Whether state 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.

Gibson Dunn
Counsel for Amici Curiae Professors of History

Partners
Theodore J. Boutrous Jr.
Kristin A. Linsley
Lee R. Crain

Decided July 1, 2024 (603 U.S. __). Fifth and Eleventh Circuits/Vacated and remanded. Justice Kagan delivered the opinion of the Court (Barrett, J., concurring) (Jackson, J., concurring in part and concurring in the judgment) (Thomas, J., concurring in the judgment) (Alito J., joined by Thomas and Gorsuch, JJ., concurring in the judgment). Florida and Texas passed laws restricting how social media services moderate content and requiring those companies to provide users an individualized explanation if it alters or removes their content. NetChoice, an internet trade association, challenged both laws as violating the First Amendment on their face. The Eleventh Circuit affirmed an injunction preventing most of the Florida law from taking effect, while the Fifth Circuit upheld the Texas law, primarily on the theory that the law did not regulate speech or content. The Supreme Court held that neither the Fifth nor the Eleventh Circuit had properly applied the standard for a "facial" challenge, instead addressing primarily how the laws might apply to "paradigmatic" social media companies, such as Facebook and YouTube, without considering their potential applicability to "other kinds of websites and apps," such as Uber, Gmail, or Reddit. A facial challenge, however, attacks a law in all of its applications and, in the First Amendment context, requires a showing that a law's unconstitutional applications "substantially outweigh" its constitutional ones. Because the record was "underdeveloped" on the actual scope of the laws' application, the Court vacated both opinions and remanded for further consideration under the proper standard. In doing so, however, the Court provided significant substantive guidance on the relevant First Amendment analysis to correct the Fifth Circuit's misguided approach (while implicitly endorsing the approach of the Eleventh Circuit). Analogizing to cases in which the Court had previously rejected government efforts to impose "right of reply" obligations or other "balance" obligations on newspapers, broadcasters, and parades, the Court explained that a social media service's exercise of "editorial discretion" in "compiling and curating" the speech that appears on a user's feed is

"expressive activity" protected by the First Amendment. And the "government may not, in supposed pursuit of better expressive balance" on social media, "alter a private speaker's own editorial choices about the mix of speech it wants to convey." In concurrence, Justice Barrett pointed out future cases may present difficult questions especially unsuited to a facial challenge, such as whether turning over moderation to AI or employing an algorithm that completely eliminates any human "editorial" element and "just presents automatically to each user whatever the algorithm thinks the user will like" also will involve the same type of "inherently expressive choice" protected by the First Amendment. Justice Thomas, concurring in the judgment, argued that federal courts categorically lack authority under Article III to declare a statute "facially" unconstitutional. Justice Thomas also called for overruling *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), which mandates less-stringent First Amendment review of the compelled disclosure of factual information. And he suggested that the "common-carrier doctrine"—which permits "'special regulation[]" of common carriers, "including a general requirement to serve all comers'"—should guide analysis on remand.

35. ***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. 330). 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 (2) a 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 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.

36. ***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.

Decided May 30, 2024 (602 U.S. __). Second Circuit/Vacated and remanded. Justice Kavanaugh delivered the opinion of the Court. National banks, like Bank of America, hold federal charters under the National Bank Act. State banks, unsurprisingly, hold state rather than federal charters. Over time, courts, regulators, and legislators have taken a broad view of the preemptive effects of federal charters and the National Bank Act. In the 2010 Dodd-Frank Act, Congress sought to narrow the preemptive effect of a federal charter by instructing that federal law preempts "state consumer financial laws" "only if" one of three specified conditions is met. 12 U.S.C. § 25b(b)(1). One condition is that a state law "prevents or significantly interferes with the exercise by the national bank of its powers." *Id.* § 25b(b)(1)(B). That standard stems from *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), which is expressly incorporated by the statute. Here, Cantero and other customers of Bank of America sued based on the Bank's failure to pay at least 2% interest on funds held in mortgage-escrow accounts—as required by New York law. Bank of America moved to dismiss, arguing that the National Bank Act preempts state escrow-interest laws, and the district court denied that motion. The Second Circuit granted Bank of America's petition for an interlocutory appeal and held the escrow-interest requirement preempted by the National Bank Act. The Court reversed, reaffirming the "significant-interference" standard and holding that courts must make that determination by examining the text and structure of the relevant state law and engaging in a "nuanced comparative analysis" of the Supreme Court's applicable opinions—not by attempting to apply a categorical rule that state banking laws are always or never preempted. Because the Supreme Court did not adopt any categorical approach, or even decide whether state-escrow laws are preempted, this decision will likely lead to further litigation over whether state banking laws apply to national banks.

37. ***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."

Gibson Dunn
Counsel for Amicus Curiae FAMM

Partner
David Debold

Decided June 14, 2024 (602 U.S. 406). Fifth Circuit/Affirmed. Justice Thomas delivered the opinion of the Court (Alito, J., concurring) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). Federal law makes it illegal to possess a "machinegun," 18 U.S.C. § 922(o), which is defined as a firearm able to "shoot, automatically more than one shot . . . by a single function of the trigger," 26 U.S.C. § 5845(b). The definition also includes "any part designed and intended . . . for use in converting a weapon into a machinegun." *Id.* Bump stocks enable a shooter to achieve a rate of

fire similar to that of a traditional machinegun. They do so by harnessing a rifle's recoil energy to slide the rifle back and forth and repeatedly "bump" the shooter's trigger finger, creating rapid fire. All the shooter has to do is keep his finger on the bump stock's finger rest and press the gun forward. In October 2017, a gunman used rifles equipped with bump stocks to fire on a crowd attending an outdoor music festival in Las Vegas. In response, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), in a reversal of its previous position, promulgated a rule deeming bump stocks to be machineguns. Numerous plaintiffs challenged the regulation, creating a circuit split. The Supreme Court resolved the split by holding that bump stocks do not meet § 5845(b)'s definition of a machinegun. The phrase "function of the trigger," the Court concluded, refers to the mode of action by which the trigger activates the firing mechanism. Bump stocks do nothing to change a gun's firing mechanism and "merely reduce[] the amount of time that elapses between separate 'functions' of the trigger." Consequently, bump stocks do not alter the reality that there is one shot per function of the trigger. The Court also concluded that any firing of more than one shot by a single function of the trigger did not occur "automatically." Instead—in addition to keeping a finger on the finger rest—a shooter must also actively maintain forward pressure on the rifle's front grip with his nontrigger hand. The Court also rejected the dissent's invocation of the presumption against ineffectiveness, which weighs against interpretations that would "rende[r] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner." *The Emily*, 9 Wheat. 381, 389 (1824). The Court explained that its interpretation does not "render" the statute "useless," because it still regulates all traditional machineguns. In concurrence, Justice Alito encouraged Congress to act, noting that the Congress that enacted 26 U.S.C. § 5845(b) likely "would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock." In dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, would have concluded that the "single function of the trigger" should be understood to turn on "the human act of the shooter's initial pull," rather than "the internal mechanism that initiates fire." More fundamentally, she accused the majority of ignoring ordinary meaning and giving short shrift to the presumption against ineffectiveness.

38. ***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.

Decided May 23, 2024 (602 U.S. _). Ninth Circuit/Affirmed. Justice Jackson delivered the opinion of the Court (Gorsuch, J., concurring). David Suski entered a user agreement with Coinbase, a cryptocurrency exchange platform, that included an arbitration agreement with a delegation clause permitting an arbitrator to decide threshold questions about the agreement's scope, applicability, and validity. Later, Suski participated in a Coinbase-sponsored sweepstakes, the rules of which included a forum selection clause that directed sweepstakes-related disputes to California

state and federal courts. After Suski filed a putative class action against Coinbase in federal court in California, Coinbase moved to compel arbitration under the user agreement. The district court denied arbitration, crediting Suski's argument that the sweepstakes rules' forum selection clause superseded the arbitration agreement. The Ninth Circuit affirmed, concluding that a court, not an arbitrator, should resolve the interaction between the user agreement and the sweepstakes rules. The Supreme Court then affirmed as well, holding that "a court, not an arbitrator, must decide whether the parties' first agreement was superseded by their second." Arbitration, the Court emphasized, is solely a question of contract and consent. Multiple types of disagreements, the Court explained, can arise in cases involving arbitration agreements. The parties can have a first-order disagreement over their underlying "merits" dispute. They can have a second-order dispute over "whether they agreed to arbitrate the merits." They can have a third-order dispute over "who should have the primary power to decide the second matter." And they can have, as here, a fourth-order dispute over what "happens if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability." In each case, whether the question is resolved by a court or an arbitrator turns on what the parties agreed to. Here, the Court found no agreement requiring an arbitrator to decide the fourth-order question, meaning that it must be decided by a court. Justice Gorsuch concurred to emphasize that parties retain the freedom to agree to broad delegation clauses that apply across multiple contracts.

39. ***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.

Decided June 26, 2024 (603 U.S. ___). Fifth Circuit/Reversed and remanded. Justice Barrett delivered the opinion of the Court (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting). Social media companies routinely "removed, demoted, or fact checked" posts that contained alleged misinformation concerning the COVID-19 pandemic or the 2020 election. At the same time, officials from the White House and various federal agencies regularly communicated with these platforms about their "content-moderation efforts." Missouri, Louisiana, and five individual plaintiffs sued dozens of federal officials and agencies, alleging that they pressured social media services to restrict the plaintiffs' speech in violation of the First Amendment. After extensive discovery, the district court entered a preliminary injunction, finding that government officials likely "coerced" or "significantly encouraged" social media services "to such extent that their content-moderation decisions should be deemed to be the decisions of the Government." The Fifth Circuit affirmed with modifications to the injunction. The Supreme Court reversed, concluding that neither the States nor the individual plaintiffs had standing to seek an injunction against any defendant. The Fifth Circuit erred by approaching the standing inquiry from "a high level of generality": the court of appeals reasoned that the platforms' content-moderation decisions were "likely attributable at least in part" to the actions of government officials because those officials had "engaged in a years-long pressure campaign to ensure that the platforms suppress those viewpoints." But the record contained no specific causation findings tying specific content-moderation decisions to pressure from the particular agencies or government officials that the plaintiffs sued. In fact, "the platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct." Plaintiffs had also failed to show that they faced a substantial risk of future injury fairly traceable to the particular defendants before the Court, as required to obtain a forward-looking injunction. To the contrary, the frequent communications between the government and social media platforms that took place at the height of the pandemic had "considerably subsided" since 2022. The Court rejected the dissent's argument that social media services "continue" to restrict the plaintiffs' "speech according to policies initially adopted under Government pressure." Even if that were true, the Court explained, without evidence that the government continued to coerce *the platforms* to adhere to those policies, a forward-looking injunction against *government officials* could not redress that injury. The Court also rejected plaintiffs' argument that they had suffered an injury sufficient to establish standing based on their "right to listen" to other speakers whose speech had been removed from social media platforms—a standing theory that would prove "'boundless.'" In

dissent, Justice Alito described the asserted pressure campaign conducted by officials from the White House and Surgeon General's Office and expressed his fear that the Court was sending the message that "[i]f a coercive campaign is carried out with enough sophistication, it may get by."

40. ***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.

Decided May 30, 2024 (602 U.S. 175). Second Circuit/Vacated and remanded. Justice Sotomayor delivered the opinion of the Court (Gorsuch, J., and Jackson, J., separately concurring). The National Rifle Association ("NRA") contracted with insurance providers regulated by the New York Department of Financial Services ("DFS") to offer insurance products to the NRA's members. Maria Vullo, the former DFS superintendent, allegedly targeted those affiliate organizations for investigation. Vullo identified potential insurance violations, which she then used as leverage to pressure the insurers into disaffiliating with the NRA. Vullo also issued "guidance letters" and a press release encouraging DFS-regulated insurance companies and financial institutions to abandon relationships with the NRA and similar gun promotion organizations to avoid "social backlash" and act with "corporate social responsibility." The NRA sued, alleging First Amendment censorship and retaliation. The Second Circuit held that Vullo's "alleged actions constituted permissible government speech and legitimate law enforcement." The Supreme Court reversed, holding that the NRA plausibly alleged that Vullo had violated the First Amendment by coercing regulated insurers to terminate their business relationships with the NRA in order to punish or suppress the NRA's gun-promotion advocacy. "To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." Judged by that standard, the NRA plausibly alleged impermissible coercion by Vullo. The Court faulted the Second Circuit for woodenly applying a multifactor test designed to test whether government conduct is coercive and for failing to draw reasonable inferences in the NRA's favor, as required at the motion to dismiss stage. The Court further emphasized that the illegality of the NRA-endorsed insurance programs does not insulate Vullo's conduct from constitutional scrutiny. While Vullo could pursue violations of state insurance law, she could not do so to punish or suppress the NRA's protected expression. In concurrence, Justice Gorsuch reiterated his skepticism of multifactor tests and encouraged courts to focus on the ultimate question: whether the plaintiff had plausibly alleged conduct that could reasonably be viewed as a threat of adverse government action to punish or suppress speech. Justice Jackson

concurred separately to argue that government coercion alone does not violate the First Amendment; only when the coercion threatens expressive rights is the First Amendment implicated.

41. ***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.

Decided June 20, 2024 (602 U.S. __). Ninth Circuit/Affirmed. Justice Thomas delivered the opinion of the Court (Jackson, J., concurring) (Gorsuch, J., joined by Sotomayor and Kagan, JJ., dissenting). Federal Rule of Evidence 704(b) prohibits expert witnesses from stating opinions "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Delilah Diaz attempted to cross from Mexico into the United States driving a car loaded with 54 pounds of methamphetamine. Diaz was charged with importing the methamphetamine in violation of 21 U.S.C. §§ 952 and 960, which required prosecutors to prove that she "knowingly" transported drugs. At trial, Diaz claimed to be a blind mule, meaning that "she did not know that there were drugs in the car." In response, the government called a Homeland Security Investigations Special Agent, who testified that "in most circumstances," the driver knows about the drugs because using an unknowing courier would be too risky for the drug-trafficking organizations. Diaz was convicted, and the Ninth Circuit upheld the conviction. The Supreme Court affirmed, holding that an expert opinion about "most" of the members of a group does not fall within Rule 704(b)'s narrow prohibition on opinions "about . . . the defendant." The Court explained that Rule 704(a)—which provides that an opinion "is not objectionable just because it embraces an ultimate issue"—represented a departure from the common-law "ultimate issue" rule. Under that rule, witnesses were categorically barred from "'stat[ing] their conclusions on' any 'ultimate issue'—i.e., issues that the jury must resolve to decide the case." The rule was widely considered "'impracticable and misconceived' because it excluded the most necessary testimony on issues where the jury should have help if it is needed." Rule 704(a), adopted in 1975, made clear that the ultimate issue rule did not apply in federal court. The Court reasoned that Rule 704(b), which was adopted after John Hinckley was acquitted by reason of insanity for his attempted assassination of President Reagan, represented a narrow reinstantiation of the ultimate issue rule. But, the Court explained, an opinion about "most drug couriers" is not an opinion "about whether Diaz herself did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." The Court rejected the dissent's broader interpretation of Rule 704(b) as prohibiting opinions "related to the ultimate issue of a defendant's mental state," explaining that interpretation would transform Rule 704(b) into "a standalone prohibition broader than Rule 704(a) or even the original

ultimate-issue rule." In concurrence, Justice Jackson emphasized that there are other evidentiary safeguards to root out unfounded expert testimony and that Rule 704(b) is "party agnostic"—meaning that the dissent's approach would bar the defendant from introducing expert testimony on issues such as "battered woman syndrome." In dissent, Justice Gorsuch accused the majority of sanctioning "mind" "read[ing]" and argued that any expert opinion "[c]oncerning, regarding, with regard to, in reference to[, or] in the matter of" the defendant's mental state transgressed Rule 704(b).

42. ***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.

Gibson Dunn
Counsel for Petitioner Truck Insurance Exchange

Partners
Allyson N. Ho
Michael A. Rosenthal
Robert B. Krakow
Russell H. Falconer

Decided June 6, 2024 (602 U.S. __). Fourth Circuit/Reversed and remanded. Justice Sotomayor delivered the opinion of the unanimous Court. The Bankruptcy Code permits any "party in interest" to "raise" issues in a chapter 11 bankruptcy proceeding. 11 U.S.C. § 1109(b). Truck Insurance Exchange ("Truck") was the primary insurer for asbestos manufacturers that filed for chapter 11 bankruptcy. Truck attempted to object to the proposed bankruptcy plan on the ground that the bankruptcy plan lacked claim disclosure requirements that could prevent Truck from paying millions in fraudulent claims under the insurance contracts. The district court confirmed the plan over Truck's objection, and the Fourth Circuit affirmed. The court of appeals agreed with the district court that Truck was not a "party in interest" under § 1109 and could not object to the plan because it did not modify the insurance contracts and was thus "insurance neutral." The Supreme Court reversed, holding that § 1109(b)'s "text, context, and history confirm that an insurer such as Truck with financial responsibility for a bankruptcy claim is a 'party in interest' because it may be directly and adversely affected by the reorganization plan." The Court explained that the plain meaning of "party in interest" refers to "entities that are potentially concerned with or affected by a proceeding." The historical context and purpose of § 1109(b) also supported that interpretation, because "Congress consistently has acted to promote greater participation in reorganization proceedings," which promotes the fairness of the process. Applying those principles, the Court held that insurers such as Truck with financial responsibility for bankruptcy claims are parties in interest because they can be directly and adversely affected by the reorganization proceeding in numerous ways. The Court rejected the insurance neutrality doctrine—which strips an insurer of standing to object if a plan of reorganization does not increase the insurer's pre-petition obligations or impair the insurer's pre-petition policy rights—concluding that the doctrine "is conceptually wrong and makes little practical sense." The Court explained that the insurance neutrality doctrine conflates the merits of an insurer's objection with the threshold party-in-interest inquiry. Going forward, insurers will no longer have to establish that plans change their pre-petition obligations to be heard in chapter 11 proceedings, including with respect to reorganization plans. Instead, insurers will need to show only

that they have financial responsibility for bankruptcy claims to participate. The decision will give insurers responsible for bankruptcy claims more opportunity to protect their interests and identify problems with reorganization plans.

43. ***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.

Gibson Dunn
Counsel for Amicus Curiae Law Enforcement Action Partnership

Partner
David Debold

Decided June 20, 2024 (602 U.S. ___). Fifth Circuit/Reversed and remanded. Per curiam opinion (Alito, J., concurring) (Kavanaugh. J., concurring) (Jackson, J., joined by Sotomayor, J., concurring) (Thomas, J., dissenting). Sylvia Gonzalez, a member of the Castle Hills City Council, presented a petition seeking the removal of the city manager. Discussions grew heated when the petition was introduced at a City Council meeting. After the meeting, as Gonzalez was packing her belongings, the mayor asked her for the petition. When Gonzalez replied that the mayor had it, the mayor asked her to check her binder, where she found the petition. Gonzalez claimed she did not intentionally place the petition in her binder and was surprised to find it there. Following an investigation, Gonzalez was charged under Texas's anti-tampering statute with intentionally removing a government document. After charges were dropped, Gonzalez sued the mayor and other officials for retaliatory arrest in violation of the First Amendment. Gonzalez conceded that probable cause existed for her arrest, but she argued, based on her review of charging data from the county, that "the Texas anti-tampering statute had never been used in the county to criminally charge someone for trying to steal a nonbinding or expressive document." In *Nieves v. Bartlett*, 587 U.S. 391 (2019), the Court held that the existence of probable cause does not defeat a plaintiff's retaliatory-arrest claim if she produces "objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." The Fifth Circuit refused to consider Gonzalez's evidence, holding that a plaintiff's claim could fall within the *Nieves* exception only if the plaintiff proffered "comparative evidence" of "otherwise similarly situated individuals who engaged in the same criminal conduct but were not arrested." The Supreme Court reversed, holding that the Fifth Circuit took an "overly cramped view" of *Nieves* when it required "very specific comparator evidence—that is, examples of identifiable people who mishandled a government petition in the same way Gonzalez did but were not arrested." To satisfy the *Nieves* exception, the plaintiff need only produce "objective" evidence that she was charged in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." In concurrence, Justice Alito faulted the Court for failing to address the second question presented—whether "the *Nieves* no-probable-cause rule applies beyond split-second arrests"—and hold that it does. Justice Kavanaugh also concurred, suggesting that this was not a *Nieves* case at all because

Gonzalez argues that "she took the government record accidentally, not intentionally, and that people who accidentally remove government documents are not arrested." Her argument therefore turns not on her conduct (taking the records), but on her *mens rea*. In Justice Kavanaugh's view, Gonzalez's concession that officers had probable cause to arrest her should have foreclosed her "attempt to contest her *mens rea* for purposes of her § 1983 retaliatory arrest claim." In a separate concurrence, Justice Jackson, joined by Justice Sotomayor, emphasized her view that the scope of permissible *Nieves* "objective" evidence is broad. In dissent, Justice Thomas reiterated his view that probable cause serves as an absolute bar to a First Amendment retaliatory-arrest claim.

44. ***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.

Decided June 21, 2024 (602 U.S. __). Exceptions to proposed consent decree sustained. Justice Jackson delivered the opinion of the Court (Gorsuch, J., joined by Thomas, Alito, and Barrett, JJ., dissenting). In 1938, Congress approved the Rio Grande Compact under the Compact Clause of the U.S. Constitution. Art. I, § 10, cl. 3. The Rio Grande Compact created an equitable apportionment of Rio Grande water as among Colorado, New Mexico, and Texas. That apportionment was based on the United States' preexisting harnessing of the Rio Grande's water into a dam and reservoir through the Rio Grande Project—a project the United States created to fulfill its treaty obligations with Mexico. A dispute arose between Texas and New Mexico over the distribution of Rio Grande water, and in 2013 Texas filed an original action in the Court alleging that New Mexico violated its Compact obligations. The United States sought to intervene, and the Court in *Texas v. New Mexico*, 583 U.S. 407 (2018), permitted intervention. The Court appointed a Special Master to adjudicate the case, and eventually Texas and New Mexico negotiated a proposed consent decree that the Special Master recommended approving. The United States excepted to the consent decree, claiming that it would impermissibly dispose of the United States' Compact claims without its consent. The Court concluded that, based on its 2018 ruling, the United States had "unique" claims under the Compact, given the federal role in overseeing the Compact and delivering water downstream under contracts pursuant to the Compact, in addition to its treaty obligations to ensure adequate water delivery to Mexico. The Court then held that the proposed consent decree negotiated by Texas and New Mexico would impermissibly dispose of the United States' claims without its consent. In dissent, Justice Gorsuch, joined by

Justices Thomas, Alito, and Barrett, emphasized that an original jurisdiction dispute is "usually reserved for disputes between States," and that "the consent decree would leave the federal government free to pursue any claims it believes it has in the lower courts, where disputes between the federal government and States are normally tried."

45. ***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.

Decided June 6, 2024 (602 U.S. __). Ninth and Tenth Circuits/Affirmed. Chief Justice Roberts delivered the opinion of the Court (Kavanaugh, J., joined by Thomas, Alito, and Barrett, JJ., dissenting). The Court held that the Indian Health Service ("IHS") must pay "contract support costs" incurred by Indian tribes that have entered contracts with IHS to operate their own health care programs when the tribes spend revenue collected from third parties. The Indian Self-Determination and Education Assistance Act ("ISDA") permits tribes to enter these "self-determination contracts," which divert to the tribes the federally appropriated funds IHS would otherwise use to operate health care programs for the tribes. 25 U.S.C. § 5301. Both IHS and tribes may collect revenue from third parties, such as Medicaid and private insurers, and ISDA requires that such "program income" be used to "further the purposes of the contract" with IHS. *Id.* § 5235(m)(1). ISDA also requires that IHS cover "contract support costs"—or administrative expenses incurred by tribes but not by IHS because of its access to federal government resources—so long as they are "directly attributable to" the self-determination contracts and do not include costs "associated with" contracts between a tribe "and any entity other than" the IHS. *Id.* §§ 5325, 5326. The Court held that IHS must cover these costs, reasoning that the ISDA definition of "contract support costs" includes costs incurred to ensure that tribes comply with self-determination contracts, which in turn require tribes to spend program income to further the purposes of the contracts. Justice Kavanaugh dissented, joined by Justices Thomas, Alito, and Barrett, arguing that the text of ISDA makes no mention of third-party income from Medicare, Medicaid, and private insurers. The dissent argued that the Court mischaracterized the statute's spending requirements to cover a broader array of costs than Congress intended.

46. ***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.

Decided May 16, 2024 (601 U.S. ___). Federal Circuit/Vacated and remanded. Justice Kagan delivered the opinion of the unanimous Court. In 2013, Stuart Harrow, a longtime civilian employee of the Department of Defense, filed a claim with the Merit Systems Protection Board objecting to a six-day furlough. When the Board eventually rejected Harrow's appeal nine years later, following the adverse decision of an administrative law judge, it sent notice to Harrow's then-defunct email address—leading Harrow to miss the 60-day deadline to petition for review in the Federal Circuit. Concluding that the deadline was an inflexible "jurisdictional requirement" and therefore "not subject to equitable tolling," the Federal Circuit rejected Harrow's request to overlook his petition's untimeliness in light of the "extenuating circumstances." The Supreme Court reversed, holding that the deadline was not jurisdictional. Jurisdictional rules, in contrast with most procedural requirements, the Court explained, "mark the bounds of a court's power," and therefore must be enforced "even if no party has raised" them and "even if equitable considerations would support excusing" their violation. Given the significant consequences of deeming a rule "jurisdictional," courts do so "only if Congress clearly states that it is." Under that approach, "most time bars are nonjurisdictional." Here, the Court reasoned that nothing in the text of the statute—providing that "any petition for review shall be filed within 60 days" in the Federal Circuit—"speaks to a court's authority to hear a case," rendering it non-jurisdictional. A separate statutory provision—28 U.S.C. § 1295, granting the Federal Circuit "jurisdiction" over, among other types of cases, appeals from the Board "pursuant to" the statute imposing the 60-day time limit—did not alter that conclusion. The Court noted that "pursuant to" could mean either "in conformance with" or "under." If it meant "in conformance with," the grant of jurisdiction would incorporate the 60-day time limit, rendering it a jurisdictional prerequisite. By contrast, if it meant "under," the reference to the statute imposing the 60-day time limit merely "identifies the provision that served as the basis for the filing." Relying on precedent reading "pursuant to" to mean "under," the Court found the second reading more plausible. Statutory context bolstered that conclusion: The statute laying out the Federal Circuit's jurisdiction used "pursuant to" several more times in reference to statutes containing "a bevy of procedural rules." Treating those sorts of "routine rules" as jurisdictional would be "untenable"—confirming that "pursuant to" was not meant to transmute the procedural requirements into strict jurisdictional rules.

47. ***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.

Decided June 13, 2024 (602 U.S. 367). Fifth Circuit/Reversed and remanded. Justice Kavanaugh delivered the opinion of the Court (Thomas, J., concurring). In 2000, the Food and Drug Administration ("FDA") approved mifepristone, an abortion drug, subject to significant regulatory restrictions (such as an in-person visit requirement before a doctor could prescribe the drug). In 2016 and 2021, FDA relaxed the regulatory requirements, including by doing away with the in-person visit requirement. Several pro-life doctors and associations sued FDA, arguing that the approval and subsequent relaxation of regulatory requirements violated the Administrative Procedure Act. The plaintiff doctors and medical associations do not prescribe or use mifepristone. The district court nevertheless enjoined FDA's approval of mifepristone, thereby ordering mifepristone off the market. The Fifth Circuit partially stayed the district court's order, permitting mifepristone to remain on the market subject to the more stringent regulatory requirements adopted in 2000. The Court stayed the district court's order in its entirety—reinstating the pre-suit status quo. The Fifth Circuit subsequently issued a merits decision finding that the plaintiffs had standing and were likely to succeed in showing that FDA's 2016 and 2021 actions were unlawful. The Court reversed, addressing the plaintiffs' three standing theories and concluding that none satisfied the requirements of injury and causation. *First*, the plaintiff doctors argued that the relaxation of the prescribing requirements would increase mifepristone complications, requiring the plaintiff doctors—against their consciences—to render emergency treatment completing the abortions. The Court explained that the plaintiffs could not establish a conscience injury because federal conscience protections permit doctors to "refus[e] to perform or assist" an abortion without punishment or discrimination from their employers. 42 U.S.C. § 300a–7(c)(1). And the Court concluded that the Emergency Treatment and Labor Act ("EMTALA") does not require "individual doctors" to "provide abortion-related medical treatment over their conscience objections." Confirming as much, the plaintiffs failed to identify a single example where a doctor was compelled to provide abortion-related treatment in violation of her conscience. *Second*, the plaintiff doctors argued that increased complications from mifepristone would require them to divert resources and time from other patients, increasing the risk of liability suits and potentially increasing insurance costs. The Court held that the asserted monetary injury was too speculative and attenuated. "Allowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax would be an unprecedented and limitless approach and would allow doctors to sue in federal court to challenge almost any policy affecting public health." *Third*, the plaintiff organizations argued that they had associational standing because they had incurred costs to oppose FDA's actions (such as conducting their own studies on mifepristone), thereby impairing their "ability to provide services and achieve their organizational missions." Reasoning that such an approach would permit organizations to gain standing by spending even a "single dollar" opposing policies they disliked, the Court rejected this theory. Only when the challenged action interferes with the organization's "core business activities" are the requirements for standing satisfied based on diversion of resources. The Court concluded by

dismissing the "if not us, who" argument—even if "no one would have standing" (of which the Court expressed skepticism), that is "not a reason to find standing." In a concurring opinion, Justice Thomas urged the Court to go further and categorically reject third-party standing and associational standing (which permits an association to sue on its members' behalf). *FDA* marks one of several high-profile reversals of the Fifth Circuit—including *CFPB v. Community Financial Services Association*, No. 22-448; *United States v. Rahimi*, No. 22-915; *Murthy v. Missouri*, No. 23-411; and *Moody v. NetChoice*, No. 22-277—which appears to be growing increasingly out of step with the Court.

48. ***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).

Gibson Dunn
Counsel appointed to argue in support of the judgment below

Partners
Miguel A. Estrada
Jonathan C. Bond

Arguing Attorney
Nick Harper

Decided June 21, 2024 (602 U.S. __). Seventh Circuit/Vacated and remanded. Justice Gorsuch delivered the opinion of the Court (Roberts, C.J., concurring) (Thomas, J., concurring) (Kavanaugh, J., joined by Alito, J., and in part by Jackson, J., dissenting) (Jackson, J., dissenting). The Armed Career Criminal Act ("ACCA") imposes a mandatory minimum sentence on defendants convicted of illegally possessing a firearm after previously being convicted of at least three violent felonies or serious drug offenses committed on different occasions. 18 U.S.C. § 924(e). In *Almendarez-Torres v. United States*, the Court held that the Constitution permits judges to find the fact of a defendant's prior conviction. 523 U.S. 224 (1998). Two years later, in *Apprendi v. New Jersey*, the Court held that, by contrast, a jury must find facts about a defendant's present offense that alter the crime's maximum or minimum possible sentence. 530 U.S. 466, 490 (2000). Departing from every court of appeals, the Supreme Court held that the occasions determination in ACCA—i.e., whether a defendant committed predicate offenses on different occasions—must be made by a jury. That conclusion, the Court found, was dictated by *Apprendi* and subsequent cases holding that a jury must find any fact that "'increase[s] the prescribed range of penalties to which a criminal defendant is exposed.'" The Court agreed that in making a finding of a prior conviction under *Almendarez-Torres*, a court may need to determine the "jurisdiction in which the defendant's crime occurred and its date." However, treating those subsidiary findings as inextricably linked with the narrow *Almendarez-Torres* exception, the Court refused to permit courts to make similar findings to determine whether offenses occurred on different occasions. In concurrence, Chief Justice Roberts emphasized that harmless error review applies to violations of the Fifth and Sixth Amendments. Justice Thomas, separately concurring, reiterated his position that *Almendarez-Torres* was wrongly decided and should be overruled. In dissent, Justice Kavanaugh, joined by Justice Alito and in part by Justice Jackson, defended *Almendarez-Torres* on historical grounds and argued that it stood for the broader proposition "that the Legislature

can decide how it wants recidivism enhancements to be applied—by a judge or by a jury." In a solo dissent, Justice Jackson expressed her view that *Apprendi* itself, which she described as a "roadblock[] for policymakers who might otherwise act to promote more fairness in sentencing," was wrongly decided.

49. ***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.

Gibson Dunn
Counsel for Amicus Curiae Chamber of Commerce of the United States et al.

Partners
Jonathan C. Bond
Saul Mezei

Decided June 6, 2024 (602 U.S. __). Eighth Circuit/Affirmed. Justice Thomas delivered the opinion of the unanimous Court. Michael and Thomas Connelly jointly owned all shares of a corporation. Under their share redemption agreement, if either brother died and the surviving brother did not exercise the option to acquire the deceased brother's shares, the corporation itself would be required to redeem the shares. The corporation took out a life insurance policy on both brothers in order to fund that obligation. When Thomas Connelly died, the corporation acquired his shares under the terms of the agreement for $3 million. When calculating its own tax liability, Thomas's estate excluded the $3 million in life insurance assets held by the corporation when determining the value of Thomas's shares. The IRS disagreed, taking the position that the redemption obligation did not offset the value of the life insurance proceeds. It thus assessed a significantly higher tax obligation, and the estate sued for a refund after paying the deficiency. The Supreme Court held in favor of the IRS, holding that a closely held corporation's life insurance policy on one of its owners that is earmarked for funding redemption of the owner's shares should be treated as a corporate asset when calculating the value of the shareholder's shares for purposes of the federal estate tax, notwithstanding the fact that the corporation was obligated to use the money to repurchase Thomas's shares. As the Court reasoned, stock redemption "necessarily" decreases the value of the corporation when redeemers "cash out" the value of their shares. Yet on the estate's calculation, the surviving brother would have been left with a corporation worth exactly what it had been worth before, even as the estate was enriched by a $3 million payment out of the corporate assets. An actual buyer, according to the Court, would not have treated the $3 million in insurance assets as being offset by the redemption obligation in assessing the corporation's value. The Court thus concluded that proper accounting required that the insurance proceeds be counted toward the value of the corporation.

APRIL CALENDAR

50. ***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.

Decided June 26, 2024 (603 U.S. _). Seventh Circuit/Reversed and remanded. Justice Kavanaugh delivered the opinion of the Court (Gorsuch, J., concurring) (Jackson, J., joined by Sotomayor and Kagan, JJ., dissenting). James Snyder, the mayor of Portage, Indiana, accepted a $13,000 check from a city contractor who had sold the city trash trucks for $1.1 million the previous year. Snyder claimed the check was for "consulting services." Federal prosecutors disagreed and charged him with "corruptly" soliciting, accepting, or agreeing to accept "anything of value from any person, intending to be influenced or rewarded" for an official act. 18 U.S.C. § 666(a)(1)(B). On appeal, the Seventh Circuit rejected Snyder's argument that § 666 criminalizes only bribes (which are "promised or given before the official act"), not gratuities (which are given as a "token of appreciation after the official act"). The Supreme Court reversed, holding that § 666 proscribes only bribes and does not make it a crime for state or local officials to accept gratuities for their past acts. The Court viewed this conclusion as dictated by "text, statutory history, statutory structure, statutory punishments, federalism, and fair notice." *First*, the statute's text shared much in common with the bribery provision for federal officials, § 201(b), and little with the gratuity provision, § 201(c). *Second*, Congress initially modeled the statute on the gratuity prohibition for federal officials but reversed course in 1986. *Third*, no other federal statute prohibits both bribery and gratuities, which are viewed as "two separate crimes" in the same provision, making it unlikely that § 666 does. *Fourth*, Congress typically imposes more significant punishments for bribery than illegal gratuities, yet § 666 imposes a single 10-year maximum sentence—far in excess of the two-year maximum for the gratuity provision applicable to federal officials. *Fifth*, "the carefully calibrated policy decisions that the States and local governments have made about gratuities would be gutted if we were to accept the Government's interpretation of § 666." And, *sixth*, "the Government does not identify any remotely clear lines separating an innocuous or obviously benign gratuity from a criminal gratuity," raising "fair notice" concerns. The Court rejected the argument that the statute's reference to being influenced "or rewarded" must encompass gratuities because bribery can involve a "reward given after the act pursuant to an agreement beforehand," and other bribery statutes use the term. In concurrence, Justice Gorsuch emphasized that, even if it went unnamed, the rule of "lenity is what's at work behind today's decision, just as it is in so many others." In dissent, Justice Jackson accused the majority of elevating "nonexistent federalism concerns over the plain text of this statute."

"The term 'rewarded,'" she emphasized, "easily covers the concept of gratuities paid to corrupt officials after the fact—no upfront agreement necessary."

51. ***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.

Decided June 20, 2024 (602 U.S. _). Sixth Circuit/Vacated and remanded. Justice Kagan delivered the opinion of the Court (Thomas, J., joined by Alito, J., dissenting) (Gorsuch, J., dissenting). Police officers arrested Jascha Chiaverini based on an arrest warrant covering three separate charges. Chiaverini sued for Fourth Amendment malicious prosecution under 42 U.S.C. § 1983, which required showing that a government official charged him without probable cause, leading to an unreasonable seizure of his person. Chiaverini's allegations focused on the lack of probable cause for one of the three charges—a felony charge for money laundering. The Sixth Circuit affirmed the district court's grant of summary judgment for the officers based on its conclusion that probable cause existed as to the other two charges—misdemeanors for receiving stolen property and dealing in precious metals without a license—holding that "a single valid charge" insulated the officers "from a Fourth Amendment malicious-prosecution claim relating to any other charges, no matter how baseless." The Supreme Court reversed, holding that probable cause for one charge does not categorically defeat a Fourth Amendment malicious prosecution claim relating to another, baseless charge. The Court found no support for the Sixth Circuit's categorical rule, reasoning that "if an invalid charge—say, one fabricated by police officers—causes a detention either to start or to continue, then the Fourth Amendment is violated." Having dispensed with the Sixth Circuit's categorical rule, the Court declined to decide how the element of "causation"—i.e., whether the invalid charge caused the seizure—is met "when a valid charge is also in the picture." In dissent, Justice Thomas, joined by Justice Alito, reiterated his view that a "malicious prosecution claim cannot be based on the Fourth Amendment." Justice Gorsuch, dissenting separately, also categorically rejected a "Fourth Amendment malicious-prosecution cause of action," suggesting that any such claim would be better housed in the Fourteenth Amendment's due process clause.

52. ***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.

Decided June 28, 2024 (603 U.S. _). D.C. Circuit/Vacated and remanded. Chief Justice Roberts delivered the opinion of the Court (Jackson, J., concurring) (Barrett, J., joined by Sotomayor and Kagan, JJ., dissenting).

Joseph Fischer was charged with obstructing an official proceeding, in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1512(c)(2), for his alleged role in the events of January 6, 2021. Fischer challenged that count, arguing that § 1512(c)(2) prohibits only evidence-related offenses. The Supreme Court agreed. Section 1512(c)(1) covers someone who "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." And § 1512(c)(2) prohibits conduct that "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." Reading the two provisions in tandem, the Court held that the residual clause of § 1512(c)(2) is "limited by the preceding list of criminal violations" in § 1512(c)(1), and thus "(c)(2) makes it a crime to impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified in (c)(1)." Thus, the Court rejected the government's view that (c)(2) covers "all forms of obstructive conduct." Otherwise, the Court reasoned, "(c)(2) would consume (c)(1)" and "there would have been scant reason for Congress to provide any specific examples at all." The Court also noted that § 1512(c) had been enacted to "plug" a document-shredding "loophole" in § 1512, and that the government's reading would make superfluous other "particularized" obstruction provisions throughout the U.S. Code. Justice Jackson concurred to emphasize that the Court's reading "follows from the legislative purpose that [§ 1512(c)'s] text embodies." In dissent, Justice Barrett, joined by Justices Sotomayor and Kagan, read (c)(2) to prohibit "obstructing, influencing, or impeding an official proceeding by means different from those specified in (c)(1)." Reading an evidence requirement into (c)(2), wrote Justice Barrett, "violates our normal interpretive principles" because the evidence-related words are absent from (c)(2) and because "we generally presume" that such omissions are intentional. The decision has notable implications for many pending January 6 cases where defendants have been charged with violating § 1512(c)(2).

53. ***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.

Decided May 30, 2024 (602 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Alito delivered the opinion of the Court (Sotomayor, J., joined by Kagan, J, dissenting) (Jackson, J., dissenting). Danny Lee Jones brutally murdered Robert Weaver, his 7-year-old daughter Tisha Weaver, and his grandmother Katherine Gumina while stealing Robert's gun collection. Arizona tried and convicted Jones of murder. After Jones's conviction, the trial court determined that the mitigating factors did not outweigh the aggravating factors and imposed a sentence of death. Jones filed a habeas petition in federal court asserting that his trial counsel was constitutionally deficient in failing to present mitigation evidence. The district court held an evidentiary hearing and concluded that Jones could not show prejudice—i.e., a "reasonable probability" that the sentencing

judge would not have imposed a death sentence—from any failure by his counsel. That was so, the district court found, because the additional mitigation evidence Jones presented in federal court "'barely . . . alter[ed] the sentencing profile presented to the sentencing judge.'" The Ninth Circuit reversed, finding—without mentioning the aggravating factors—that Jones had demonstrated prejudice. After Arizona sought en banc review, the Ninth Circuit amended its opinion to briefly "mention the aggravating circumstances." The Court reversed, holding that the Ninth Circuit's prejudice analysis erred three times over. *First*, the Ninth Circuit failed to "adequately" account for the "weighty aggravating circumstances." *Second*, the Ninth Circuit applied an "unsound" rule preventing district courts from "assessing the relative strength of expert witness testimony"—i.e., comparing defense experts to prosecution experts. *Finally*, the Ninth Circuit erroneously faulted the district court for "attaching diminished persuasive value to Jones's mental health conditions because it saw no link between those conditions and Jones's conduct when he committed the three murders." With those errors swept aside, the Court explained, the district court correctly concluded that that there was no reasonable probability that the mitigating evidence presented by Jones in federal court (which was largely cumulative of the evidence originally offered in state court) "would have altered the outcome at sentencing." The Court emphasized that the "analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors." In dissent, Justices Sotomayor and Kagan agreed that the Ninth Circuit erred in "all but ignor[ing]" the aggravating factors but would have remanded for application of the proper standard rather than reversing outright. Justice Jackson dissented separately, arguing that the Ninth Circuit sufficiently considered the aggravating factors.

54. ***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.

Gibson Dunn
Counsel for Petitioner City of Grant Pass

Partners
Theane D. Evangelis
Jonathan C. Bond
Bradley J. Hamburger
Samuel Eckman

Decided June 28, 2024 (603 U.S. __). Ninth Circuit/Reversed and remanded. Justice Gorsuch delivered the opinion of the Court (Thomas, J., concurring) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). The Court held that the Eighth Amendment's prohibition on "cruel and unusual punishments" does not forbid low-level fines and jail terms for camping on public property. The Court explained that the Eighth Amendment places limits on the methods of punishment that a state may impose after conviction—not on the type of conduct that a government may prohibit in the first place. The Court also rejected the plaintiffs' reliance on *Robinson v. California*, 370 U.S. 660 (1962), which held that the Eighth Amendment prohibited the government from making the "status" of being an addict a crime, regardless of the punishment. As the Court explained, public camping, even when purportedly compelled by one's circumstances, is conduct rather than a status under *Robinson*. The Court refused to extend *Robinson* beyond its narrow context of status crimes, explaining that the Court had already rejected such an extension once in *Powell v.*

Texas, 392 U.S. 514 (1968), and warning that the plaintiffs' expansion of *Robinson* had no support in the Eighth Amendment, and conflicted with traditional principles of federalism. "Homelessness is complex," the Court recognized, a problem with many causes and potential policy solutions. But "the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not." Justice Thomas concurred to observe that *Robinson* was wrongly decided and that the plaintiffs had not established that the civil fines and penalties they incurred implicated the Cruel and Unusual Punishments Clause. Justice Sotomayor, joined by Justices Kagan and Jackson, dissented on the ground that the City's public-camping laws "effectively" criminalized homelessness and therefore ran afoul of the Eighth Amendment, as interpreted in *Robinson*.

55. ***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.

Decided May 16, 2024 (601 U.S. ___). Ninth Circuit/Reversed and remanded. Justice Sotomayor delivered the opinion of the unanimous Court. After being sued by current and former delivery drivers for alleged employment law violations, respondents, the operators of the delivery service, moved in federal court to compel arbitration and requested a stay pending arbitration. The district court granted the motion to compel arbitration. But rather than stay the case pending arbitration, as requested by Spizzirri, the district court dismissed. The Ninth Circuit affirmed, holding that the district court properly exercised its discretion to dismiss. The Court reversed, holding that when a court finds that a dispute is subject to arbitration and a party requests a stay pending arbitration, the court *must* stay the action and does not have discretion to dismiss the action under the plain text of the Federal Arbitration Act ("FAA"). Section 3 of the FAA provides that the court "shall . . . stay the trial of the action" if requested by "one of the parties." 9 U.S.C. § 3. The Court rejected the Ninth Circuit's conclusion that district courts nonetheless retain inherent discretion to dismiss, explaining that "shall" creates "a mandatory obligation." The broader "structure and purpose" of the FAA confirmed this conclusion. Orders compelling arbitration are not immediately appealable, *see* 9 U. S. C. §16(b), but if a court compelling arbitration could dismiss the lawsuit, rather than issue a stay, the party opposing arbitration could immediately appeal the dismissal. The Court also explained that staying, rather than dismissing, lawsuits subject to arbitration furthers the supervisory role that the FAA envisions for courts. If a case is stayed, post-arbitration proceedings to confirm, vacate, or modify the arbitral award can be undertaken without the need to file a new case.

56. ***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.

Decided June 21, 2024 (602 U.S. __). Ninth Circuit/Reversed and remanded. Justice Barrett delivered the opinion of the Court (Gorsuch, J., concurring in judgment) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting). Luis Asencio-Cordero (a noncitizen) submitted a visa application in El Salvador in order to live in the United States with his wife Sandra Muñoz (a citizen). A consular officer denied Asencio-Cordero's application after finding that he was affiliated with a transnational criminal gang. The officer did not disclose the reasons for his decision due to national security concerns. The doctrine of consular non-reviewability bars noncitizens from challenging a visa denial. Muñoz filed suit arguing that her procedural due process rights under the Fifth Amendment were implicated by the denial of Asencio-Cordero's application without disclosure of the basis for the denial because she had a liberty interest in living with her spouse in the United States. The Court held that "a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country." According to the Court, this conclusion followed from *Washington v. Glucksberg*, 521 U.S. 702 (1997), which requires looking to the "Nation's history and tradition" before identifying an unenumerated right. After surveying the history of immigration laws, which treated admission of noncitizens as a favor, rather than a right, the Court concluded that Muñoz's asserted right was not "deeply rooted in the Nation's history and tradition." The Court also noted that it would be "unsettling" if a party could claim "a procedural due process right in someone else's legal proceedings." Justice Gorsuch concurred with the judgment to note the mootness of the constitutional questions, since the government had already provided Muñoz all the information she had requested by the time the Court heard the case. In dissent, Justice Sotomayor, joined by Justices Kagan and Jackson, argued that the majority should have resolved the case "on narrow grounds under longstanding precedent." Justice Sotomayor agreed with Justice Gorsuch that Muñoz had, at that point, already received whatever process was due, and the case was at its end. Additionally, she argued that Muñoz had a "constitutionally protected interest in her husband's visa application because its denial burdened her right to marriage," which itself had "deep roots" in the United States. *Muñoz* marks a notable shift in procedural due process precedent; the Court essentially held that an individual must have an enumerated right or a substantive due process right rooted in history and tradition to trigger procedural due process.

Gibson Dunn
Counsel for Amicus Curiae United States Conference of Catholic Bishops and Catholic Legal Immigration Network, Inc.

Partners
Amer S. Ahmed
Richard W. Mark
Samuel Eckman

57. ***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.

Decided June 13, 2024 (602 U.S. _). Sixth Circuit/Vacated and remanded. Justice Thomas delivered the opinion of the Court (Jackson, J., concurring in part, dissenting in part, and concurring in the judgment). Section 10 of the National Labor Relations Act authorizes the National Labor Relations Board to bring, prosecute, and adjudicate administrative complaints against employers for "unfair labor practice[s]." 29 U.S.C. § 160(b). While such administrative proceedings are pending, the Board can petition a federal district court "for appropriate temporary relief or restraining order." *Id.* § 160(j). And a district court may grant such preliminary injunctive relief "as it deems just and proper." *Id.* After issuing an administrative complaint against Starbucks alleging unfair labor practices in connection with its employees' efforts to unionize a Tennessee store, the Board petitioned a federal district court for a preliminary injunction. Applying a looser standard than the traditional four-factor test that governs motions for preliminary injunctions, the district court granted the injunction, reasoning that the Board had offered "some evidence" and a nonfrivolous legal theory. The Sixth Circuit affirmed. The Supreme Court reversed, holding that the traditional four-factor test applies to requests for preliminary injunctions by the Board. The Court reiterated that when Congress authorizes courts to issue preliminary injunctive relief, the traditional four-factor standard will apply absent a clear legislative statement to the contrary. The Court emphasized as well that the Board gets no special deference and must, like all other litigants, establish a likelihood of success on the merits to secure a preliminary injunction. Justice Jackson, dissenting in part, agreed that the traditional four-factor test applied, but would have concluded that courts should apply those factors deferentially to a Board request for an injunction.

58. ***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.

Decided June 27, 2024 (603 U.S. __). Ninth Circuit/DIG'd. Per curiam opinion dismissing as improvidently granted (Kagan, J., joined by Sotomayor, J., and in part by Jackson, J., concurring) (Barrett, J., joined by Roberts, C.J., and Kavanaugh J., concurring) (Jackson, J., concurring in part and dissenting in part) (Alito, J., joined by Thomas, J., and in part by Gorsuch, J., dissenting). Idaho bans abortions except when necessary to save the life of the mother. In 2022, the federal government sued Idaho under the Emergency Medical Treatment and Labor Act ("EMTALA"), which requires emergency rooms in hospitals that receive Medicare funding to

provide necessary stabilizing treatment to patients who arrive with an emergency medical condition. The government construed EMTALA to require emergency rooms to perform abortions when necessary to stabilize a medical condition that seriously threatens a woman's health and contended that the Idaho law is preempted where it conflicts with EMTALA. The district court issued a preliminary injunction blocking Idaho from enforcing its abortion ban when an abortion is necessary to prevent serious health harms to the mother. After the Ninth Circuit declined to stay the injunction, the Court granted certiorari before judgment and stayed the injunction. In a three-line per curiam opinion, the Court dismissed the case as improvidently granted and vacated the stay—reimposing the district court's injunction while the case is litigated at the Ninth Circuit. In concurrence, Justice Kagan, joined by Justice Sotomayor and in part by Justice Jackson, argued that the Idaho law clearly conflicts with EMTALA—which, in her view, requires performing abortions necessary to avoid "grave health consequences." Justice Barrett, joined by Chief Justice Roberts and Justice Kavanaugh, concurred to explain the Court's decision to dismiss the case as improvidently granted. Both the United States and Idaho, she noted, had narrowed their positions: The United States by restricting its challenge to "conditions posing serious jeopardy to a woman's physical health" and the State by conceding that "the Act permits physicians to treat" various conditions—including "PPROM, placental abruption, preeclampsia, and eclampsia"—"with emergency abortions." Because the positions of the parties were still evolving and new arguments were being introduced (including "whether Congress, in reliance on the Spending Clause, can obligate recipients of federal funds to violate state criminal law"), expedited consideration by the Court was no longer warranted. Justice Jackson, concurring in part and dissenting in part, agreed with Justice Kagan that "EMTALA plainly requires doctors to provide medically necessary stabilizing abortions in limited situations" and conflicts with Idaho law, and she faulted the Court for dodging the issue. In dissent, Justice Alito, joined by Justice Thomas and in part by Justice Gorsuch, contended that "EMTALA's text unambiguously demands that Medicare-funded hospitals protect the health of both a pregnant woman and her unborn child" and criticized the Court for losing "the will to decide the easy but emotional and highly politicized [question] that the case presents."

59. ***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.

Decided July 1, 2024 (603 U.S. _). D.C. Circuit/Vacated and remanded. Chief Justice Roberts delivered the opinion of the Court (Thomas, J., concurring) (Barrett, J., concurring in part) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) (Jackson, J., dissenting). In 2023, a federal grand jury indicted former President Donald Trump for conspiring to overturn the 2020 presidential election, in violation of four federal criminal statutes. The indictment alleges that Trump pressured the acting Attorney General, the Vice President, state officials, and others to falsify or

fraudulently alter election results. Trump moved to dismiss the indictment on the ground that all of the alleged conduct fell within his official duties as President and that he was therefore absolutely immune from federal criminal prosecution for that conduct. The Court agreed in part, clarifying the scope of the President's federal criminal immunity and remanding to the district court to evaluate the indictment more closely. The Court held that Presidents enjoy absolute immunity from federal criminal prosecution for acts falling within their exclusive constitutional authority; at least presumptive immunity with respect to other official acts; and no immunity with respect to unofficial acts. The first category, the Court explained, includes Trump's alleged conversations with Justice Department officials, including the acting Attorney General, about investigating purported election fraud, and he is therefore "absolutely immune from prosecution for [that] alleged conduct." Whether Trump may be prosecuted for his interactions with the Vice President, state officials, and private parties, or for his tweets and public speech in connection with the events of January 6, 2021, turns on whether the alleged conduct fell within his "official responsibilities." Presumptive immunity extends to "the outer perimeter" of those responsibilities, "covering actions so long as they are not manifestly or palpably beyond [the President's] authority." Courts distinguishing between official and unofficial conduct "may not inquire into the President's motives," nor "deem an action unofficial merely because it allegedly violates a generally applicable law." The touchstone is whether prosecution "would pose any dangers of intrusion on the authority and functions of the Executive Branch." Because most of the indictment's allegations involved conduct neither clearly within the President's exclusive authority nor clearly outside his official responsibilities, the Court remanded to the district court to determine in the first instance whether the specific conduct charged "qualifies as official or unofficial." In a section of the opinion that Justice Barrett declined to join, a five-Justice majority added that Presidents "cannot be indicted based on conduct for which they are immune from prosecution"—including, for example, "testimony or private records of the President or his advisers probing the official act itself." The full six-Justice majority rejected Trump's contention that the prosecution of a President always requires impeachment and Senate conviction, as well as the government's argument that presidential immunity does not extend to criminal prosecutions at all. In addressing the separation-of-powers concerns raised in the dissent, the Court explained that a limited immunity from criminal prosecution for official acts follows naturally from the President's unique constitutional role; it "does not place him above the law," but rather "preserves the basic structure of the Constitution from which that law derives."

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. 22, 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 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 § 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," *id.* § 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.

Gibson Dunn
Counsel for Amicus Curiae Former Executive Office for Immigration Review Judges

Partner
Richard W. Mark

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?

9. ***San Francisco v. EPA*, No. 23-753 (9th Cir., 75 F.4th 1074; cert. granted May 28, 2024)**. The Question Presented is: Whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in National Pollutant Discharge Elimination System permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

10. ***Delligatti v. United States*, No. 23-825 (2d Cir., 83 F.4th 113; cert. granted June 3, 2024)**. The Question Presented is: Whether attempted murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

11. ***Advocate Christ Medical Center v. Becerra*, No. 23-715 (D.C. Cir., 80 F.4th 346; cert. granted June 10, 2024)**. The Question Presented is: Whether the phrase "entitled . . . to benefits," used twice in the same sentence of the Medicare Act, means the same thing for Medicare part A and SSI, such that it includes all who meet basic program eligibility criteria, whether or not benefits are actually received.

12. ***Facebook, Inc. v. Amalgamated Bank*, No. 23-980 (9th Cir., 87 F.4th 934; cert. granted June 10, 2024)**. The Question Presented is: Whether risk disclosures are false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm.

Gibson Dunn
Counsel for Petitioners Facebook, Inc., et al.

Partners
Joshua S. Lipshutz
Katherine Moran Meeks
Brian M. Lutz

13. ***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; cert. granted June 17, 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.

14. ***Kousisis v. United States*, No. 23-909 (3d Cir., 82 F.4th 230; cert. granted June 17, 2024)**. The Questions Presented are: (1) Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme; (2) Whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services; and (3) Whether all contract rights are "property."

15. ***NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (9th Cir., 81 F.4th 918; cert. granted June 17, 2024)**. The Questions Presented are: (1) Whether plaintiffs seeking to allege scienter under the Private Securities Litigation Reform Act based on allegations about internal company documents must plead with particularity the contents of those documents; and (2) Whether plaintiffs can satisfy the Act's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

16. ***Wisconsin Bell, Inc. v. United States ex rel. Heath*, No. 23-1127 (7th Cir., 92 F.4th 654; cert. granted June 17, 2024)**. The Question Presented is: Whether reimbursement requests submitted to the E-rate program established by the Federal Communications Commission to provide discounted telecommunications services to schools and libraries—but administered by a private, nonprofit corporation and funded entirely by contributions from private telecommunications carriers—are "claims" under the False Claims Act.

Gibson Dunn
Counsel for
Petitioner
Wisconsin Bell, Inc.

Partners
Helgi C. Walker
Allyson N. Ho
Andrew LeGrand
Ashley E. Johnson

17. ***United States v. Skrmetti*, No. 23-477 (6th Cir., 83 F.4th 460; cert. granted June 24, 2024)**. The Question Presented is: Whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment.

18. ***United States v. Miller*, No. 23-824 (10th Cir., 71 F.4th 1247; cert. granted June 24, 2024)**. The Question Presented is: Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under 11 U.S.C. § 544(b)(1)—which permits a trustee to avoid any pre-petition transfer of the debtor's property that would be voidable "under

applicable law" outside bankruptcy—when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

19. ***Feliciano v. Department of Transportation*, No. 23-861 (Fed. Cir., 2023 WL 3449138; cert. granted June 24, 2024)**. The Question Presented is: Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

20. ***Hungary v. Simon*, No. 23-867 (D.C. Cir., 77 F.4th 1077; cert. granted June 24, 2024)**. The Questions Presented are: (1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act; (2) Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference; and (3) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

21. ***Dewberry Group, Inc. v. Dewberry Engineers Inc.*, No. 23-900 (4th Cir., 77 F.4th 265; cert. granted June 24, 2024)**. The Question Presented is: Whether an award of the "defendant's profits" under the Lanham Act, 15 U.S.C. § 1117(a), can include an order for the defendant to disgorge the distinct profits of legally separate non-party corporate affiliates.

Gibson Dunn
Counsel for Petitioner Dewberry Group, Inc.

Partners
Helgi C. Walker
Thomas G. Hungar
Jonathan C. Bond

22. ***Seven County Infrastructure Coalition v. Eagle County*, No. 23-975 (D.C. Cir., 82 F.4th 1152; cert. granted June 24, 2024)**. The Question Presented is: Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

23. ***Stanley v. City of Sanford*, No. 23-997 (11th Cir., 83 F.4th 1333; cert. granted June 24, 2024)**. The Question Presented is: Whether, under the Americans with Disabilities Act, a former employee—who was qualified to perform her job and who earned post-employment benefits while employed—loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.

Gibson Dunn
Counsel for Amicus Curiae International Centre for Missing and Exploited Children

Partners
Amer S. Ahmed
Jillian N. London
Thomas G. Hungar
Andrea E. Neuman
Joshua D. Dick

24. ***Velazquez v. Garland*, No. 23-929 (10th Cir., 88 F.4th 1301; cert. granted July 2, 2024)**. The Question Presented is: Whether, when a noncitizen's voluntary-departure period ends on a weekend or public holiday, is a motion to reopen filed the next business day sufficient to avoid the penalties for failure to depart?

25. ***Hewitt v. United States*, No. 23-1002 (5th Cir., 92 F.4th 304; cert. granted July 2, 2024), consolidated with *Duffey v. United States*, No. 23-1150 (5th Cir., 92 F.4th 304; cert. granted July 2, 2024)**. The Question Presented is: Whether the First Step Act's sentencing reduction provisions apply to a defendant originally sentenced before the First Step Act's enactment when that original sentence is judicially vacated and the defendant is resentenced to a new term of imprisonment after the First Step Act's enactment.

26. ***FDA v. Wages and White Lion Investments, L.L.C.*, No. 23-1038 (5th Cir., 90 F.4th 357; cert. granted July 2, 2024)**. The Question Presented is: Whether the court of appeals erred in setting aside FDA's denial of applications for authorization to market new e-cigarette products as arbitrary and capricious.

27. ***Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (5th Cir., 95 F.4th 263; cert. granted July 2, 2024)**. The Question Presented is: Whether the court of appeals erred as a matter of law in applying rational-basis review to a law burdening adults' access to sexual materials, instead of strict scrutiny.

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

1. ***Zilka v. City of Philadelphia*, No. 23-914 (Pa., 304 A.3d 1153; CVSG June 10, 2024)**. The Question Presented is: Whether the Commerce Clause requires states to consider a taxpayer's burden in light of the state tax scheme as a whole when crediting a taxpayer's out-of-state tax liability as the West Virginia and Colorado Supreme Courts have held and this Court has suggested, or permits states to credit out-of-state state and local tax liabilities as discrete tax burdens, as the Pennsylvania Supreme Court held below.

2. ***Sunoco LP v. City and County of Honolulu*, No. 23-947 (Haw., 537 P.3d 1173; CVSG June 10, 2024), consolidated with *Shell PLC v. City and County of Honolulu*, No. 23-952 (Haw., 537 P.3d 1173; CVSG June 10, 2024)**. The Question Presented is: Whether federal law precludes state-law claims seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate.

3. ***Walen v. Bergum*, No. 23-969 (D.N.D., 2023 WL 7216070; CVSG June 10, 2024)**. The Questions Presented are: (1) Whether the district court erred by applying the incorrect legal standard when deciding that the legislature had good reasons and a strong basis to believe the subdistricts were required by the VRA; (2) Whether the district court erred by improperly weighing the evidence and granting inferences in favor of the moving party at summary judgment instead of setting the case for trial; and (3) Whether the district court erred when it found that the legislature's attempted compliance with Section 2 of the VRA can justify racial sorting of voters into districts.

Gibson Dunn
Counsel for Petitioners Chevron Corporation and Chevron U.S.A., Inc.

Partners
Theodore J. Boutrous Jr.
William E. Thomson
Thomas G. Hungar
Andrea E. Neuman
Joshua D. Dick

Of Counsel
Lochlan F. Shelfer

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. ***AstraZeneca UK Limited v. Atchley*, No. 23-9 (D.C. Cir., 22 F.4th 204; CVSG Oct. 2, 2023; GVR recommended May 21, 2024; GVR'd June 24, 2024)**. 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 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; GVR'd June 10, 2024)**. 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; cert. denied July 2, 2024)**. 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; cert. denied July 2, 2024)**. 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; cert. denied June 17, 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; cert. denied June 17, 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.

Round-Up Authors


Miguel A. Estrada
+1 202.955.8257
mestrada@gibsondunn.com


Katherine Moran Meeks
+1 202.955.8258
kmeeks@gibsondunn.com


Jessica L. Wagner
+1 202.955.8652
jwagner@gibsondunn.com


Reed Sawyers
+1 202.777.9412
rsawyers@gibsondunn.com

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. Fifteen 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 39 petitions for certiorari since 2006.

Appellate and Constitutional Law Practice Group Leaders:

Thomas H. Dupree Jr. (+1 202.955.8547, tdupree@gibsondunn.com)

Allyson N. Ho (+1 214.698.3233, aho@gibsondunn.com)

Julian W. Poon (+1 213.229.7758, jpoon@gibsondunn.com)