GIBSON DUNN

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U.S. Supreme Court Round-Up

October Term 2024

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. ***Williams v. Washington,* No. 23-191 (Ala., 387 So. 3d 138; cert. granted Jan. 12, 2024; argued Oct. 7, 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. ***Royal Canin U.S.A., Inc. v. Wullschleger*, No. 23-677 (8th Cir., 75 F.4th 918; cert. granted Apr. 29, 2024; argued Oct. 7, 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.

   Decided January 15, 2025 (604 U.S. __). Eighth Circuit/Affirmed. Justice Kagan delivered the opinion for a unanimous Court. Anastasia Wullschleger's complaint in state court originally asserted claims under both federal and state law, so Royal Canin removed the case to federal court. But when Wullschleger later amended her complaint to delete the federal claims, the Eighth Circuit ordered the case remanded back to state court because there was no longer any basis to keep it in federal court. For cases first filed in federal court, jurisdiction has long been assessed throughout the litigation, so if an amendment eliminates federal claims, the court can no longer exercise supplemental jurisdiction over the remaining state-law claims. But because of the opportunity for gamesmanship, and based on dicta in Supreme Court opinions, in removed cases all other circuits had held that jurisdiction should be assessed at the time of removal without regard to subsequent amendments. The Court sided with the Eighth Circuit. When a plaintiff "eliminates the federal-law claims that enabled removal, leaving only state-law claims behind, the court's power to decide

the dispute dissolves." 28 U.S.C. § 1367(a) vests federal courts that have jurisdiction over federal claims with supplemental jurisdiction to hear closely related state claims. Because § 1367(a) "draws no distinction" between cases originally filed in federal court and those removed to federal court, the Court held that the same rule must apply for both originally filed and removed cases. That conclusion, the Court reasoned, was consistent with both congressional and judicial practice recognizing that amendments to complaints "hav[e] the potential to alter jurisdiction." The Court dismissed as dictum the language in its prior cases that seemed to favor the alternative approach. When Wullschleger deleted all federal claims from her complaint, she "deprived" the district court of original jurisdiction and thereby "dissolved" supplemental jurisdiction over the state claims, requiring a remand to state court.

3. ***Bondi v. VanDerStok*, No. 23-852 (5th Cir., 86 F.4th 179; cert. granted Apr. 22, 2024; argued Oct. 8, 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.

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4. ***Lackey v. Stinnie*, No. 23-621 (4th Cir., 77 F.4th 200; cert. granted Apr. 22, 2024; argued Oct. 8, 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.

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5. ***Glossip v. Oklahoma*, No. 22-7466 (Okla. Crim. App., 529 P.3d 218; cert. granted Jan. 22, 2024; argued Oct. 9, 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.

6. ***Medical Marijuana, Inc. v. Horn*, No. 23-365 (2d Cir., 80 F.4th 130; cert. granted Apr. 29, 2024; argued Oct. 15, 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.

7. ***Bouarfa v. Mayorkas*, No. 23-583 (11th Cir., 75 F.4th 1157; cert. granted Apr. 29, 2024; argued Oct. 15, 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.

   Decided Dec. 10, 2024 (604 U.S. __). Eleventh Circuit/Affirmed. Justice Jackson delivered the opinion of the unanimous Court. Federal law bars judicial review of immigration "decision[s] . . . in the discretion of the Attorney General or the Secretary" of Homeland Security. 8 U.S.C. § 1252(a)(2)(B)(ii). By statute, U.S. Citizenship and Immigration Services ("USCIS") *must* deny immigrant visa petitions filed by American citizens on behalf of their noncitizen spouses if the noncitizen previously sought to secure an immigration benefit through a sham marriage. *Id.* § 1154(c). Once a petition is approved, however, USCIS "may" for "good and sufficient cause, revoke the approval of any petition." *Id.* § 1155. Amina Bouarfa, an American citizen, filed an immigrant visa petition on behalf of her non-citizen husband, Ala'a Hamayel. After initially approving Bouarfa's petition, USCIS uncovered evidence that Hamayel had previously sought a visa through a sham marriage and exercised its discretion under § 1155 to revoke the petition. After the Board of Immigration Appeals affirmed USCIS's sham-marriage determination, Bouarfa sought review in federal court under the Administrative Procedure Act. The Eleventh Circuit affirmed the district court's dismissal, concluding that § 1252(a)(2)(B)(ii) stripped judicial review of the agency's exercise of discretionary authority under § 1155. Resolving a circuit split, the Court affirmed the Eleventh Circuit and held that federal courts lack jurisdiction to review the revocation of a visa petition. The Court explained that §1155—providing that the agency "may" for "good and sufficient cause, revoke the approval of any [visa] petition"—was a "quintessential grant of discretion." The Court rejected Bouarfa's arguments that the agency practice of revoking approved petitions after making a sham-marriage determination limited the agency's discretion.

8. ***Bufkin v. McDonough*, No. 23-713 (Fed. Cir., 75 F.4th 1368; cert. granted Apr. 29, 2024; argued Oct. 16, 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 the 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; argued Oct. 16, 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.

NOVEMBER CALENDAR

10. ***Wisconsin Bell, Inc. v. United States ex rel. Heath*, No. 23-1127 (7th Cir., 92 F.4th 654; cert. granted June 17, 2024; argued Nov. 4, 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

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corporation and funded entirely by contributions from private telecommunications carriers—are "claims" under the False Claims Act.

11. ***Advocate Christ Medical Center v. Becerra*, No. 23-715 (D.C. Cir., 80 F.4th 346; cert. granted June 10, 2024; argued Nov. 5, 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. ***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; argued Nov. 5, 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.

    Decided Jan. 15, 2025 (604 U.S. __). Fourth Circuit/Reversed. Justice Kavanaugh delivered the opinion for a unanimous Court. The Fair Labor Standards Act of 1938 requires employers to pay their employees a minimum wage and overtime compensation, but also exempts many categories of employees from those requirements. The Act places the burden on the employer to show that an exemption applies, but the circuits disagreed about the standard the employer must meet in making that showing. Six circuits applied the default standard for civil cases (preponderance of the evidence), whereas the Fourth Circuit alone required clear and convincing evidence that an exemption applies. The Supreme Court rejected the Fourth Circuit's approach. As it explained, the preponderance standard is the default standard of proof in American civil litigation and thus is the standard Congress presumptively adopts in civil-litigation statutes. There are three main exceptions to that presumption: (1) if the statute itself establishes a different standard, either through express language or by employing well-known terms that connote a higher standard; (2) if the Constitution requires a higher standard (as with the First Amendment's actual-malice doctrine); or (3) in "uncommon cases" where the government seeks to take "unusual coercive action" that is "more dramatic" than "conventional relief," such as denaturalizing a U.S. citizen. The Court concluded that none of those three exceptions applies to the Fair Labor Standards Act. It likewise rejected the employees' policy arguments for a heightened standard. Even though worker protections implicate weighty interests, the Court has applied the preponderance standard in statutes protecting other weighty interests, like Title VII. FLSA rights are non-waivable, but the Court has applied the preponderance standard to other non-waivable rights under the National Labor Relations Act. The Court remanded for the lower courts to assess whether the employer had met the preponderance standard. Justice Gorsuch, in a brief concurrence, emphasized that diverging from the preponderance standard for policy reasons would inappropriately choose sides in a policy debate, rather than declare the law.

13. ***Facebook, Inc. v. Amalgamated Bank*, No. 23-980 (9th Cir., 87 F.4th 934; cert. granted June 10, 2024; argued Nov. 6, 2024; dismissed as improvidently granted Nov. 22, 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.

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14. ***Velazquez v. Bondi*, No. 23-929 (10th Cir., 88 F.4th 1301; cert. granted July 2, 2024; argued Nov. 12, 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.

15. ***Delligatti v. United States*, No. 23-825 (2d Cir., 83 F.4th 113; cert. granted June 3, 2024; argued Nov. 12, 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.

16. ***NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (9th Cir., 81 F.4th 918; cert. granted June 17, 2024; argued Nov. 13, 2024; dismissed as improvidently granted Dec. 11, 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.

DECEMBER CALENDAR

17. ***FDA v. Wages and White Lion Investments, L.L.C.*, No. 23-1038 (5th Cir., 90 F.4th 357; cert. granted July 2, 2024; argued Dec. 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.

18. ***United States v. Miller*, No. 23-824 (10th Cir., 71 F.4th 1247; cert. granted June 24, 2024; argued Dec. 2, 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. ***Hungary v. Simon*, No. 23-867 (D.C. Cir., 77 F.4th 1077; cert. granted June 24, 2024; argued Dec. 3, 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

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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.

20. ***United States v. Skrmetti*, No. 23-477 (6th Cir., 83 F.4th 460; cert. granted June 24, 2024; argued Dec. 4, 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.

21. ***Kousisis v. United States*, No. 23-909 (3d Cir., 82 F.4th 230; cert. granted June 17, 2024; argued Dec. 9, 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."

22. ***Feliciano v. Department of Transportation*, No. 23-861 (Fed. Cir., 2023 WL 3449138; cert. granted June 24, 2024; argued Dec. 9, 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.

23. ***Seven County Infrastructure Coalition v. Eagle County*, No. 23-975 (D.C. Cir., 82 F.4th 1152; cert. granted June 24, 2024; argued Dec. 10, 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.

24. ***Dewberry Group, Inc. v. Dewberry Engineers Inc.*, No. 23-900 (4th Cir., 77 F.4th 265; cert. granted June 24, 2024; argued Dec. 11, 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.

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JANUARY CALENDAR

25. ***TikTok, Inc. v. Garland*, No. 24-656 (D.C. Cir., 122 F.4th 930; cert. granted Dec. 18, 2024; argued Jan. 10, 2025), consolidated with *Firebaugh v. Garland*, No. 24-657 (D.C. Cir., 122 F.4th 930; cert. granted Dec. 18, 2024; argued Jan. 10, 2025).** The Question Presented is: Whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to petitioners, violates the First Amendment.

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Decided Jan. 17, 2025 (604 U.S. __). D.C. Circuit/Affirmed. Per curiam opinion (Sotomayor, J., concurring in part and concurring in judgment) (Gorsuch, J., concurring in judgment). The Protecting Americans from Foreign Adversary Controlled Applications Act prohibits U.S. companies from providing services to distribute, maintain, or update the social media platform TikTok unless the app's U.S. operations are severed from Chinese control. TikTok Inc., the American company that runs TikTok in the United States, and ByteDance Ltd., TikTok Inc.'s Chinese-connected ultimate parent company, claimed that the law violates their First Amendment rights, as did a group of TikTok users and creators. The Court held that the Act did not violate any of the challengers' First Amendment rights. It assumed without deciding that the Act was a "regulation of non-expressive activity that disproportionately burdens those engaged in expressive activity," triggering First Amendment review, though the Court noted that it had not "articulated a clear framework" for this area. The Court held that the Act was "facially content-neutral" and "justified by a content-neutral rationale" and thus subject to intermediate scrutiny. The Act focused on TikTok "due to a foreign adversary's control over the platform" and not based on the content of any speech on TikTok, and the government provided a content-neutral justification for the Act—preventing China from collecting data from U.S. TikTok users. The Court then concluded that the Act passed intermediate scrutiny. The Act's aim of ensuring that China does not "leverag[e] its control over ByteDance Ltd. to capture the personal data" of "tens of millions of U.S. TikTok users" was indisputably an important government interest. And the Act was "sufficiently tailored" to address that interest, since it barred China from accessing U.S. TikTok users' data while still allowing TikTok to operate in the United States if ByteDance divested from it. The Court did not need to evaluate TikTok's proposed regulatory alternatives given the "latitude" afforded the "Government to design regulatory solutions to address content-neutral interests." Because the data collection rationale sufficed to sustain the Act, and the record showed that Congress "would have passed" the Act based on that "justification alone," the Court declined to decide whether the other rationale for the Act—preventing a foreign adversary from using its control over TikTok's recommendation algorithm to "alter the content on the platform in an undetectable manner"—would pass muster. Justice Sotomayor would have held, rather than assumed, that the Act implicates the First Amendment. Justice Gorsuch opined that even under strict scrutiny, the Act was narrowly tailored to advance a compelling interest of preventing China from collecting Americans' personal information.

26. ***Hewitt v. United States*, No. 23-1002 (5th Cir., 92 F.4th 304; cert. granted July 2, 2024; argued Jan. 13, 2025), consolidated with *Duffey v. United States*, No. 23-1150 (5th Cir., 92 F.4th 304; cert. granted July 2, 2024; argued Jan. 13, 2025).** 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.

27. ***Stanley v. City of Sanford*, No. 23-997 (11th Cir., 83 F.4th 1333; cert. granted June 24, 2024; argued Jan. 13, 2025)**. 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.

28. ***Thompson v. United States*, No. 23-1095 (7th Cir., 89 F.4th 1010; cert. granted Oct. 4, 2024; argued Jan. 14, 2025).** The Question Presented is: Whether 18 U.S.C. § 1014, which prohibits making a "false statement" for the purpose of influencing certain financial institutions and federal agencies, also prohibits making a statement that is misleading but not false.

29. ***Waetzig v. Halliburton Energy Services, Inc.*, No. 23-971 (10th Cir., 82 F.4th 918; cert. granted Oct. 4, 2024; argued Jan. 14, 2025)**. The Question Presented is: Whether a Rule 41 voluntary dismissal without prejudice is a "final judgment, order, or proceeding" under Rule 60(b).

30. ***Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (5th Cir., 95 F.4th 263; cert. granted July 2, 2024; argued Jan. 15, 2025)**. 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.

31. ***FDA v. R.J. Reynolds Vapor Co.*, No. 23-1187 (5th Cir., 2024 WL 1945307; cert. granted Oct. 4, 2024; argued Jan. 21, 2025)**. The Question Presented is: Whether under the statute permitting review of the FDA's denial of authorization for a new tobacco product, 21 U.S.C. § 387l(a)(1), a manufacturer may file a petition for review in a circuit (other than the D.C. Circuit) where it neither resides nor has its principal place of business, if the petition is joined by a seller of the manufacturer's products that is located within that circuit.

32. ***McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation*, No. 23-1226 (9th Cir., 2023 WL 7015279; cert. granted Oct. 4, 2024; argued Jan. 21, 2025).** The Question Presented is: Whether the Hobbs Act, 28 U.S.C. § 2342(1), requires a district court to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

33. ***Barnes v. Felix*, No. 23-1239 (5th Cir., 91 F.4th 393; cert. granted Oct. 4, 2024; argued Jan. 22, 2025).** The Question Presented is: Whether courts should look only to "the moment of the threat" when evaluating an excessive force claim under the Fourth Amendment.

34. ***Cunningham v. Cornell University*, No. 23-1007 (2d Cir., 86 F.4th 961; cert. granted Oct. 4, 2024; argued Jan. 22, 2025).** The Question Presented is: Whether a plaintiff can state an ERISA claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by 29 U.S.C. § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in the provision's text.

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Cases Scheduled For Oral Argument

FEBRUARY CALENDAR

35. ***Gutierrez v. Saenz*, No. 23-7809 (5th Cir., 93 F.4th 267; cert. granted Oct. 4, 2024; argument on Feb. 24, 2025).** The Question Presented is: Whether Article III standing requires a particularized determination that a specific state official will redress the plaintiff's injury by following a favorable declaratory judgment.

36. ***Esteras v. United States*, No. 23-7483 (6th Cir., 88 F.4th 1163; cert. granted Oct. 21, 2024; argument on Feb. 25, 2025).** The Question Presented is: Whether a district may may rely on the factors set forth at 18 U.S.C. § 3553(a)(2)(A)—the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense—when revoking supervised release, even though Congress excluded those factors from the supervised-release statute's list of factors, 18 U.S.C. § 3583(e).

37. ***Perttu v. Richards*, No. 23-1324 (6th Cir., 96 F.4th 911; cert. granted Oct. 4, 2024; argument on Feb. 25, 2025).** The Question Presented is: Whether, under the Prison Litigation Reform Act, prisoners have a right to a jury trial concerning their exhaustion of administrative remedies when disputed facts regarding exhaustion are intertwined with the underlying merits of their claim.

38. ***Ames v. Ohio Department of Youth Services*, No. 23-1039 (6th Cir., 87 F.4th 822; cert. granted Oct. 4, 2024; argument on Feb. 26, 2025).** The Question Presented is: Whether, in addition to pleading the other elements of Title VII, a majority-group plaintiff must show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."

39. ***CC/Devas (Mauritius) Limited v. Antrix Corp. Ltd.*, No. 23-1201 (9th Cir., 2023 WL 4884882; cert. granted Oct. 4, 2024; argument on Mar. 3, 2025), consolidated with *Devas Multimedia Private Limited v. Antrix Corp. Ltd.*, No. 24-17 (9th Cir., 2024 WL 1945307; cert. granted Oct. 4, 2024; argument on Mar. 3, 2025).** The Question Presented is: Whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under the Foreign Sovereign Immunities Act.

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40. ***BLOM Bank SAL v. Honickman*, No. 23-1259 (2d Cir., 2024 WL 852265; cert. granted Oct. 4, 2024; argument on Mar. 3, 2025).** The Question Presented is: Whether Rule 60(b)(6)'s stringent standard applies to a post-judgment request to vacate for the purpose of filing an amended complaint.

41. ***Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, No. 23-1141 (1st Cir., 91 F.4th 511; cert. granted Oct. 4, 2024; argument on Mar. 4, 2025).** The Questions Presented are: (1) Whether the production and sale of firearms in the United States is the "proximate cause" of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico; and (2) Whether the production and sale of firearms in the United States amounts to "aiding and abetting"

illegal firearms trafficking because firearms companies allegedly know that some of their products are unlawfully trafficked.

42. ***Nuclear Regulatory Commission v. Texas*, No. 23-1300 (5th Cir., 78 F.4th 827; cert. granted Oct. 4, 2024; argument on Mar. 5, 2025), consolidated with *Interim Storage Partners, LLC v. Texas*, No. 23-1312 (5th Cir., 78 F.4th 827; cert. granted Oct. 4, 2024; argument on Mar. 5, 2025).** The Questions Presented are: (1) Whether the Hobbs Act, 28 U.S.C. § 2341 et seq., which authorizes a "party aggrieved" by an agency's "final order" to petition for review in a court of appeals, 28 U.S.C. § 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority; and (2) Whether the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., and the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq., permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

MARCH CALENDAR

43. ***Louisiana v. Callais*, No. 24-109 (W.D. La., 732 F. Supp. 3d 574; probable jurisdiction noted Nov. 4, 2024; argument on Mar. 24, 2025), consolidated with *Robinson v. Callais*, No. 24-109 (W.D. La., 732 F. Supp. 3d 574; probable jurisdiction noted Nov. 4, 2024; argument on Mar. 24, 2025).** The Question Presented is: Whether the three-judge district court erred in concluding that Louisiana Senate Bill 8, which created a second majority-minority congressional district in response to previous Voting Rights Act litigation, was an unconstitutional racial gerrymander.

44. ***Riley v. Bondi*, No. 23-1270 (4th Cir., 2024 WL 1826979; cert. granted Nov. 4, 2024; argument on Mar. 24, 2025).** The Questions Presented are: (1) Whether the 30-day deadline in 8 U.S.C. § 1252(b)(1) for filing a petition for review of an order of removal is jurisdictional; and (2) Whether a noncitizen satisfies the deadline in Section 1252(b)(1) by filing a petition for review challenging an agency order denying withholding of removal or protection under the Convention Against Torture within 30 days of the issuance of that order.

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45. ***EPA v. Calumet Shreveport Refining, LLC*, No. 23-1229 (5th Cir., 86 F.4th 1121; cert. granted Oct. 21, 2024; argument on Mar. 25, 2025).** The Question Presented is: Whether venue for challenges by small refineries to the EPA's denial of exemptions from the Clean Air Act's Renewable Fuel Standard program lies exclusively in the D.C. Circuit because the agency's denial actions are "nationally applicable" or, alternatively, are "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1).

46. ***Oklahoma v. EPA*, No. 23-1067 (10th Cir., 93 F.4th 1262; cert. granted Oct. 21, 2024; argument on Mar. 25, 2025), consolidated with *PacifiCorp v. EPA*, No. 23-1068 (10th Cir., 93 F.4th 1262; cert. granted Oct. 21, 2024; argument on Mar. 25, 2025).** The Question Presented is: Whether the Environmental Protection Agency's disapproval of a State Implementation Plan may only be challenged in the D.C. Circuit under 42 U.S.C. § 7607 (b)(1) if EPA packages that disapproval with

disapprovals of other States' plans and purports to use a consistent method in evaluating the state-specific determinations in those plans.

47. ***FCC v. Consumers' Research*, No. 24-354 (5th Cir., 109 F.4th 743; cert. granted Nov. 22, 2024; argument on Mar. 26, 2025), consolidated with *Schools, Health & Libraries Broadband Coalition v. Consumers' Research*, No. 24-422 (5th Cir., 109 F.4th 743; cert. granted Nov. 22, 2024; argument on Mar. 26, 2025).** The Questions Presented are: (1) Whether Congress violated the nondelegation doctrine by authorizing the Federal Communications Commission to determine, within the limits set forth in 47 U.S.C. § 254, the amount that providers must contribute to the universal service fund; (2) Whether the Commission violated the nondelegation doctrine by using the financial projections of a private company serving as the Fund's administrator in computing universal service contribution rates; (3) Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to the private administrator violates the nondelegation doctrine; and (4) Whether this case is moot in light of the challengers' failure to seek preliminary relief before the Fifth Circuit.

48. ***Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, No. 24-154 (Wis., 3 N.W.3d 666; cert. granted Dec. 13, 2024; argument on Mar. 31, 2025).** The Question Presented is: Whether a state violates the First Amendment's Religion Clauses by denying a religious organization an otherwise-available tax exemption because the organization does not meet the state's criteria for religious behavior.

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Partner
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49. ***Rivers v. Guerrero*, No. 23-1345 (5th Cir., 99 F.4th 216; cert. granted Dec. 6, 2024; argument on Mar. 31, 2025).** The Question Presented is: Whether 28 U.S.C. § 2244(b)(2), which bars the filing of a "second or successive habeas corpus application," applies (i) only to habeas filings made after a prisoner has exhausted appellate review of his first petition, (ii) to all second-in-time habeas filings after final judgment, or (iii) to some second-in-time filings, depending on a prisoner's success on appeal or ability to satisfy a seven-factor test.

50. ***Fuld v. Palestine Liberation Organization*, No. 24-20 (2d Cir., 82 F.4th 74; cert. granted Dec. 6, 2024; argument on Apr. 1, 2025), consolidated with *United States v. Palestine Liberation Organization*, No. 24-151 (2d Cir., 82 F.4th 74; cert. granted Dec. 6, 2024; argument on Apr. 1, 2025).** The Question Presented is: Whether 18 U.S.C. § 2334(e)(1)—which provides that the Palestine Liberation Organization and the Palestinian Authority "shall be deemed to have consented to personal jurisdiction" in certain terrorism-related civil suits if they took specified actions in the future: (a) made payments to designees or family members of terrorists who injured or killed U.S. nationals, or (b) maintained certain premises or conducted particular activities in the United States—complies with the Due Process Clause of the Fifth Amendment.

51. ***Medina v. Planned Parenthood South Atlantic*, No. 23-1275 (4th Cir., 95 F.4th 152; cert. granted Dec. 18, 2024; argument on Apr. 2, 2025).** The Question Presented is: Whether the Medicaid Act's any-qualified-provider provision unambiguously confers a private right upon a Medicaid beneficiary to choose a specific provider.

CASES AWAITING ARGUMENT DATE

OCTOBER TERM 2024

52. ***Diamond Alternative Energy, LLC v. Environmental Protection Agency*, No. 24-7 (D.C. Cir., 98 F.4th 288; cert. granted Dec. 13, 2024).** The Question Presented is: Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.

53. ***Becerra v. Braidwood Management, Inc.*, No. 24-316 (5th Cir., 104 F.4th 930; cert. granted Jan. 10, 2025).** The Questions Presented are: (1) Whether the court of appeals erred in holding that the structure of the Department of Health and Human Services' (HHS) U.S. Preventive Services Task Force violates the Appointments Clause; and (2) Whether the court of appeals erred in declining to sever the statutory provision that it found to unduly insulate the Task Force from the HHS Secretary's supervision.

54. ***Department of Education v. Career Colleges and Schools of Texas*, No. 24-413 (5th Cir., 98 F.4th 220; cert. granted Jan. 10, 2025).** The Question Presented is: Whether the court of appeals erred in holding that the Higher Education Act of 1965 does not permit the assessment of borrower defenses to repayment before default, in administrative proceedings, or on a group basis.

55. ***Commissioner of Internal Revenue v. Zuch*, No. 24-416, (3d Cir., 97 F.4th 81; cert. granted Jan. 10, 2025).** The Question Presented is: Whether a proceeding under 26 U.S.C. § 6330 for a pre-deprivation determination about a levy proposed by the Internal Revenue Service to collect unpaid taxes becomes moot when there is no longer a live dispute over the proposed levy that gave rise to the proceeding.

56. ***A.J.T., By and Through Her Parents, A.T. & G.T. v. Osseo Area Schools, Independent School District No. 279*, No. 24-249 (8th Cir., 96 F.4th 1058; cert. granted Jan. 17, 2025).** The Question Presented is: Whether the Americans with Disabilities Act and Rehabilitation Act require children with disabilities to satisfy a uniquely stringent "bad faith or gross misjudgment" standard when seeking relief for discrimination relating to their education.

57. ***Parrish v. United States*, No. 24-275 (4th Cir., 74 F.4th 160; cert. granted Jan. 17, 2025).** The Question Presented is: Whether a litigant who files a notice of appeal after the ordinary appeal period expires must file a second, duplicative notice after the appeal period is reopened.

58. ***Mahmoud v. Taylor*, No. 24-297 (4th Cir., 102 F.4th 191; cert. granted Jan. 17, 2025).** The Question Presented is: Whether public schools burden parents' religious exercise when they compel elementary-school children to participate in instruction on gender and sexuality against their parents' religious convictions and without notice or opportunity to opt out.

59. ***Soto v. United States*, No. 24-320 (Fed. Cir., 92 F.4th 1094; cert. granted Jan. 17, 2025).** The Question Presented is: Whether, given the Federal Circuit's holding that a claim for compensation under 10 U.S.C. § 1413a is a claim "involving … retired pay" under 31 U.S.C. § 3702(a)(I)(A), 10 U.S.C. §1413a provides a settlement mechanism that displaces the default procedures and limitations set forth in the Barring Act.

60. ***Laboratory Corporation of America Holdings v. Davis*, No. 24-304 (9th Cir., 2024 WL 489288; cert. granted Jan. 24, 2025).** The Question Presented is: Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

61. ***Oklahoma Statewide Charter School Board v. Drummond*, No. 24-394 (Supreme Court of Oklahoma, 558 P.3d 1; cert. granted Jan. 24, 2025), consolidated with *St. Isidore of Seville Catholic Virtual School v. Drummond*, No. 24-396 (Supreme Court of Oklahoma, 558 P.3d 1; cert. granted Jan. 24, 2025).** The Questions Presented are: (1) Whether the academic and pedagogical choices of a privately owned and run school constitute state action simply because it contracts with the state to offer a free educational option for interested students; and (2) Whether a state violates the Free Exercise Clause by excluding privately run religious schools from the state's charter-school program solely because the schools are religious, or whether a state can justify such an exclusion by invoking anti-establishment interests that go further than the Establishment Clause requires.

62. ***Martin v. United States*, No. 24-362 (11th Cir., 2024 WL 1716235; cert. granted Jan. 27, 2025).** The Questions Presented are: (1) Whether the Constitution's Supremacy Clause bars claims under the Federal Tort Claims Act when the negligent or wrongful acts of federal employees have some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law; and (2) Whether the discretionary-function exception is categorically inapplicable to claims arising under the law-enforcement proviso to the intentional torts exception.

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OCTOBER TERM 2025

1. ***Bowe v. United States*, No. 24-5438 (11th Cir., 2024 WL 4038107; cert. granted Jan. 17, 2025).** The Questions Presented are: (1) Whether 28 U.S.C. § 2444(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. § 2255; and (2) Whether 28 U.S.C. § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file a second or successive motion to vacate under 28 U.S.C. § 2255.

Pending Petitions with Calls For The Views of The Solicitor General ("CVSG")

1. ***Landor v. Louisiana Department of Corrections & Public Safety*, No. 23-1197 (5th Cir., 82 F.4th 337; CVSG Oct. 7, 2024)**. The Question Presented is: Whether an individual may sue a government official in his individual capacity for damages for

violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq.

2. ***M & K Employee Solutions, LLC v. Trustees of the IAM National Pension Fund*, No. 23-1209 (D.C. Cir., 92 F.4th 316; CVSG Oct. 7, 2024)**. The Question Presented is: Whether 29 U.S.C. § 1391's instruction to compute liability for withdrawal from an underfunded multiemployer pension plan "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year.

3. ***Mulready v. Pharmaceutical Care Management Association*, No. 23-1213 (10th Cir., 78 F.4th 1183; CVSG Oct. 7, 2024)**. The Questions Presented are: (1) Whether ERISA preempts state laws that regulate Pharmacy Benefit Managers by preventing them from cutting off rural patients' access, steering patients to favored pharmacies, excluding pharmacies willing to accept their terms from preferred networks, and overriding State discipline of pharmacists; and (2) Whether Medicare Part D preempts state laws that limit the conditions Pharmacy benefit Managers may place on pharmacies' participation in their preferred networks.

4. ***Cox Communications, Inc. v. Sony Music Entertainment*, No. 24-171 (4th Cir., 93 F.4th 222; CVSG Nov. 25, 2024)**. The Questions Presented are: (1) Whether the Fourth Circuit erred in holding that a service provider can be held liable for "materially contributing" to copyright infringement merely because it knew that people were using certain accounts to infringe and did not terminate access, without proof that the service provider affirmatively fostered infringement or otherwise intended to promote it; and (2) Whether the Fourth Circuit erred in holding that mere knowledge of another's direct infringement suffices to find willfulness under 17 U.S.C. § 504(c).

5. ***Sony Music Entertainment v. Cox Communications, Inc.*, No. 24-181 (4th Cir., 93 F.4th 222; CVSG Nov. 25, 2024)**. The Question Presented is: Whether the profit requirement of vicarious copyright infringement permits liability where the defendant expects commercial gain from the enterprise in which infringement occurs (as the First, Second, Third, Seventh, and Ninth Circuits have held), or whether the profit requirement of vicarious copyright infringement permits liability only where the defendant expects commercial gain from the act of infringement itself (as the Fourth Circuit has held).

6. ***Port of Tacoma v. Puget Soundkeeper Alliance*, No. 24-350 (9th Cir., 104 F.4th 95; CVSG Jan. 13, 2024).** The Question Presented is: Whether Section 505 of the Clean Water Act (CWA) authorizes citizens to invoke the federal courts to enforce conditions of state-issued pollutant-discharge permits adopted under state law that mandate a greater scope of coverage than required by the CWA.

7. ***Fiehler v. Mecklenburg*, No. 23-1360 (Supreme Court of Alaska, 538 P.3d 706; CVSG Jan. 13, 2025).** The Question Presented is: Whether a court has the power to disregard evidence of the location of a water boundary from a federal survey based on subsequent evidence of the body of water's location.

8. ***FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345 (2d Cir., 2024 WL 3174971; CVSG Jan. 13, 2025).** The Question Presented is: Whether Section 47(b) of the Investment Company Act, 15 U.S.C. § 80a-46(b), creates an implied private right of action.

9. ***Borochov v. Islamic Republic of Iran*, No. 24-277 (D.C. Cir., 94 F.4th 1053; CVSG Jan. 13, 2025).** The Question Presented is: Whether the Foreign Sovereign Immunities Act's terrorism exception extends jurisdiction to claims arising from a foreign state's material support for a terrorist attack that injures or disables, but does not kill, its victims.

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CVSG: Petitions In Which The Solicitor General Opposed Certiorari

1. ***Zilka v. City of Philadelphia*, No. 23-914 (Pa., 304 A.3d 1153; CVSG June 10, 2024; cert opposed Dec. 9, 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; cert. opposed Dec. 10, 2024), consolidated with *Shell PLC v. City and County of Honolulu*, No. 23-952 (Haw., 537 P.3d 1173; CVSG June 10, 2024; cert. opposed Dec. 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.

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3. ***Walen v. Bergum*, No. 23-969 (D.N.D., 700 F. Supp. 3d 759; CVSG June 10, 2024; dismissal of appeal in part and summary affirmance in part recommended Dec. 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.

4. ***Alabama v. California*, No. 22O158 (Original Jurisdiction; CVSG Oct. 7, 2024; leave to file bill of complaint opposed Dec. 10, 2024)**. The Question Presented is: Whether States may constitutionally seek to impose liability or obtain equitable relief premised on either emissions by or in nonconsenting States or the promotion, use, and/or sale of traditional energy products in or to nonconsenting States.

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. Twelve current Gibson Dunn lawyers have argued before the Supreme Court, and during the Court's ten most recent Terms, the firm has argued a total of 27 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 over 40 petitions for certiorari since 2006.

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