



The Florida Bar's Annual Review of  
**U.S. Supreme Court First Amendment Cases**  
October 2022 Term

June 23, 2023

Moderator  
**David A. Karp**  
Carlton Fields

*Featuring*

**Hon. John D. Couriel**  
Justice  
Florida Supreme Court

**Samuel J. Salario, Jr.**  
Former Judge  
Second District Court of Appeal

**Lynn Oberlander**  
Of Counsel  
Ballard Spahr

**Bryan Gowdy**  
Partner  
Creed & Gowdy

**Caroline Corbin**  
Professor of Law  
University of Miami School of Law

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## **Speakers**

### **John D. Couriel – Justice of the Florida Supreme Court**

John D. Couriel is the 90th Justice of the Florida Supreme Court. He obtained his B.A magna cum laude from Harvard College in 2000 and his J.D. from Harvard Law School in 2003. After working as a law clerk for U.S. District Judge John D. Bates in Washington D.C., he joined Davis Polk & Wardwell in New York, focusing on securities offerings, mergers and acquisitions, bankruptcy matters, and investigations. He later became an Assistant United States Attorney, prosecuting various federal offenses, in the Southern District of Florida. In 2013, he joined Kobre & Kim LLP, specializing in cross-border disputes and investigations. Fluent in Spanish, Couriel's parents emigrated from Cuba, with his father being one of the unaccompanied minors brought to the U.S. as part of Operation Pedro Pan. He was appointed to the Florida Supreme Court on June 1, 2020.

### **Samuel J. Salario, Jr. – Shareholder, Lawson Huck Gonzalez, PLLC**

Sam Salario served as a judge on Florida's Second District Court of Appeal from 2015 to 2020. He earned his B.A. from American University in 1992 and his J.D. from University of Florida Levine College of Law with high honors in 1995. He is now a shareholder with Lawson Huck Gonzalez, PLLC. His practice focuses on appeals, mediations, trial court representations, and issue-based advocacy. Previously, he was a partner at a national law firm, specializing in securities and derivative litigation, and internal investigations. He also served as a law clerk to U.S. District Judge William Terrell Hodges of the Middle District of Florida.

### **Lynn Oberlander – Of Counsel, Ballard Spahr**

Lynn Oberlander is nationally recognized media lawyer at Ballard Spahr, where she counsels companies that employ creative professionals in legal challenges to the broadcast, distribution, and publication of their work. She provides general counsel services, pre-broadcast and pre-publication review, fair use analysis, newsgathering policies, and litigation support for copyright and content disputes. Prior to joining Ballard Spahr, she served as general counsel for digital media companies and held senior in-house positions at Univision, Forbes, and NBC. She earned her B.A. cum laude from Yale University in 1987 and her J.D. from Columbia University School of Law in 1991.

### **Bryan Gowdy – Partner, Creed & Gowdy**

Bryan Gowdy is a board-certified appellate lawyer specializing in appeals, post-conviction motions, and trial support. His practice covers various areas of law, including plaintiff's injury, products liability, commercial cases, criminal law, and family law. He has twice argued before the U.S. Supreme Court, winning the landmark case, *Graham v. Florida*, which applied the Eighth Amendment for the first time to non-capital punishment and declared unconstitutional all life-without-parole sentences imposed on juveniles for non-homicides. He has also argued before various U.S. Courts of Appeals, the Florida Supreme Court, and all of Florida's district courts of appeal. Gowdy began his legal career as a law clerk to U.S. District Judge Maurice Paul in the Northern District of Florida and U.S. Circuit Judge Susan Black of the U.S. Court of Appeals for the Eleventh Circuit. Gowdy graduated from the School of Foreign Service at Georgetown University and first in his class from University of Florida Levin College of Law. Prior to law school, he served as a surface warfare officer in the United States Navy.

### **Caroline Corbin – Professor of Law, University of Miami School of Law**

Caroline Mala Corbin is a Professor of Law at the University of Miami School of Law, specializing in constitutional law, First Amendment, and reproductive rights. Her scholarly work primarily focuses on the intersection of the First Amendment's speech and religion clauses with equality issues. She has published articles in the *New York University Law Review*, *UCLA Law Review*, and *Harvard Law Review*. Professor Corbin is a frequent commentator in local and national media on First Amendment matters. Before joining the University of Miami law faculty, she held a postdoctoral research fellowship at Columbia Law School, litigated civil rights cases at Sullivan & Cromwell LLP and the ACLU Reproductive Freedom Project, and clerked for Judge M. Blane Michael of the U.S. Court of Appeals for the Fourth Circuit. She earned a B.A. from Harvard University and a J.D. from Columbia Law School.

### **Moderator: David Karp – Of Counsel, Carlton Fields**

David Karp is an appellate counsel at Carlton Fields, based in Miami. His practice focuses on trial litigation and appeals in federal and state courts with a special interest in defamation and First Amendment law. Before becoming a lawyer, Karp worked for more than a decade as a reporter and editor at the former *St. Petersburg Times* (now *Tampa Bay Times*). Karp graduated from Yale College and magna cum laude from the University of Florida Levin College of Law. After law school, he served as a law clerk to Senior U.S. District Judge Susan Bucklew of the Middle District of Florida.

## Cases from October 2022 Term

### Free Expression Cases<sup>1</sup>

1. *Gonzalez v. Google LLC*  
No. 21-1333, [143 S. Ct. 1191](#)  
Decided May 18, 2023  
*Holding:* Vacating judgment and remanding to 9th Circuit to reconsider in light of *Twitter v. Taamneh*.  
  
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2. *Twitter v. Taamneh*  
No. 21-1496, [143 S. Ct. 1206](#)  
Decided May 18, 2023  
*Holding:* Complaint alleging that social-media company aided and abetted ISIS in its terrorist attack on a nightclub in Istanbul, Turkey, by directing users to a ISIS website failed to state a claim under 18 U.S.C. § 2333(d)(2).
3. *Counterman v. Colorado*  
No. 22-138  
[497 P.3d 1039](#) (Colo. App. 2021)  
Argued April 19, 2023  
*Issue:* Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.
4. *303 Creative LLC v. Elenis*  
No. 21-476  
[6 F.4th 1160](#) (10th Cir. 2021)  
Argued December 5, 2022  
*Issue:* Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

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<sup>1</sup> Case summaries for decisions not yet decided obtained from SCOTUSblog.com

5. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*  
No. 21-869, [143 S. Ct. 1258](#)  
Decided May 18, 2023  
*Issue:* Whether a work of art is “transformative” when it conveys a different meaning or message from its source material, or whether a court is forbidden from considering the meaning of the accused work where it “recognizably deriv[es] from” its source material.
6. *Jack Daniel’s Properties v. VIP Products, LLC*  
No. 22-148, \_ S.Ct. \_, [2023 WL 3872519](#)  
Decided June 8, 2023  
*Holding:* When a defendant uses the mark as a designation of source for its own goods or services the threshold test for trademark infringement in *Rogers v. Grimaldi* challenging expressive works does not apply.

### **Free Exercise Cases**

7. *Groff v. DeJoy*  
No. 22-174  
[35 F.4th 162](#) (3d Cir. 2022)  
Argued April 18, 2023  
*Issue:* Whether the court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and (2) whether an employer may demonstrate “undue hardship on the conduct of the employer’s business” under Title VII merely by showing that the requested accommodation burdens the employee’s coworkers, not the business itself.
8. *Yeshiva University v. YU Pride Alliance*  
No. 22A184, [213 L. Ed. 2d 1154](#) (2022), 143 S.Ct. 1  
Application for Stay Denied September 14, 2022  
*Ruling:* The court denied the stay of a lower court order requiring Yeshiva University to treat a LGBTQ student group the same as other student groups in the university’s process to recognize student clubs because Yeshiva University could seek review from the lower appellate
9. *We the Patriots USA v. Hochul*  
No. 21-1143, [213 L. Ed. 2d 1126](#) (2022)  
Petition for Certiorari Denied June 30, 2022

## Upcoming Cases for October 2023 Term

1. *Lindke v. Freed*  
No. 22-611  
[37 F.4th 1199](#) (6th Cir. 2022)  
*Issue:* Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.  
  
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2. *O'Connor-Ratcliff v. Garnier*  
No. 22-324  
[41 F.4th 1158](#) (9th Cir. 2022)  
*Issue:* Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.
3. *Vidal v. Elster*  
No. 22-704  
[26 F.4th 1328](#) (Fed. Cir. 2022)  
*Issue:* 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.

## Noteworthy Pending Petitions for October 2023 Term

4. *NetChoice, LLC v. Paxton*  
No. 22-555  
[49 F.4th 439](#) (5th Cir. 2022)  
*Issue:* Whether Texas' social media law, Senate Bill 20, violates the First Amendment?
5. *Moody v. NetChoice, LLC* and *NetChoice, LLC v. Moody*  
No. 22-277, No. 22-393  
[34 F.4th 1196](#) (11th Cir. 2022)  
*Issue:* Whether Florida's social media law, Senate Bill 7072, or at least its compelled disclosure provisions, violates the First Amendment.