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Supreme Court Term October 2023: A Review of Selected Major Rulings

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Supreme Court Term October 2023: A Review of Selected Major Rulings

The Supreme Court issued a number of opinions of interest to Congress in the term that began on October 2, 2023. Over the course of the term, the Court decided cases addressing high-profile issues including presidential criminal immunity, immigration, equal protection and elections, and firearms regulation.

Among the decisions of particular note are: (1) *United States v. Rahimi*, which held that a federal law banning the possession of a firearm while under a domestic violence restraining order did not violate the Second Amendment; (2) *Alexander v. South Carolina Conference of the NAACP*, which reversed a lower court decision invalidating portions of the South Carolina congressional redistricting maps as an unconstitutional racial gerrymander; (3) *Campos-Chaves v. Garland*, which held that the Immigration and Nationality Act does not allow for the rescission of a removal order entered in absentia on the basis of an initial defective "notice to appear" that fails to specify the time and place of a removal proceeding; and (4) *Trump v. United States*, which held, for the first time, that the Constitution provides a President with "some immunity" from criminal liability for acts taken while in office.

An Appendix at the end of this report lists all of the Court's merits decisions from this term, states their holdings in summary form, and provides references to CRS resources that address selected cases in more detail.

SUMMARY

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During the Supreme Court term that began in October 2023, the Supreme Court issued merits decisions in 56 cases.[1] A number of these decisions concern high-profile issues such as firearms regulation, elections, presidential immunity, immigration, criminal law, and the administrative state.

Some decisions issued by the Court this past term involved matters of first impression. One such decision was *Trump v. United States*,[2] discussed later in this report, which held that the Constitution provides former President Donald Trump with "some immunity" from criminal liability for acts taken while in office.[3] In another decision involving a novel issue, *Trump v. Anderson*,[4] the Court reversed a ruling by the Colorado Supreme Court that would have allowed former President Trump to be removed from Colorado's ballot as an insurrectionist under Section 3 of the Fourteenth Amendment, unanimously holding that Colorado could not disqualify the former President from seeking office.[5] In an unsigned opinion, five Justices stated that only Congress, pursuant to its authority under Section 5 to pass "appropriate legislation" to enforce the Fourteenth Amendment, can enforce the provision on which Colorado had relied to disqualify Trump.[6]

The Court also issued a notable decision on the construction of a federal criminal law utilized by the Department of Justice (DOJ) in the wake of the unrest at the Capitol on January 6, 2021.[7] In the six-to-three decision *Fischer v. United States*,[8] the Court endorsed a narrow reading of 18 U.S.C. § 1512(c)(2), which authorizes felony penalties for a person who "corruptly ... otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so."[9] This decision could have wide-ranging implications for numerous individuals involved with the Capitol unrest charged under this criminal provision.

Discussed in other CRS products, the Court issued several consequential decisions in federal administrative law. Among these decisions is a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*), in which the Court overruled the 1984 decision *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[10] A previously foundational decision in administrative law, *Chevron* had established a framework requiring a court to defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation was reasonable.[11] In another prominent

[1] *See* Appendix. List of Cases.

[2] Trump v. United States, 144 S. Ct. 2312 (2024).

[3] *See infra* "Trump v. United States: Presidential Immunity"; *see also* CRS Legal Sidebar LSB11194, *Presidential Immunity from Criminal Prosecution in Trump v. United States*, by Todd Garvey (2024).

[4] 601 U.S. 100 (2024).

[5] *Id.* at 106. For a discussion of this decision, see CRS Legal Sidebar LSB11096, *Disqualification of a Candidate for the Presidency, Part II: Examining Section 3 of the Fourteenth Amendment as It Applies to Ballot Access*, by L. Paige Whitaker, Jennifer K. Elsea, and Juria L. Jones (2024).

[6] Trump, 601 U.S. at 106. For a discussion of this decision, see CRS Legal Sidebar LSB11126, *Fischer v. United States: Supreme Court Reads Federal Obstruction Provision Narrowly in Capitol Breach Prosecution*, by Peter G. Berris (2024).

[7] For a discussion of Supreme Court decisions addressing federal criminal laws during the 2023 Term, see CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024).

[8] 144 S. Ct. 2176 (2024).

[9] *Id.* at 2190.

[10] Loper Bright v. Raimondo, 144 S. Ct. 2244 (2024); Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). For an overview of the Court's decision in *Loper*, see CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024).

[11] *Chevron*, 467 U.S. at 842–43.

decision, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court in a six-to-three decision held that claims for civil suits under 28 U.S.C. § 2401 may accrue when an injury to the plaintiff occurs, thereby extending the period after the publication of agency regulations in which some plaintiffs may be able to bring certain challenges to those regulations under the Administrative Procedure Act.[12]

Beyond the cases mentioned above, the Court issued a number of significant decisions in other areas of law touching upon immigration, elections, and firearms regulation. This report focuses on four decisions from this term that may be of interest to Congress. Three of the cases center on constitutional issues: *United States v. Rahimi*, involving certain individuals' access to firearms under the Second Amendment; *Trump v. United States*, involving presidential immunity under the Constitution; and *Alexander v. South Carolina State Conference of the NAACP*, involving racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment.[13] The other case addressed an issue of statutory interpretation in immigration law: *Campos-Chaves v. Garland*, involving the rescission of removal orders entered in absentia when an alien[14] is served with initial written notice for removal proceedings that fails to specify a time and place.[15]

The Appendix lists all of the Court's merits decisions this term, summarizes the decisions' key holdings, and provides references to CRS resources that address selected cases in more detail.

United States v. Rahimi: Domestic Violence and the Second Amendment[16]

On June 21, 2024, the Supreme Court issued its decision in *United States v. Rahimi*,[17] a Second Amendment case in which the Court upheld a federal law that prohibits individuals subject to certain domestic violence restraining orders from possessing firearms.[18] The case follows the Court's 2022 landmark decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[19] In *Bruen*, the Court announced a new legal standard based on historical tradition to assess whether laws and regulations comport with the Second Amendment.[20] Since that decision, lower courts have grappled with applying this standard, leading to divergent decisions on the constitutionality of a variety of firearm regulations, including the federal possession bans for individuals who have

[12] Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 144 S. Ct. 2440 (2024). For a discussion of this decision, see CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, coordinated by Benjamin M. Barczewski (2024). Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

[13] United States v. Rahimi, 144 S. Ct. 1889 (2024); Trump v. United States, 144 S. Ct. 2312 (2024); Alexander v. South Carolina State Conference of the NAACP, 144 S. Ct. 1221, 1252 (2024), *rev'g* S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 177 (D.S.C. 2023).

[14] *See* 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States.").

[15] Campos-Chaves v. Garland, 144 S. Ct. 1637, 1644 (2024).

[16] CRS Legislative Attorney Matthew Trout wrote this section of the report.

[17] United States v. Rahimi, 144 S. Ct. 1889 (2024).

[18] 18 U.S.C. § 922(g)(8).

[19] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

[20] *Id.* at 2126.

been previously convicted of felony,[21] those who use controlled substances,[22] and aliens unlawfully present in the United States.[23]

Rahimi is the first such case the Supreme Court agreed to review post-*Bruen*.[24] The Fifth Circuit held that this ban violated the Second Amendment under *Bruen* because it did not comport with the United States' historical tradition of firearms regulation.[25] The Supreme Court ultimately reversed, holding that this law was consistent with the historical tradition of disarming dangerous individuals.[26] The case allowed the Court to further clarify the standard announced in *Bruen*; provide guidance to legislators, other firearms regulators, and stakeholders about the scope of the Second Amendment; and resolve the legal ambiguity surrounding an important federal statute in favor of its constitutionality.

Background

The Second Amendment and Firearms Regulation

The Second Amendment to the Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[27] The Supreme Court first interpreted the Second Amendment as creating an individual right to possess some types of firearms for the purpose of self-defense in the 2008 case of *District of Columbia v. Heller*.[28] The Court further held in the 2010 case of *McDonald v. City of Chicago* that this individual right was incorporated through the Fourteenth Amendment and thus applies both to the federal government (including D.C.) and to the fifty states.[29] In deciding *Heller*, the Court emphasized that the individual right was not unlimited and did not confer on individuals the right to carry "any weapon whatsoever in any manner whatsoever and for whatever [reason]."[30] Writing for the majority, Justice Scalia cautioned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[31]

Heller and *McDonald* left unresolved a number of questions, including what conduct the Second Amendment protected beyond the use of handguns in the home for self-defense and what constitutional standard courts should use to analyze firearm regulations that do implicate the Second Amendment.

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[21] *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96 (3d Cir. 2023) (en banc) (analyzing 18 U.S.C. § 922(g)(1)), *vacated sub nom. Garland v. Range*, 144 S. Ct. 2706 (2024).

[22] *See, e.g.*, United States v. Daniels, 77 F.4th 337 (5th Cir. 2023) (analyzing 18 U.S.C. § 922(g)(3)), *vacated*, 144 S. Ct. 2707 (2024).

[23] *See, e.g.*, United States v. Stiladeen, 64 F.4th 978 (8th Cir. 2023) (analyzing 18 U.S.C. § 922(g)(5)(A)).

[24] United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

[25] *Rahimi*, 61 F.4th at 460–61.

[26] *Rahimi*, 144 S. Ct. at 1903.

[27] U.S. CONST. amend. II.

[28] 554 U.S. 570 (2008).

[29] 561 U.S. 742 (2010).

[30] *Heller*, 554 U.S. at 626.

[31] *Id.* at 626–27.

In *Bruen*, the Supreme Court refined and clarified the scope of the Second Amendment rights articulated in *Heller* and *McDonald*. The Court held that a law that purports to regulate conduct protected by the plain text of the Second Amendment is presumptively unconstitutional unless the government establishes that the law is "consistent with the Nation's historical tradition of firearm regulation."[32] This standard, the Court explained, "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*."[33] Applying this standard to the New York law at issue, the Court determined first that the plain text of the Second Amendment presumptively protects a right to bear arms in public for self-defense[34] and second that there was no historical analogue to New York's requirement that a person seeking a license to carry a concealed pistol or revolver demonstrate "good moral character" and "proper cause."[35] Accordingly, the Court struck down the New York law as violating the Second Amendment.[36]

In *Rahimi*, the Court considered the constitutionality of another restriction on firearm possession. Federal law makes it unlawful, in connection with interstate or foreign commerce, for nine categories of individuals to ship, transport, possess, or receive any firearm or ammunition.[37] A covered individual who knowingly violates this prohibition may be fined or imprisoned not more than fifteen years, or both,[38] with heightened penalties available if certain aggravating factors are met.[39]

Individuals subject to certain domestic violence restraining orders are one of the nine groups subject to this prohibition.[40] To trigger the statutory ban, a restraining order must meet the following three criteria:

- it must have been issued by a court after a hearing of which the individual received actual notice and the opportunity to participate;
- it must restrain the person from "harassing, stalking, or threatening" an intimate partner or his or her child or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- it must include a finding that the person represents a credible threat to the physical safety of the intimate partner or child, or it must explicitly prohibit the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury.[41]

[32] *Bruen*, 597 U.S. at 24–30.

[33] *Id.* at 29.

[34] *Id.* at 32–33.

[35] *Id.* at 70.

[36] *Id.*

[37] *See* 18 U.S.C. § 922(g)(1)–(9).

[38] *Id.* § 924(a)(8); *see also* Rehaif v. United States, 139 S. Ct. 2191 (2019) (clarifying knowledge requirement). The potential term of imprisonment was recently increased from ten years to fifteen years. The ten-year penalty was in effect at the time of Rahimi's actions. *See* 18 U.S.C. § 924(a)(2) (2018).

[39] *See, e.g.*, 18 U.S.C. § 924(e)(1) (providing a heightened penalty for a person with three prior convictions of violent felonies, a serious drug offense, or some combination of both).

[40] *Id.* § 922(g)(8).

[41] *Id.*

Factual and Procedural History

Between December 2020 and January 2021, Zackey Rahimi was involved in five separate shootings in and around Arlington, Texas.[42] After identifying him as a suspect and obtaining a warrant, Arlington police searched Rahimi's home and found a rifle and a pistol.[43]

Rahimi admitted that he was subject to a civil protective order entered February 5, 2020, by a Tarrant County, Texas, state judge after Rahimi allegedly assaulted his ex-girlfriend.[44] The protective order prohibited Rahimi from, among other things, "[c]ommitting family violence," "[g]oing to or within 200 yards of the residence or place of employment" of his ex-girlfriend, and "[e]ngaging in conduct ... including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass" either his ex-girlfriend or a member of her family or household.[45] The order also expressly prohibited Rahimi from possessing a firearm.[46]

Rahimi was then indicted for possessing a firearm while under a domestic violence restraining order in violation of 18 U.S.C. § 922(g)(8).[47] Rahimi moved to dismiss the indictment, arguing that § 922(g)(8) violated the Second Amendment, although he acknowledged that then-binding Fifth Circuit precedent had upheld the constitutionality of the ban.[48] After the trial court denied his motion to dismiss, Rahimi pleaded guilty to the charge.[49] Rahimi appealed the denial of his motion to dismiss, and the Fifth Circuit panel initially affirmed the trial court based on existing precedent.[50] Shortly after the Fifth Circuit issued its opinion, the Supreme Court decided *Bruen*.[51] The panel then withdrew its prior opinion and requested additional briefing addressing the effect of *Bruen* on Rahimi's constitutional challenge.[52]

Upon rehearing, the Fifth Circuit panel held that *Bruen* overruled the court's prior precedent and that the prohibition on individuals subject to domestic violence restraining orders from possessing firearms was unconstitutional.[53] First, the panel rejected the government's argument that the Second Amendment protected only "law-abiding, responsible citizens" and therefore did not protect Rahimi.[54] The court, quoting *Heller*, stated that "the Supreme Court has made clear that 'the Second Amendment right is exercised individually and belongs to all Americans.'"[55] Second, the court analyzed whether § 922(g)(8) was consistent with the nation's historical tradition by determining whether the government identified "relevantly similar" historical laws that imposed "a comparable burden on the right of armed self-defense."[56] Specifically, the court considered

[42] United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

[43] *Id.* at 449.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* The prior Fifth Circuit decision upholding § 922(g)(8) was *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020).

[49] *Rahimi*, 61 F.4th at 449.

[50] United States v. Rahimi, No. 21-11001, 2022 WL 2070392, at *1 n.1 (5th Cir. June 8, 2022), *withdrawn*, *Rahimi*, 61 F.4th at 448.

[51] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1(2022).

[52] United States v. Rahimi, No. 21-11011, 2022 WL 2552046, at *1 (5th Cir. July 7, 2022) (per curiam order).

[53] *Rahimi*, 61 F.4th at 449–50.

[54] *Id.* at 451–52.

[55] *Id.* at 453 (quoting District of Columbia v. Heller, 554 U.S. 570, 581 (2008)).

[56] *Id.* at 455 (quoting *Bruen*, 597 U.S. at 27–28).

three categories of historical laws contemporaneous to the founding and later ratification of the Second Amendment: English and American laws providing for disarmament of dangerous individuals, English and American "going armed" laws, and colonial and early state surety laws.[57] Ultimately, the court concluded that these examples did not provide "relevantly similar" historical analogues for § 922(g)(8).[58] The court therefore struck down § 922(g)(8) under *Bruen* as violating the Second Amendment.[59]

The United States then petitioned the Supreme Court for review,[60] which the Court granted on June 30, 2023.[61] The sole question before the Court was whether the federal ban on firearm possession by individuals subject to domestic violence restraining orders passes constitutional muster.[62] As the Fifth Circuit stated, the validity of the underlying restraining order and Rahimi's breach of that order are not at issue, and the restraining order conditions (other than the firearm prohibition) "are plainly lawful and enforceable."[63]

The Supreme Court's Opinion

The Court, in an opinion by Chief Justice Roberts, held that § 922(g)(8) is consistent with the Second Amendment, reversing the Fifth Circuit and rejecting Rahimi's challenge to the law.[64] The Court emphasized that the scope of the Second Amendment is not limited to those laws that "precisely match . . . historical precursors" or that are "identical" to laws from 1791, as if the Second Amendment were "trapped in amber."[65] Instead, the Court explained that, under *Bruen*, a court is required to assess whether a challenged law is "relevantly similar" to laws from the country's regulatory tradition, with "why and how" the challenged law burdens the Second Amendment right being the "central" considerations in this inquiry.[66]

In the context of § 922(g)(8), the Court determined that sufficient historical support existed for the principle that, "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[67] The Court found that surety laws, which were designed to prevent firearm violence by requiring an individual who posed a credible threat of violence to another to post a surety, and "going armed" laws, which punished individuals who had menaced others or disturbed the public order with firearms through imprisonment or disarmament, established a historical tradition of similar firearm regulation.[68] In the Court's view,

[57] *Id.* at 456. "Going armed" laws refer to the ancient criminal offense of "going armed to terrify the King's subjects." *Id.* at 457. Surety laws were common law allowing an individual who could show "just cause to fear" injury from another to "demand surety of the peace against such person." *Id.* at 459. The individual causing fear would then be required to post monetary surety or be forbidden from carrying arms. *Id.*

[58] *Id.* at 460.

[59] *Id.* at 461.

[60] Petition for Writ of Certiorari, United States v. Rahimi, No. 22-915 (U.S. Mar. 17, 2023).

[61] *Rahimi*, 143 S. Ct. at 2688–89.

[62] Petition for Writ of Certiorari, *supra* note footnote 60, at I.

[63] *Rahimi*, 61 F.4th at 449 n.2.

[64] United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

[65] *Id.* at 1897–98.

[66] *Id.* at 1898.

[67] *Id.* at 1901.

[68] *Id.* at 1901–02.

§ 922(g)(8), which disarms an individual found by a judge to threaten the physical safety of another, "fits neatly" within this tradition.[69]

The Court emphasized that § 922(g)(8) is of "limited duration," prohibiting firearm possession for only as long as the individual is subject to the restraining order, and Rahimi himself was subject to the order for up to two years after his release from prison.[70] The Court also explained that, historically, individuals could be imprisoned for threatening others with firearms, so the regulatory burden imposed by § 922(g)(8) was less than the more severe penalty of imprisonment.[71]

Finally, the Court rejected the government's argument that Rahimi may be disarmed simply because he is not "responsible," clarifying that, although the Court's precedents describe "responsible" individuals as those who enjoy the Second Amendment right, this wording was a vague description rather than a legal line being drawn.[72]

Concurring and Dissenting Opinions

A majority of the Court—six Justices in total—wrote separately to concur or dissent, offering their individual views on how the Second Amendment and the *Bruen* standard should be properly interpreted both in this case and in future cases.

Justice Sotomayor's concurring opinion, joined by Justice Kagan, expressed her continued view that *Bruen* was wrongly decided and that a different legal standard should apply to Second Amendment cases.[73] She wrote separately to emphasize that when applying the *Bruen* historical tradition standard, however, the majority's methodology was the "right one."[74] In Justice Sotomayor's view, this is an "easy case," as § 922(g)(8) is "wholly consistent" with historical firearms regulations.[75] By contrast, she criticized the dissenting view as too "rigid," characterizing it as "insist[ing] that the means of addressing that problem cannot be 'materially different' from the means that existed in the eighteenth century," which would unduly hamstring modern policy efforts.[76]

In his concurring opinion, Justice Gorsuch underscored the difficulty in maintaining a facial challenge to a law, which requires a showing that the law has no constitutional applications.[77] He also defended the *Bruen* historical tradition standard, arguing that the original meaning of the Constitution, while "an imperfect guide," provides proper constraints on judicial decisionmaking and is better than unbounded alternatives such as an interest-balancing inquiry.[78] Justice Gorsuch also cautioned that the Court decided a narrow question—whether § 922(g)(3) "has *any* lawful scope"—and that future defendants could argue that § 922(g)(3) was unconstitutional under particular facts.[79]

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[69] *Id.* at 1901.

[70] *Id.* at 1902.

[71] *Id.*

[72] *Id.* at 1903.

[73] *Id.* at 1904 (Sotomayor, J., concurring).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 1905.

[77] *Id.* at 1907 (Gorsuch, J., concurring).

[78] *Id.* at 1909.

[79] *Id.* at 1910.

Justice Kavanaugh concurred to expound his view on the roles of text, history, and precedent in constitutional interpretation. He explained that unambiguous text controls and that history, rather than policy, is a more neutral and principled guide for constitutional decisionmaking when the text is unclear.[80] Using historical examples, Justice Kavanaugh illustrated his view on how pre- and post-ratification history may inform the meaning of vague constitutional text.[81] Next, he argued that balancing tests in constitutional cases are a relatively recent development, generally depart from tests centered on text and history, are inherently subjective, and should not be extended to the Second Amendment arena.[82] Finally, he opined that the majority's opinion was faithful to his perception of the appropriate roles of text, history, and precedent in constitutional adjudication in this particular case.[83]

Justice Barrett wrote a concurring opinion to explain her understanding of the relationship between *Bruen*'s historical tradition test and originalism as a method of constitutional interpretation. In her view, historical tradition is a means to understand original meaning, and, accordingly, historical practice around the time of ratification should be the focus of the legal inquiry.[84] In her view, history demonstrates that, "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Justice Barrett agreed with the majority that § 922(g)(8) "fits well within that principle."[85]

Justice Jackson also wrote a concurring opinion, agreeing that the majority fairly applied *Bruen* as precedent.[86] She wrote separately to highlight what she perceived as problems with applying the history-and-tradition standard in a workable manner.[87] She argued that *Rahimi* illustrates the "pitfalls of *Bruen*'s approach" by demonstrating the difficulty of sifting through the historical record and determining whether historical evidence establishes a tradition of sufficiently analogous regulation.[88] The numerous unanswered questions that remain even after *Rahimi*, in her view, result in "the Rule of Law suffer[ing]."[89] Stating that legal standards should "foster stability, facilitate consistency, and promote predictability," Justice Jackson concluded by arguing that "*Bruen*'s history-focused test ticks none of those boxes."[90]

Justice Thomas was the sole dissenter. In his view, the historical examples cited by the majority were not sufficient to establish a tradition of firearm regulation that justified § 922(g)(8).[91] According to Justice Thomas, courts should look to two metrics to evaluate whether historical examples of regulation are analogous to modern enactments: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[92] In his view, the two categories of evidence proffered by the government—historical laws disarming "dangerous" individuals and historical characterization of the right to bear arms as belonging only to "peaceable" citizens—

[80] *Id.* at 1912 (Kavanaugh, J., concurring).

[81] *Id.* at 1913–19.

[82] *Id.* at 1921.

[83] *Id.* at 1923.

[84] *Id.* at 1924 (Barrett, J., concurring).

[85] *Id.* at 1926 (quoting *Rahimi*, 144 S. Ct. at 1896 (majority opinion)).

[86] *Id.* (Jackson, J., concurring).

[87] *Id.* at 1928.

[88] *Id.*

[89] *Id.* at 1929.

[90] *Id.*

[91] *Id.* at 1930 (Thomas, J., dissenting).

[92] *Id.* at 1931–32.

did not impose comparable burdens as § 922(g)(8).[93] Justice Thomas argued that § 922(g)(8) was enacted in response to "interpersonal violence," whereas the historical English laws were concerned with insurrection and rebellion.[94] Ultimately, Rahimi could have been disarmed, in Justice Thomas's view, through criminal conviction but not through a restraining order.[95]

Considerations for Congress

Second Amendment law is rapidly developing. As noted above, *Bruen* has led to a variety of court decisions, including in *Rahimi*, addressing the constitutionality of various federal and state gun regulations.[96] *Rahimi* offers an example of how the Court will likely apply the *Bruen* standard going forward and offers further guidance on how to evaluate the constitutionality of firearms regulations.

If Congress wishes to establish new firearm regulations, amend existing regulations, or repeal regulations it believes are unconstitutional, it may wish to consider the historical pedigree of such laws in light of *Bruen*. Although *Rahimi* concerned one particular regulation—the ban on firearm possession by individuals subject to domestic violence restraining orders—its treatment of the historical analogue test is instructive more broadly. *Rahimi's* emphasis that a "historical analogue," and not a "historical twin," must support the modern regulation and its application of that principle in this case give further guidance as to the proper level of generality that courts, regulators, and stakeholders should use when analyzing the Second Amendment's application to other types of firearms laws.[97]

Rahimi also clarifies that the *Bruen* standard is likely to remain the legal standard for the foreseeable future. Although the *Bruen* historical tradition has been the subject of criticism, including by judges,[98] a clear majority of the Court reaffirmed the standard in *Rahimi*.

Finally, Congress can consider statutory changes to § 922(g)(8) in response to the Court's decision. The Court rejected a facial challenge to the law, but it left open the possibility of case-by-case (also known as "as applied") challenges in the future. Although the Court did not specify what those challenges might look like, other lower court judges have raised concerns. For example, Congress could consider whether any changes to § 922(g)(8) are appropriate in light of due process concerns, such as those raised in a concurrence by Judge James Ho to the Fifth Circuit's *Rahimi* decision about the nature of some restraining order proceedings.[99]

[93] *Id.* at 1933–37.

[94] *Id.* at 1941–44.

[95] *Id.* at 1947.

[96] *See supra* notes 21–23 and accompanying text.

[97] *See Rahimi*, 144 S. Ct. at 1898.

[98] *See, e.g.*, Order Dismissing Case, United States v. Bullock, No. 3:18-cr-00165-CWR-FKB (D. Miss. June 28, 2023) (quoting Gordon S. Wood, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 446 (2013)) (criticizing *Bruen*, arguing that "the Court continues to engage in 'law office history'—that is, history selected to 'fit the needs of people looking for ammunition in their causes'—in Constitutional interpretation.").

[99] *See Rahimi*, 61 F.4th at 465 (Ho, J., concurring) (highlighting that restraining order proceedings offer fewer protections for the accused than criminal proceedings do).

Alexander v. South Carolina State Conference of the NAACP: Racial Gerrymandering[100]

The Supreme Court has long grappled with claims of unconstitutional racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment.[101] According to the Court, if race is the predominant factor in the drawing of district lines, then reviewing courts must apply a "strict scrutiny" standard of review.[102] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a district and that the design of the district was narrowly tailored to further that compelling interest.[103]

On May 23, 2024, the Court, in *Alexander v. South Carolina State Conference of the NAACP*, partially reversed a three-judge federal district court decision that had invalidated portions of the South Carolina congressional redistricting map as an unconstitutional racial gerrymander.[104] The Court held that the district court's determination that racial considerations predominated in the design of South Carolina's Congressional District 1 in violation of the Equal Protection Clause was clearly erroneous, as was the district court's finding of racial vote dilution.[105] The Supreme Court also clarified how reviewing courts should evaluate claims of unconstitutional racial gerrymandering, particularly when citizens' race and partisan preference are closely correlated.[106] In sum, the Court held that a challenger asserting racial gerrymandering must, as a threshold matter, "disentangle race and politics" to prove that a legislature was primarily motivated by race rather than politics and that a reviewing court must "start with a presumption that the legislature acted in good faith."[107]

Background

After the 2020 decennial census, South Carolina redrew its congressional redistricting map.[108] Due to an increase in population in District 1 and a decrease in population in District 6, the South Carolina legislature determined that redistricting was necessary to comport with the constitutional requirement of equal population among districts, also known as the principle of *one person, one vote*.[109] The legislative subcommittee tasked with redrawing the map stated that the redistricting process would be guided by traditional redistricting principles, including the goals of contiguity

[100] CRS Legislative Attorney L. Paige Whitaker wrote this section of the report.

[101] The Supreme Court first recognized a claim of racial gerrymandering under the Fourteenth Amendment's Equal Protection Clause in *Shaw v. Reno*, 509 U.S. 630, 645 (1993), holding that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." For an overview discussion, see CRS Legal Sidebar LSB10639, *Congressional Redistricting 2021: Legal Framework,* by L. Paige Whitaker (2021).

[102] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995).

[103] *See id.* at 920 ("To [sic] satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling [sic] interest.").

[104] 144 S. Ct. 1221, 1252 (2024), *rev'g* S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 177 (D.S.C. 2023).

[105] *Id.* at 1251.

[106] *See id.* at 1241. ("[T]he application of this test calls for particular care when the defense contends that the driving force in its critical districting decisions (namely, partisanship) was a factor that is closely correlated with race.").

[107] *Id.* at 1233.

[108] *See id.* at 1237.

[109] *See id.* For discussion of the "one-person, one-vote" principle, see Whitaker, *supra* note 101.

and incumbent protection.[110] In addition, the South Carolina legislature stated that its goals were political—that is, to "create a stronger Republican tilt in District 1."[111] Ultimately, the enacted congressional redistricting map "increas[ed] District 1's projected Republican vote share by 1.36% to 54.39%" and slightly increased District 1's black voting-age population (BVAP) from 16.56% to 16.72%.[112]

The South Carolina State Conference of the NAACP and a District 1 voter (the challengers) filed suit in federal district court challenging Districts 1, 2, and 5 as racial gerrymanders and for creating unlawful racial vote dilution.[113] Although the three-judge federal district court denied the challengers' claims with regard to Districts 2 and 5, the district court held that South Carolina created District 1 with the goal of a 17% BVAP in violation of the Equal Protection Clause.[114] (As required by federal law, a three-judge federal district court panel heard the case.[115]) Similarly, the district court held that the state's use of race in creating District 1 "unlawfully diluted the black vote."[116] Accordingly, the district court permanently enjoined the state from holding elections in District 1 until the court approved a revised congressional redistricting map.[117] The State of South Carolina appealed to the U.S. Supreme Court, which noted probable jurisdiction on May 18, 2023.[118] (Under federal law, a party may appeal directly to the Supreme Court any decision that is required to be heard by a three-judge federal district court.[119]) The state argued that the district court committed legal and factual error by determining that race played a predominant role in how the legislature designed District 1 and by failing to "properly disentangle race from politics."[120]

While awaiting a ruling by the Supreme Court, in March 2024, the three-judge federal district court ordered, in an "unusual case," that the 2024 congressional elections be held under the existing congressional redistricting map.[121] The district court determined that in view of the impending primary election date, without a remedial redistricting map in place, "the ideal must bend to the practical."[122]

The Supreme Court's Opinion

In *Alexander v. South Carolina State Conference of the NAACP*, in a six-to-three decision, the Supreme Court reversed in part and remanded in part the district court ruling that racial considerations unconstitutionally predominated in the design of South Carolina's Congressional District 1 and created racial vote dilution.[123] In so ruling, the *Alexander* Court addressed how

[110] *See Alexander*, 144 S. Ct. at 1237.

[111] *Id.*

[112] *Id.* at 1238.

[113] *See id.*

[114] *See Alexander*, 144 S. Ct. at 1238.

[115] 28 U.S.C. § 2284. For discussion of three-judge federal district courts, see CRS In Focus IF12746, *Three-Judge District Courts*, by Joanna R. Lampe (2024).

[116] *Id.*

[117] *See id.*

[118] *See id.* (citing Alexander v. S.C. State Conf. of the NAACP, 143 S. Ct. 2456 (2023)).

[119] 28 U.S.C. § 1253.

[120] *See Alexander*, 144 S. Ct. at 1240.

[121] S.C. State Conf. of the NAACP v. Alexander, No. 21-cv-03302, 2024 WL 1327340, at *2 (D.S.C. Mar. 28, 2024) (unpublished order).

[122] *Id.*

[123] *See Alexander*, 144 S. Ct. at 1233.

reviewing courts should evaluate claims of unconstitutional racial gerrymandering when the race and partisan preferences of citizens are closely correlated, such as in South Carolina, where, in the 2020 presidential election, "at least 90% of black voters voted for the Democratic candidate."[124] Justice Alito wrote the opinion of the Court, which was joined by Chief Justice Roberts and Justices Gorsuch, Kavanaugh, and Barrett; Justice Thomas also joined, with the exception of Part III-C of the opinion.

Writing for the Court majority, Justice Alito rejected, under clear-error review, the conclusion of the district court that the South Carolina legislature predominantly used race in the design of District 1.[125] As the Court explained, clear-error review means that a court cannot disregard the district court's factual findings unless, after reviewing the full record, a court is "left with the definite and firm conviction that a mistake has been committed."[126] The Court applied clear-error review because the state government's primary argument in this case—that the district court failed to properly distinguish between race and politics—criticizes "the factual basis of the District Court's findings."[127]

At the outset of its opinion, the Supreme Court emphasized the distinctions between claims of partisan and racial gerrymandering.[128] A claim of unconstitutional partisan gerrymandering is nonjusticiable by a federal court, and, therefore, the Court underscored that it is permissible under the U.S. Constitution for a legislature to create a redistricting map to further a partisan goal.[129] In contrast, the Court stated that if a legislature creates a redistricting map using racial considerations as a predominant factor, then a reviewing court will apply a strict scrutiny standard of review and could hold the map unconstitutional under the Equal Protection Clause.[130] Nonetheless, the Court announced that the process of redistricting remains the "traditional domain" of state legislatures.[131] Further, in view of the complexity of redistricting, the Court reiterated from a prior case that federal courts need to "exercise extraordinary caution" in reviewing claims of unconstitutional racial gerrymandering.[132] Such caution is needed, the Court explained, because a federal court's evaluation of a redistricting map constitutes "a serious intrusion on the most vital of local functions."[133] Hence, the Court concluded that when evaluating a claim of racial gerrymandering, a reviewing court should "start with a presumption that the legislature acted in good faith."[134]

The Court identified additional reasons for adherence to the presumption of legislative good faith in the context of evaluating claims of unconstitutional racial gerrymandering.[135] First, the

[124] *Id.* at 1235.

[125] *Id.* at 1240.

[126] *Id.* (quoting Cooper v. Harris, 581 U.S. 285, 309 (2017)).

[127] *Id.*

[128] *See id.* at 1233.

[129] *Id.* at 1233, 1253 (citing Rucho v. Common Cause, 588 U.S. 684 (2019)). For discussion of the Supreme Court's decision in *Rucho*, holding claims of unconstitutional partisan gerrymandering nonjusticiable, see CRS Legal Sidebar LSB10324, *Partisan Gerrymandering Claims Not Subject to Federal Court Review: Considerations Going Forward*, by L. Paige Whitaker (2019).

[130] *Alexander*, 144 S. Ct. at 1233. ("[A]s far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting. By contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional.").

[131] *Id.* at 1233.

[132] *Id.* (quoting Miller v. Johnson, 515 U.S. 900, 915–16 (1995)).

[133] *Id.* at 1234.

[134] *Id.* at 1233.

[135] *Id.* at 1236.

presumption reflects the respect of the judiciary for state legislative decision making.[136] Second, if a federal court holds that race was the driving force behind a legislature's redistricting decisions, the court is thereby accusing legislators of "offensive and demeaning" behavior, which the courts "should not be quick to hurl."[137] Third, the Court determined that it should guard against challengers who seek to use the federal courts as "weapons of political warfare" when unable to achieve partisan victories in the legislative branch.[138]

In reviewing the district court's ruling in *Alexander*, the Supreme Court determined that the challengers failed to meet the "demanding" burden of proving that that the "legislature subordinated traditional race-neutral districting principles ... to racial considerations."[139] That is, the Court found that the challengers failed to "disentangle race and politics" to prove that a legislature was primarily motivated by race rather than by politics.[140] As in this case, when a state defends its redistricting map as a partisan gerrymander, the Court announced that the challengers are faced with a "special challenge[]" of proving that race "*drove* a district's lines."[141] If *either* race or politics could be the reason for a district's contours, then the challenger "has not cleared its bar."[142] This burden "is especially difficult" to meet in a case where the challengers are presenting only circumstantial evidence, the Court explained, because when race and politics are closely aligned, a partisan gerrymandered map "can look very similar to a racially gerrymandered map."[143] In *Alexander*, the Court concluded that the challengers proffered only weak circumstantial evidence, such as "flawed expert reports," and presented no direct evidence to support their claim.[144] For example, the Court criticized the district court for finding, absent direct evidence, that the legislature created District 1 "with a racial 'target,' namely, the maintenance of a 17% BVAP," and therefore concluding that this "deliberate use of race rendered District 1's lines unlawful."[145] To the contrary, the Court observed that the nonpartisan employee and his colleagues who created the redistricting map testified that they used only political data and "steadfastly denied using race."[146] In Part III-C of the opinion, the Court determined that the district court's reliance on four expert reports was "flawed" because they disregarded certain traditional redistricting criteria, including geography and partisan interests.[147] Accordingly, the Court concluded that the reports did not support a finding that race was a predominant factor in drawing District 1.[148]

The Supreme Court further held that the district court erred by failing to draw an adverse inference against the challengers because they did not adduce an alternative redistricting map that

[136] *Id.* ("First, this presumption reflects the Federal Judiciary's due respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution.").

[137] *Id.* (quoting *Miller*, 515 U.S. at 912) ("Second, when a federal court finds that race drove a legislature's districting decisions, it is declaring that the legislature engaged in 'offensive and demeaning' conduct that 'bears an uncomfortable resemblance to political apartheid.'") (internal citations omitted).

[138] *Id.* (quoting *Cooper*, 581 U.S. at 335) ("Third, we must be wary of plaintiffs who seek to transform federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'").

[139] *Id.* at 1240.

[140] *Id.* at 1244.

[141] *Id.* at 1235 (quoting *Cooper*, 581 U.S. at 308).

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1240.

[145] *Id.* at 1241.

[146] *Id.*

[147] *Id.* at 1243.

[148] *Id.*

would achieve the legislature's partisan goals while maintaining racial balance.[149] As a threshold matter, the Court stated that, absent an alternative map, it is difficult for a challenger to overcome the Court's presumption that a legislature "acted in good faith," which directs reviewing courts to draw an inference in favor of the legislature when faced with evidence that could support different conclusions.[150] According to the Court, an alternative redistricting map, which is "remarkably easy to produce" with the use of a computer, can accomplish "the critical task of distinguishing between racial and partisan motivations when race and partisanship are closely entwined," particularly when there is little direct evidence of a racial gerrymander.[151] The Court explained that the adverse inference "may be dispositive in many, if not most, cases" in which the challenger is unable to produce direct evidence or "extraordinarily powerful circumstantial evidence" of an unconstitutional racial gerrymander.[152] The Court criticized the district court for misunderstanding Supreme Court precedent by holding that an alternative map is pertinent only to demonstrating that a remedy is possible.[153] Instead, the Court announced that reviewing courts should interpret a challenger's failure to adduce an alternative redistricting map "as an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense that the districting lines were 'based on a permissible, rather than a prohibited, ground.'"[154]

With regard to the district court's finding of racial vote dilution, the Supreme Court likewise held that it was clearly erroneous because the district court relied on the "same findings of fact and reasoning" that informed its analysis of the racial gerrymandering claim and applied the wrong legal standard.[155] In contrast to a racial gerrymandering claim, the Court emphasized that a challenger in a vote dilution claim cannot prevail by "simply" showing that race was a predominant factor in the creation of a redistricting map.[156] Instead, a challenger must show that a redistricting map "'has the purpose *and* effect' of diluting the minority vote."[157] As a result, the Court remanded the challengers' claim of vote dilution.[158]

Concurring and Dissenting Opinions

Justice Thomas wrote a separate opinion concurring with all but Part III-C of the majority opinion.[159] He argued that the Court majority "exceeded the proper scope of clear-error review" by analyzing the expert reports.[160] He maintained, however, that the court's clear-error review was unnecessary, as reversible legal errors resulted from the district court (1) not considering evidence indicating that race and politics were correlated under a presumption of legislative good faith and (2) not accounting for the challengers' failure to adduce an alternative redistricting map.[161] More generally, Justice Thomas wrote to voice his disagreement with the Court adjudicating claims of

[149] *Id.* at 1250.

[150] *Id.* at 1235–36.

[151] *Id.* at 1249, 1251.

[152] *Id.* at 1250.

[153] *Id.* ("The District Court, however, misunderstood our case law when it held that an alternative map is relevant only for the purpose of showing that a remedy is plausible.").

[154] *Id.*

[155] *Id.* at 1251.

[156] *Id.* at 1252.

[157] *Id.* (citing Shaw v. Reno, 509 U.S. 630, 649 (1993)).

[158] *See id.*

[159] *See id.* at 1252–68 (Thomas, J., concurring).

[160] *See id.* at 1252.

[161] *Id.*

unconstitutional racial gerrymandering and vote dilution, contending that they present nonjusticiable political questions.[162] According to Justice Thomas, the Constitution assigns the process of redistricting to the political branches of government, and courts lack judicially manageable standards for evaluating such claims.[163]

Justice Kagan wrote a dissenting opinion, which Justices Sotomayor and Jackson joined.[164] Characterizing the majority opinion as "seriously wrong," the dissent argued that the Court did not properly apply the clear-error standard of review.[165] According to the dissent, clear-error review directed the Court to afford the district court's findings "significant deference," meaning that the Court was required to uphold the district court if its determinations were "plausible."[166] In this case, the dissent argued, based on "extensive evidence, including expert statistical analyses," the district court's determination that the state engaged in unconstitutional racial gerrymandering was "more than plausible."[167] More broadly, the dissent maintained that the Court revised the law "to impede racial-gerrymandering cases generally" by holding that courts should afford deference to state legislatures by presuming good faith instead of properly affording deference to a district court's findings of fact.[168] Further, the dissent criticized the Court for holding that "courts must draw an adverse inference against those plaintiffs when they do not submit a so-called alternative map—no matter how much proof of a constitutional violation they otherwise present."[169] This "new approach," the dissent contended, provides state legislators and mapmakers with "an incentive to use race as a proxy to achieve partisan ends."[170]

Considerations for Congress

The Supreme Court's ruling in *Alexander v. South Carolina State Conference of the NAACP* has both short- and long-term implications for the redistricting process in South Carolina and across the nation. In the short term, the ruling reversed a federal district court's invalidation of the South Carolina congressional redistricting map, thereby permitting the state to hold elections—beyond the 2024 elections—under the map as drawn.[171] In the long term, the decision established a "high bar" for racial gerrymandering claims going forward, particularly in cases relying on circumstantial evidence, and will likely result in fewer successful challenges.[172]

[162] *Id.* at 1254 ("[R]acial gerrymandering and vote dilution claims brought under the Fourteenth and Fifteenth Amendments are nonjusticiable."). The Supreme Court's political question doctrine instructs that federal courts should not resolve questions that would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on powers that the Constitution vests in the legislative or executive branches. The political question doctrine is intended to maintain the separation of powers and respect the roles of the legislative and executive branches in interpreting the Constitution. For further discussion, see CRS Legal Sidebar LSB10761, *The Political Question Doctrine: Political Process, Elections, and Gerrymandering (Part 6)*, by Joanna R. Lampe (2022).

[163] *Id.* at 1253.

[164] *See id.* at 1268–87 (Kagan, J., dissenting).

[165] *Id.* at 1269.

[166] *Id.* (quoting *Cooper*, 581 U.S. at 293).

[167] *Id.* at 1270, 1286.

[168] *Id.* at 1269.

[169] *Id.* (characterizing the adverse inference requirement as "micro-management of a plaintiff's case [which] is elsewhere unheard of in constitutional litigation.").

[170] *Id.* at 1269, 1286.

[171] *Id.* at 1233.

[172] *Id.* at 1235.

Further, the decision appears to be indicative of a shift in how the Court views such claims.[173] The *Alexander* decision requires courts, in reviewing racial gerrymandering claims, to afford the state legislature the presumption of legislative good faith.[174] In so doing, the Court clarified that in cases where a state defends a redistricting map as a *partisan* gerrymander and the challengers are relying on circumstantial evidence, a reviewing court must draw an adverse inference against a challenger who does not adduce an alternative map that preserves racial balance while achieving the state's political goals. Therefore, in effect, a challenger is required to produce an alternative map in such cases.

Nonetheless, the practical consequences of the Supreme Court's ruling in *Alexander* may be less extensive than appears at first glance. While *Alexander* addressed constitutional racial gerrymandering claims, challenges to redistricting maps are also frequently brought under Section 2 of the Voting Rights Act.[175] Section 2 prohibits redistricting maps that result in minority vote dilution—i.e., the diminishing or weakening of minority voting power—and, under certain circumstances, may require the creation of one or more "majority-minority" districts in a congressional redistricting map.[176] A majority-minority district is one in which a racial or language minority group comprises a voting majority. In 2023, in *Allen v. Milligan*, the Supreme Court held that an Alabama congressional redistricting map likely violated Section 2 and reaffirmed the constitutionality of the law in the redistricting context.[177] In addition, challengers may bring racial vote dilution challenges under the Equal Protection Clause, which are distinct from racial gerrymandering claims, as the *Alexander* Court emphasized.[178] Hence, other avenues for challenging redistricting maps remain. One law professor has suggested that, since the Court's 2019 decision in *Rucho v. Common Cause*[179] (holding that claims of unconstitutional partisan gerrymandering are nonjusticiable), legislatures "no longer need to use race as a proxy or a means to pursue or to defend partisan gerrymanders," which may generate fewer racial gerrymandering claims.[180]

As the Court in *Alexander* resolved a question of constitutional law under the Equal Protection Clause, Congress cannot legislatively alter the Supreme Court's interpretation. It is likely, however, that Congress could enact federal laws establishing standards for congressional redistricting. For example, federal law currently establishes single-member districts and the timing of apportionment,[181] and during the nineteenth and twentieth centuries, federal apportionment laws with limited duration established requirements for congressional districts such as contiguousness and compactness.[182] Congress's authority to legislate in this area stems

[173] *See id.* at 1236 (characterizing the standard for racial gerrymandering claims as "extraordinarily onerous because the Fourteenth Amendment was designed to eradicate race-based action.").

[174] *Id.* at 1235–36.

[175] Pub. L. No. 89-110, 79 Stat. 437 (1965) (52 U.S.C. § 10301).

[176] *Id.*

[177] 599 U.S. 1, 17, 38 (2023).

[178] *See Alexander*, 144 S. Ct. at 1252.

[179] 588 U.S. 684, 718 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

[180] Richard Pildes, *Why the Stakes in the SC Redistricting Case are Lower Than Some Might Think*, ELECTION L. BLOG (May 23, 2024, 12:37 PM), https://electionlawblog.org/?p=143251.

[181] *See* 2 U.S.C. § 2a (establishing that apportionment of the House of Representatives occur after each decennial census) and 2 U.S.C. § 2c (requiring that only one Representative be elected per congressional district, i.e., a single-member district).

[182] *See, e.g.*, Act of Aug. 8, 1911, ch. 4, 5, 37 Stat. 13 (providing for the apportionment of Representatives under the thirteenth census).

from the Elections Clause of the Constitution,[183] providing states with the initial and principal authority to regulate the times, places, and manner of elections within their jurisdictions and Congress with the authority to "override" such state laws to regulate federal elections.[184] Legislation proposing to establish standards for congressional redistricting maps would need to comport with the Elections Clause, as interpreted by the Supreme Court.

Campos-Chaves v. Garland: Notices to Appear and Recissions of Removal Orders Entered in Absentia Under the Immigration and Nationality Act[185]

The Immigration and Nationality Act (INA)[186] governs how people are admitted to, and removed from, the United States.[187] Aliens targeted for removal in the interior of the United States may be placed in removal proceedings under 8 U.S.C. § 1229a.[188] Removal proceedings are conducted before an immigration judge (IJ) within the DOJ's Executive Office for Immigration Review (EOIR).[189] In removal proceedings before an EOIR IJ, the alien has the right to (1) obtain counsel at his or her own expense, (2) apply for available relief from removal (e.g., asylum), (3) present testimony and evidence on his or her own behalf, and (4) administratively appeal an adverse decision to the Board of Immigration Appeals (BIA).[190] An alien may also seek judicial review of a final order of removal.[191]

Removal proceedings begin when the government files a charge of removability against an individual.[192] Federal statute requires the federal government to provide the alien with a written notice of the proceedings known as a "Notice to Appear" (NTA).[193] The NTA must contain certain information including, as relevant here, "[t]he time and place at which the proceedings will be held."[194] At times, the government has provided written notices that fail to specify the time, place, or date of removal hearings, instead stating that the time and place would be provided at a later date.[195] The BIA has held that an NTA lacking time and place specification is sufficient to vest an

[183] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). *See* Cong. Research Serv., *Congress and Elections Clause*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S4-C1-3/ALDE_00013640/(last visited Sept. 11, 2024).

[184] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814–15 (2015) ("The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation.").

[185] CRS Legislative Attorney Kelsey Y. Santamaria wrote this section of the report.

[186] Immigration & Nationality Act, ch. 477, 66 Stat. 163 (1952).

[187] Pereida v. Wilkinson, 592 U.S. 224, 227 (2021).

[188] 8 U.S.C. § 1229a.

[189] *See* 8 C.F.R. § 1003.0.

[190] *See generally* CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*, by Hillel R. Smith (2021).

[191] *See* 8 U.S.C. § 1252.

[192] *See id.* § 1229(a).

[193] *Id.*

[194] *Id.* § 1229(a)(1)(G)(i).

[195] *Cf.* Campos-Chaves v. Garland, 144 S. Ct. 1637, 1644 (2024) ("The NTA provided the address of the immigration court, but told Campos-Chaves to appear on "a date to be set" and at "a time to be set."); Pereira v. Sessions, 585 U.S. (continued...)

immigration court with jurisdiction over an individual's removal proceedings.[196] Courts of appeals have affirmed the BIA's interpretation that an NTA need not initially specify the time and place of the alien's hearing in order to commence removal proceedings.[197]

However, an NTA that omits this information may have other implications to an alien's eligibility for certain forms of relief from removal. The 2024 decision *Campos-Chaves v. Garland*[198] is the third case in recent years in which the Supreme Court has addressed the immigration implications of such a statutorily noncompliant NTA. In *Campos-Chaves*, the Supreme Court addressed whether a removal order entered in absentia may be rescinded when the alien had received an NTA without a specified time and place for the hearing and then received a later notice of hearing with the time and place of the hearing.[199]

Legal Background

Statutory Framework

To initiate removal proceedings under 8 U.S.C. § 1229a, a separate statute—§ 1229(a)(1)—requires the government to provide the alien with an "NTA" including, among other information, the time and place of the proceedings.[200] In addition, § 1229(a)(2) permits the government to serve, "in the case of any change or postponement in the time and place of such proceedings," a written notice containing "the new time or place of proceedings" and the consequences of failing to attend.[201]

Under § 1229a(a)(5)(A), an alien who fails to attend a removal hearing may be ordered removed in absentia.[202] The alien must have received "written notice required under paragraph (1) or (2) of section 1229(a) ... " and the government must "establish[] by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable."[203] Section 1229a(b)(5)(C)(ii) allows for the rescission of an in absentia removal order on the basis of defective notice of the hearing—that is, if the alien "demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2)" of § 1229(a).[204]

Prior Supreme Court Decisions

Both the 2018 decision *Pereira v. Sessions* and the 2021 decision *Niz-Chavez v. Garland* involved questions over eligibility for cancellation of removal when the petitioners had received NTAs that

198, 206 (2018) ("Critical here, the notice did not specify the date and time of Pereira's removal hearing. Instead, it ordered him to appear before an Immigration Judge in Boston 'on a date to be set at a time to be set.'").

[196] Arambula-Bravo, 28 I. & N. Dec. 388, 389–91 (B.I.A. 2021), *petition for review denied*, 2024 WL 1299986 (9th Cir. filed Mar. 27, 2024); *see also* Fernandes, 28 I. & N. Dec. 605, 607 (B.I.A. 2022) (further clarifying that the time and place requirement was a non-jurisdictional claims-processing rule).

[197] *See, e.g.*, Chery v. Garland, 16 F.4th 980, 986–87 (2d Cir. 2021); Chavez-Chilel v. Att'y Gen. U.S., 20 F.4th 138, 142–43 (3d Cir. 2021); United States v. Cortez, 930 F.3d 350 (4th Cir. 2019).

[198] 144 S. Ct. 1637, 1643 (2024).

[199] *Id*.

[200] 8 U.S.C. § 1229(a)(1).

[201] *Id.* § 1229(a)(2).

[202] *Id.* § 1229a(a)(5)(A)

[203] *Id.* § 1229a(b)(5)(A).

[204] *Id.* § 1229a(b)(5)(C)(ii).

failed to specify the time and place of their hearings.[205] Under § 1229b(b), a nonpermanent resident who is subject to removal proceedings and has accrued ten years of continuous physical presence and meets other requirements may be eligible for cancellation of removal, a form of discretionary relief.[206] Under the so-called "stop-time rule" found in § 1229b(b)(1), "any period of ... continuous physical presence in the United States shall be deemed to end ... when the alien is served a notice to appear under section 1229(a)."[207]

In *Pereira*, the Court held in an eight-to-one decision that an NTA that fails to specify the time and place of the hearing does not trigger the stop-time rule.[208] In other words, the service of a defective NTA does not end the accrual of the petitioner's physical presence for purposes of establishing eligibility for cancellation of removal.[209] The majority opinion, written by Justice Sotomayor, cited the statutory language in § 1229(b)(d)(1), which provides that the continuous period ends "when the alien is served a notice to appear under section 1229(a)."[210] It then explained that in § 1229(a), an "NTA" is "a written notice ... specifying ... "[t]he time and place at which the proceedings will be held."[211] The Court observed that an NTA that does not include both the "when" and the "where" cannot "reasonably" be expected to result in persons appearing at their hearings.[212]

Then, in the 2021 decision *Niz-Chavez v. Garland*, the Court considered whether the government must serve a *single* document that includes all required information or whether the government may serve that information over the course of multiple documents.[213] In a six-to-three decision, the Court held that the government must serve a single document that includes all the required information for the notice to trigger the stop-time rule.[214] In the majority opinion drafted by Justice Gorsuch, the majority reasoned that "a" in "when the alien is served *a* notice to appear under section 1229(a)" means a single document with the required information, as opposed to a series of documents.[215] The Court also remarked that statutory structure and legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[216] supported this interpretation.[217] In a dissenting opinion, Justice Kavanaugh, joined by Chief Justice Roberts and Justice Alito, argued that the provision of notice in an installment of two documents is sufficient to trigger the stop-time rule.[218]

Factual Background

Campos-Chaves comprised three consolidated appeals of cases brought by aliens who, pursuant to § 1229a(b)(5)(C)(ii), moved to rescind their in absentia removal orders because they did not

[205] Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021).

[206] 8 U.S.C. § 1229b(b).

[207] *Id.* § 1229b(b)(1).

[208] *Pereira*, 585 U.S. at 202.

[209] *Id.*

[210] *Id.* at 209.

[211] *Id.* at 209.

[212] *Id.* at 212.

[213] Niz-Chavez v. Garland, 593 U.S. 155, 157–58 (2021).

[214] *Id.* at 172.

[215] *Id.* at 161–62.

[216] Pub. L. No. 104-208, tit. VIII, div. C, 110 Stat. 3009, 3009-546.

[217] *Niz-Chavez*, 593 U.S. at 165–69.

[218] *Id.* at 184 (Kavanaugh, J., dissenting).

receive proper notice of their hearings in accordance with the statutory framework.[219] The named petitioner, Moris Esmelis Campos-Chaves, entered the United States in 2005 without inspection by immigration authorities (i.e., surreptitiously) near Laredo, Texas.[220] Three days later, the government initiated removal proceedings by serving an NTA, charging that he was removable under § 1182(a)(6)(A)(i) as an alien present in the United States without being admitted or paroled.[221] While the NTA provided the address of the immigration court, the NTA directed Campos-Chaves to appear on "a date to be set" and at "a time to be set."[222] A few months later, the government sent a notice of hearing listing the hearing date as September 20, 2005, at 9 a.m.[223] Campos-Chaves did not attend that hearing, and the IJ ordered him removed in absentia.[224] In 2018, Campos-Chaves moved to reopen his removal proceedings on the basis that he received a defective NTA that failed to specify the date and time of his hearing.[225] The IJ denied his motion, and the BIA dismissed his appeal.[226] Campos-Chaves then appealed to the Fifth Circuit, which denied his petition on the ground that he did not dispute that he received the subsequent notice of hearing.[227]

Like Campos-Chaves, the other two cases involved petitioners who received NTAs that stated that the date and time of the proceedings would be determined at a later date and then received subsequent notices of hearings with a time and date.[228] The other two petitioners similarly failed to appear at the scheduled hearings and were ordered removed in absentia.[229] They moved to rescind their removal orders on the ground that they received defective NTAs.[230] The IJ and BIA disagreed with the petitioners.[231] On appeal, the Ninth Circuit held that the lack of a single-document NTA rendered the in absentia removal order rescindable.[232] The Ninth Circuit denied the government's petitions to rehear the cases en banc.[233]

The Supreme Court's Opinion

The Supreme Court granted certiorari to review these three consolidated appeals.[234] The question before the Court was "whether the failure to receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. 1229(a) precludes an additional document from providing adequate notice under paragraph (2), and renders any in absentia removal order subject, indefinitely, to recission."[235] In a five-to-four decision, the majority held that the petitioners

[219] Campos-Chaves v. Garland, 144 S. Ct. 1637, 1644 (2024).

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.* at 1645.

[227] *Id.*; Campos-Chaves v. Garland, 54 F.4th 314, 315 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2687 (2023), *aff'd*, 144 S. Ct. 1637 (2024).

[228] *Campos-Chaves*, 144 S. Ct. at 1645–46.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 1645–46.

[232] *Id.* at 1645.

[233] *Id.* at 1646.

[234] *See* Campos-Chaves v. Garland, 143 S. Ct. 2687 (2023); Garland v. Singh, 143 S. Ct. 2688 (2023).

[235] Brief for the Respondent, Campos-Chaves v. Garland, No. 22-674, 2023 WL 2664680. (U.S. Mar. 24, 2023).

cannot seek rescission of their in absentia removal orders on the basis of defective notice under § 1229a(b)(5)(C)(ii).[236] The Court reasoned that the petitioners had received proper notice when they received a paragraph (2) notice of a change in time or place of proceedings.[237]

In the majority opinion written by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Kavanaugh, and Barrett, the Court reasoned that the phrase "notice in accordance with paragraph (1) or (2)" in § 1229a(b)(5)(C)(ii)—the provision governing rescission of a removal order when an alien fails to appear at a proceeding—means that either a paragraph (1) NTA or a paragraph (2) notice of hearing is sufficient to defeat recission.[238] The Court ruled that the word "or" has a disjunctive meaning in this statutory context and that, therefore, either paragraph (1) or paragraph (2) notice is sufficient to "count."[239] The Court also looked to the broader statutory context, specifically § 1229a(b)(5)(A), which sets the preconditions for an alien to be removed in absentia.[240] That subparagraph provides:

> Any alien who, after written notice required under paragraph (1) or (2) of Section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if [immigration authorities] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable.[241]

The Court explained that § 1229a(b)(5)(A) does not require notice under *both* paragraphs (1) and (2) of § 1229(a) before an alien may be removed in absentia.[242] The Court further observed how § 1229a(b)(5)(A) refers to "*the* written notice," indicating that the required notice "is tied to a singular proceeding."[243]

According to the majority, the notice that "matters" for purposes of rescission is the one that informed the alien of the time and date of the missed hearing at which he or she was ordered removed.[244] The Court reasoned that this understanding is consistent with § 1229a(b)(5)(A), which ties "the written notice" to the specific missed proceeding.[245] Therefore, a paragraph (2) notice can provide valid notice even if the initial NTA was deficient.[246] The majority rejected the argument that the terms "change" and "new" in paragraph (2)—which provides for written notice with "the new time or place of the proceedings" "in the case of any change or postponement in the time and place of such proceedings"—require a prior compliant NTA.[247] The majority found that the petitioners had received "notice in accordance with paragraph (1) or (2)" because they had received paragraph (2) notices for the hearings they did not attend, even though their initial NTAs were defective in not providing a time and place.[248] As a result, the Court held, the

[236] *Campos-Chaves*, 144 S. Ct. at 1643.

[237] *Id.*

[238] *Id.* at 1647.

[239] *Id.* at 1647.

[240] *Id.*

[241] 8 U.S.C. § 1229a(b)(5)(A).

[242] *Campos-Chaves*, 144 S. Ct. at 1647–48.

[243] *Id.*

[244] *Id.* at 1649.

[245] *Id.*

[246] *Id.*

[247] *Id.* at 1650.

[248] *Id.* at 1649.

petitioners may not seek rescission of their removal orders entered in absentia on the ground of defective notice.[249]

The Court rejected the petitioners' reliance on *Pereira* in arguing that a paragraph (2) notice requires an initial, compliant NTA.[250] The Court described *Pereira* as concerning the "narrow" question of the stop-time rule under § 1229b(d)(1)(A) as opposed to the meaning of § 1229(a)(2).[251] Likewise, the majority rejected the invocation of *Niz-Chavez v. Garland* as "far[ing] no better."[252] The Court remarked, however, that "[t]oday's decision does not mean that the Government is free of its obligation to provide an NTA."[253]

Dissenting Opinion

In a dissenting opinion joined by Justices Sotomayor, Kagan, and Gorsuch, Justice Jackson argued that the majority misread the plain text of the statute and ignored the role of a compliant NTA under § 1229(a)(1).[254] She described an NTA under paragraph (1) as "indispensable" because it "initiates the removal process as a matter of law."[255] She further noted that § 1229(a)(1) requires that the NTA must contain specific information, including the time and place of the removal proceeding and the consequences of failing to appear.[256] While a paragraph (2) notice contains information that overlaps with a paragraph (1) NTA, Justice Jackson stated, it does not "undermine the mandatory nature of paragraph (1)'s requirements."[257] She then cited the Court's prior decision in *Pereira*, in which the Court held that "an NTA that does not contain the requisite time-and-place information does not qualify as an NTA at all."[258] She further observed the Court's holding in *Niz-Chavez* that a deficient NTA does not "retroactively transform[] into one that satisfies §1229(a)(1) if the Government backfills that missing information using a later notice" and that "the government must issue a single statutorily compliant document."[259] Disagreeing with the majority's conclusion that paragraph (1) or paragraph (2) notice is sufficient for purposes of § 1229a(b)(5)(C)(ii), Justice Jackson reasoned that, "if the Government has to issue an NTA that satisfies paragraph (1), which it does, that language cannot mean the Government can *choose* to provide *either* a paragraph (1) *or* paragraph (2) notice and still be in compliance with the statute."[260]

Justice Jackson also rejected the majority's expansive interpretation of "any change" and "new" in paragraph (2).[261] According to Justice Jackson, "use of the word 'change' in the context of a statute that first requires something—*e.g.*, the setting of a time and place—presumes the earlier existence of that thing to be swapped out."[262] Similarly, she concluded that the majority's

[249] *Id.* at 1643.

[250] *Id.* at 1650–51.

[251] *Id.*

[252] *Id.* at 1651 n.1.

[253] *Id.* at 1651.

[254] *Id.* at 1652 (Jackson, J., dissenting).

[255] *Id.* at 1654.

[256] *Id.* at 1654–55.

[257] *Id.* at 1655.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.* at 1656–57.

[262] *Id.* at 1657.

interpretation of "or" in "notice in accordance with paragraph (1) or (2)" was erroneous, as "the statute plainly 'anticipates a predicate' NTA that complies with Congress's mandate."[263]

Justice Jackson further argued that the majority's reasoning is inconsistent with *Pereira* and *Niz-Chavez*.[264] Justice Jackson cited the Court's language in *Pereira*, in which the majority stated that the government could only "exercise that statutory authority *after* it has served a notice to appear specifying the time and place of the removal proceedings."[265] She additionally cited *Niz-Chavez*, where the Court stated that "*once the government serves a compliant notice to appear*, [the statute] permits it to send a supplemental notice amending the time and place of an alien's hearing if logistics require a change."[266]

According to Justice Jackson, "[b]y snipping the thread that connects the notices Congress required in paragraphs (1) and (2) of § 1229(a), today's decision mangles the broader statutory scheme."[267] She criticized the majority's approach as inconsistent with "Congress's objectives when it comes to removal procedures, which have long included ensuring that noncitizens facing removal receive notice."[268]

Considerations for Congress

Through the INA, Congress adopted a statutory framework for the admission and removal of certain aliens. As discussed above, § 1229(a)(1) requires the government to provide the alien with an NTA containing certain information, including the time and place of the removal proceeding.[269] In addition, § 1229(a)(2) provides a procedural mechanism for the federal government to provide written notice for a change in the time and place of the proceeding.[270] Courts have grappled with questions of statutory interpretation in a variety of contexts over the implications of the government's failure to provide statutorily compliant NTAs and whether a paragraph (2) notice—that is, a notice of a "change" in time and place—is sufficient to effectively cure a statutorily deficient NTA.

As demonstrated in *Pereira*, *Niz-Chavez*, and now *Campos-Chaves*, the provision of an NTA without a specified time and place for a removal hearing may have impacts on other aspects of the INA's framework on admission, removal, and eligibility for other immigration benefits, such as whether a statutorily deficient NTA triggers the so-called "stop-time" rule for purposes of accrual of physical presence for cancellation of removal or allows for the rescission of an in absentia removal order.[271] Through *Pereira* and *Niz-Chavez*, the Court has interpreted the statutory framework to require a single-document NTA containing the statutorily required information to trigger the stop-time rule.[272] In contrast, *Campos-Chaves* declares that a paragraph (2) notice—a notice of a "change" in time and place—is sufficient notice under the statutory framework for purposes of in absentia removal orders even if the petitioner did not receive an

[263] *Id.* at 1658.

[264] *Id.*

[265] *Id.* at 1659 (quoting *Pereira v. Sessions*, 585 U.S. 198, 218 (2018)).

[266] *Id.* at 1659 (quoting *Niz-Chavez v. Garland*, 593 U.S. 155, 170 (2021)) (emphasis added).

[267] *Id.* at 1660.

[268] *Id.*

[269] 8 U.S.C. § 1229(a)(1)(G).

[270] *Id.* § 1229(a)(2).

[271] *Campos-Chaves*, 144 S. Ct. at 1644; Niz-Chavez v. Garland, 593 U.S. 155 (2021); Pereira v. Sessions, 585 U.S. 198 (2018).

[272] *Niz-Chavez*, 593 U.S. at 172; *Pereira*, 585 U.S. at 202.

initial compliant NTA.[273] While the Supreme Court has now addressed the effect of a statutorily deficient NTA in several contexts, courts may contend with similar questions involving statutorily deficient NTAs in other factual circumstances.

Congress could use its legislative authority to amend the statutory framework governing written notice for removal proceedings. If Congress wished to require the government to provide the time and place for hearings in the NTA, Congress could clarify, for example, that the failure to provide such information constitutes grounds for rescission of in absentia removal orders under § 1229a(b)(5)(C)(ii). Another potential option might be to amend the statutory framework to provide that an NTA must contain all specified information, including the time and date of the alien's hearing, to commence formal removal proceedings and to vest jurisdiction in the immigration court. Alternatively, if Congress wished to provide the government with additional flexibility in how it provides the statutorily required information, Congress could clarify that the required information may be provided in multiple documents (i.e., an initial NTA and a subsequent hearing notice).

Trump v. United States: Presidential Immunity[274]

On July 1, 2024, the Supreme Court issued a divided six-to-three opinion in *Trump v. United States* addressing, for the first time, the existence and scope of a constitutionally based presidential immunity from criminal indictment and prosecution.[275] The decision, which held that the Constitution provides former President Donald Trump with "some immunity" from criminal liability for acts taken while in office, appears to establish a three-tiered framework in which Presidents receive absolute immunity for actions that relate to "core" or "exclusive" presidential powers, at least presumptive immunity for all other "official acts," and no immunity for "unofficial" acts.[276]

Background

The original criminal indictment obtained by Special Counsel Jack Smith against former President Donald Trump for allegedly attempting to overturn the results of the 2020 election focused on five categories of actions or schemes: (1) attempting to influence state officials to "subvert the legitimate election results"; (2) organizing "fraudulent slates of electors"; (3) using the DOJ to "conduct sham election criminal investigations"; (4) knowingly and fraudulently attempting to influence the Vice President's role in certifying electoral votes; and (5) utilizing the events of January 6, 2021, to "levy false claims of election fraud and convince members of Congress" to delay the certification.[277] President Trump characterized many of these acts as "official" conduct and asserted that, under the separation of powers, he was fully and absolutely immune from criminal prosecution.[278]

A federal district court and a unanimous U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rejected former President Trump's immunity assertion; both courts held that

[273] *Campos-Chaves*, 144 S. Ct. at 1643.

[274] CRS Legislative Attorney Todd Garvey wrote this section of the report.

[275] Trump v. United States, 144 S. Ct. 2312 (2024).

[276] *Id*. at 2327.

[277] Indictment at 5–6, United States v. Trump, No. 23-cr-00257 (D.D.C. Aug. 1, 2023), 2023 WL 4883396.

[278] United States v. Trump, 704 F. Supp. 3d 196, 206 (D.D.C. 2023).

the former President enjoyed no immunity from criminal liability.[279] The Supreme Court then granted certiorari on the question of whether "a former President enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."[280]

Prior to *Trump*, the Supreme Court had never considered whether Presidents (sitting or former) enjoyed criminal immunity for their official acts. In *Nixon v Fitzgerald*, the Court held that Presidents are absolutely immune from civil suits for acts taken "within the 'outer perimeter'" of their official responsibilities.[281] This official act immunity, the Court reasoned, was a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers" and justified on the notion that a President must be free to "deal fearlessly and impartially with the duties of his office" without a concern for liability that could "render [the President] unduly cautious in the discharge of his official duties."[282] In *Clinton v. Jones*, the Supreme Court later clarified that Presidents do not enjoy immunity from civil suits predicated on unofficial acts, explaining that *Fitzgerald*'s concern that civil liability could render the President "unduly cautious in the discharge of his official duties" had no application to potential liability for the manner in which the President engaged in unofficial acts.[283]

Although the judiciary had never considered the question of criminal immunity before *Trump*, the executive branch has taken the position that sitting Presidents possess absolute immunity from criminal prosecution for any act, official or unofficial, at least while they hold office.[284] That position, the executive branch asserts, is based in the separation of powers under the reasoning that imprisoning, prosecuting, or even indicting a sitting President for either official or unofficial acts would "unduly interfere" with the President's ability to "perform his constitutionally assigned duties."[285] The executive branch has acknowledged, however, that a President's immunity from criminal indictment and prosecution is "temporary" and ends when a President leaves office.[286]

The criminal immunity at issue in *Trump* was, therefore, a question of first impression for the Court.

The Supreme Court's Opinion

Chief Justice John Roberts's majority opinion in *Trump* was rooted in principles of presidential exceptionalism. The President, as the Court observed in *Fitzgerald*, "occupies a unique position in the constitutional scheme."[287] He is vested with powers of "unrivaled gravity and breadth" that include "responsibilities of utmost discretion and sensitivity" and that must, according to the Court, be exercised "fearlessly," independently, and with "bold and unhesitating action."[288] Under

[279] *See* United States v. Trump, 91 F.4th 1173 (D.C. Cir. 2024); *Trump*, 704 F. Supp. 3d at 206.

[280] United States v. Trump, 144 S. Ct. 1027 (2024) (order granting certiorari).

[281] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

[282] *Id*. at 749, 752.

[283] Clinton v. Jones, 520 U.S. 681, 694 (1997). For a more detailed discussion of *Fitzgerald*, *Clinton*, and presidential immunity generally, see CRS Legal Sidebar LSB11121, *Presidential Immunity, Criminal Liability, and the Impeachment Judgment Clause*, by Todd Garvey (2024).

[284] A Sitting President's Amenability to Indictment and Criminal Prosecution, 25 Op. O.L.C. 222 (2000).

[285] *Id*. at 244.

[286] *Id*. at 238.

[287] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

[288] *Trump*, 144 S. Ct. at 2327, 2329.

the majority's reasoning, the "hesitation" that could "result when a President is making decisions under 'a pall of potential prosecution'" would constrain the "energy" and "vigor" with which the Framers expected the President to act and threaten not only the functioning of the executive branch but the entire government.[289] Some immunity, the Court concluded, is therefore necessary "to safeguard the independence" of the executive branch "and to enable the President to carry out his constitutional duties without undue caution."[290] The scope and strength of that immunity, however, depends on the nature of the presidential action involved.

Exclusive Presidential Powers

According to the majority opinion in *Trump*, the President enjoys absolute criminal immunity when acting within the scope of his "exclusive constitutional authority."[291] Among these "core constitutional powers," according to the Court, are the pardon power, the power to remove subordinate executive branch officials, the power to recognize a foreign nation, and the "investigation and prosecution of crimes."[292] The Court concluded that because these select powers are both "conclusive and preclusive," Congress "may not criminalize the President's actions" and the judiciary may not "adjudicate a criminal prosecution that examines such presidential actions."[293] When acting within these areas of authority, the President is completely and absolutely immune from criminal liability for any act. This leaves elections and impeachment as the remaining forms of accountability under the Constitution.

The majority opinion did not extensively address the parameters of these "core" functions.[294] The conclusion that the "investigation and prosecution of crimes" is a "preclusive and exclusive" presidential power,[295] for example, could be interpreted to be in tension with *Morrison v. Olson*,[296] which upheld enactment of the Independent Counsel statute against a separation of powers challenge, and perhaps cases such as *McGrain v. Daugherty*, which upheld the validity of a congressional investigation into the DOJ's failure to prosecute certain individuals following the Teapot Dome scandal as "plainly" involving a subject "on which legislation could be had."[297] Still, the Court in *Trump* did not indicate that it was calling into question any of its earlier pronouncements on Congress's authority on these matters.

Other Official Acts

The President retains "at least a presumptive immunity" for other "official acts" that do not relate to a core presidential power, according to the Court in *Trump*.[298] The *Trump* majority opinion adopted language from both *Fitzgerald* and a recent D.C. Circuit decision to define "official acts" as those that occur "within the 'outer perimeter' of [his] official presidential responsibility" that are not "manifestly or palpably beyond [the President's] authority."[299] Once an action is deemed

[289] *Id*. at 2331.

[290] *Id*.

[291] *Id*. at 2335.

[292] *Id*. at 2327–28.

[293] *Id*. at 2328.

[294] *Id*. at 2326–28.

[295] *Id*. at 2334–35.

[296] 487 U.S. 654 (1988).

[297] 273 U.S. 135, 177–78 (1927).

[298] *Trump*, 144 S. Ct. at 2331.

[299] *Id*. at 2333–34 (citing *Fitzgerald*, 457 U.S. at 755–56; Blasingame v. Trump, 87 F.4th 1, 14 (D.C. Cir. 2023)).

to be within the outer perimeter of a President's official duties, the President is presumptively immune from criminal liability unless the prosecutor "can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[300]

Although the Court described its decision as creating a "limited"[301] immunity, the official act immunity envisioned in *Trump* appears to be extensive. As described by the Court, official acts appear to include not only the President's exercise of his statutory and constitutional powers, but also "speaking to and on behalf of the American people" or using the "'bully pulpit' to persuade Americans ... in ways that the President believes would advance the public interest."[302] As a result, the majority opinion observed that "most of a President's public communications are likely to fall comfortably within" the umbrella of official acts for which the President enjoys at least presumptive immunity.[303]

The scope of this described immunity becomes apparent when compared to the much narrower immunity enjoyed by Members of Congress—an immunity that, unlike the President's immunity, derives directly from constitutional text. Members of Congress do not enjoy immunity for all official acts. Instead, the Supreme Court has said that congressional immunity extends only to those "legislative acts" that form "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."[304] The Third Circuit, for example, has plainly stated that "the Speech or Debate Clause does not immunize every official act performed by a member of Congress."[305] Moreover, the Supreme Court has explicitly held that a Member's communications with the public, even when seeking "to inform the public and other Members" of matters of national importance, are "not a part of the legislative function" and are therefore not legislative acts.[306]

Unofficial Acts

If an act that supports a criminal indictment is "unofficial," then the President enjoys no immunity under *Trump*.[307] The justifications that demand criminal immunity for official presidential acts do not attach to unofficial acts. As described by the Court, "[a]lthough Presidential immunity is required for official actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for unofficial conduct."[308] This, the Court explained, is because the immunity established in *Trump* exists to protect the functioning of the office of the Presidency, not to insulate the personal actions of the President.[309]

While it appears clear that actions occurring either before or after the President's tenure of office must be unofficial acts, the *Trump* opinion acknowledged that during a President's tenure of

[300] *Id*. at 2331–32.

[301] *Id*. at 2341.

[302] *Id*. at 2333.

[303] *Id*. at 2340.

[304] Gravel v. United states, 408 U.S. 606, 625 (1972).

[305] U.S. v. McDade, 28 F.3d 283, 295 (3rd Cir. 1994).

[306] Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979).

[307] *Trump*, 144 U.S. at 2332 ("As for a President's unofficial acts, there is no immunity.").

[308] *Id*.

[309] *Id*. ("Although Presidential immunity is required for official actions to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for unofficial conduct.").

office, "[d]istinguishing the President's official actions from his unofficial ones can be difficult."[310] As described above, to be considered unofficial, a presidential action must be adequately divorced from an exercise of presidential authority. The only illustration the Court gave of such an action was to suggest that speaking as "a candidate for office or party leader" might be considered unofficial conduct.[311] Moreover, proving that presidential conduct should be categorized as "unofficial" appears to be no easy task, as the Court made clear that, in distinguishing official from unofficial conduct, courts may neither "inquire into the President's motives" nor "deem an action unofficial merely because it allegedly violates a generally applicable law."[312]

What Immunity Includes

The immunity described in *Trump* does not merely protect a President from criminal prosecution. The majority opinion may also insulate a President from indictment and, according to a majority of five Justices, prevent a jury from considering "official act" evidence even when pursuing allegations of "unofficial" criminal wrongdoing.[313] A prosecutor is therefore barred from using evidence of official acts in prosecuting unofficial acts—meaning that the *Trump* opinion's "official act" immunity may also make it more difficult for prosecutors to seek accountability for otherwise unprotected unofficial acts. For example, the majority suggested that in a criminal prosecution for bribery in relation to an official act, prosecutors may "point to the public record to show" that the official act was performed and introduce "evidence of what the President allegedly demanded, received, accepted, or agreed to accept or receive ... " in exchange for performing the official act.[314] However, prosecutors could not "admit testimony or private records of the President or his advisers probing the official act itself."[315]

The result of the immunity described in Trump is that a prosecutor may pursue a prosecution of a former President only if the underlying conduct does not relate to a core or exclusive presidential power and either (1) the allegedly criminal act is "manifestly" outside the "outer perimeter" of a President's official activity or (2) if it is within that outer perimeter, the prosecutor is able to prove, without recourse to presidential motive or the use of evidence reflecting official actions, that the prosecution "would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[316] Although the majority definitively concluded that the President is absolutely immune from criminal prosecution for official acts involving core constitutional functions, the opinion seems to envision that the operation of the immunity framework it announced—including whether absolute immunity might extend to at least some non-core presential actions—would be clarified only through subsequent developments. Echoing a statement made in an earlier case about presidential powers, the majority declared that it would be inappropriate, in the first ever case of its kind before the Court, "to definitively and comprehensively determine the President's scope of immunity from criminal prosecution."[317]

[310] *Id*. at 2333.

[311] *Id*. at 2340.

[312] *Id*. at 2333–34.

[313] *Id*. at 2340–42.

[314] *Id*. at 2341 n.3.

[315] *Id*.

[316] *Id*. at 2331–32.

[317] *Id*. at 2332.

Concurring and Dissenting Opinions

Justice Thomas concurred in the judgment to "highlight" another way in which the prosecution of former President Trump "may violate our constitutional structure."[318] The Appointments Clause establishes the default rule that "Officers of the United States" be appointed by the President with the advice and consent of the Senate, with the exception that Congress may vest the appointment of "inferior officers" in the President, the courts of law, or the head of a department.[319] However an officer is appointed, Justice Thomas reasoned that the text of the Clause further requires that the "underlying office" first be "established by law."[320] Justice Thomas noted that there were "serious questions" about whether the Office of Special Counsel had been "established by law" that should be considered by the lower courts before a "private citizen" such as the Special Counsel can be permitted to prosecute a former President.[321]

Justice Barrett also wrote a concurring opinion in which she explained how she would have "framed the underlying legal issues" as a separation of powers question rather than in terms of presidential immunity.[322] Justice Barret agreed that a President "cannot be held criminally liable for conduct within his 'conclusive and preclusive' authority ... " but would have taken a different approach to criminal prosecutions involving other official acts that "fall[] outside of the President's core powers."[323] Justice Barrett would have applied a two-step analysis to such prosecutions that reflected the Court's usual approach to separation of powers questions, asking first "whether the relevant criminal statute reaches the President's official conduct" and, if so, whether the statute's application to the particular facts is constitutional.[324]

Justice Barrett disagreed with the majority opinion in two important respects. First, she would not have left open the possibility that the President is immune for *all* official acts. "Congress has concurrent authority over many government functions," she wrote, "and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute."[325] She also disagreed with the majority's conclusion that the Constitution limits the introduction of official act evidence in a prosecution based on unprotected presidential conduct, noting, for example, that such an approach would "hamstring" prosecutions for bribery (which generally require evidence of some official act).[326]

Justice Sotomayor wrote a dissenting opinion, joined by Justices Kagan and Jackson, strongly criticizing the majority opinion as "invent[ing] an atextual, ahistorical, and unjustifiable immunity."[327] Justice Sotomayor attacked the majority's presumptive immunity for official acts as "inconsistent with text, history, and established understandings of the President's role."[328] She also described the majority's conclusion that the President enjoys absolute immunity for core

[318] *Id*. at 2347 (Thomas, J., concurring).

[319] U.S. CONST. art. II, § 2.

[320] *Trump*, 144 S. Ct. at 2348 (Thomas, J., concurring).

[321] *Id*. In a separate prosecution of the former President, a federal district court judge in Florida held that Special Counsel Smith's appointment violated the Appointments Clause. *See* United States v. Trump, 2024 WL 3404555 (S.D. Fla. July 15, 2024).

[322] *Trump*, 144 S. Ct. at 2352 (Barrett, J., concurring).

[323] *Id*. at 2352.

[324] *Id*. at 2352–53.

[325] *Id*. at 2352.

[326] *Id*. at 2355.

[327] *Id*. at 2356 (Sotomayor, J., dissenting).

[328] *Id*. at 2357.

presidential functions as "unnecessary and misguided" and the opinion's "illogical" holding prohibiting the introduction of official act evidence as "unprecedented."[329]

Justice Jackson wrote her own dissenting opinion to describe how the majority opinion "alter[ed] the paradigm of accountability for Presidents of the United States" in a way that injects significant uncertainty into the constitutional system and disrupts the "balance of power between the three coordinate branches of our Government . . . aggrandizing power in the Judiciary and the Executive, to the detriment of Congress."[330] The new immunity crafted by the majority opinion, she argued, "undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power, to the detriment of us all."[331] The result, Justice Jackson argued, is that "even a hypothetical President who admits to having ordered the assassinations of his political rivals or critics, or one who indisputably instigates an unsuccessful coup, has a fair shot at getting immunity."[332]

Considerations for Congress

The *Trump* majority opinion's precise impact on Special Counsel Smith's election-related prosecution will largely depend, in the first instance, on how the trial court applies and interprets the above framework. As the Supreme Court acknowledged, application of its framework and analysis of whether a given presidential action qualifies for immunity is "fact specific," "may prove to be challenging," and may take significant time.[333]

The majority opinion in *Trump* made clear that the former President is entitled to absolute immunity and cannot be prosecuted for "the alleged conduct involving his discussions with Justice Department officials."[334] This conduct includes threats to remove the Acting Attorney General after that official allegedly refused to announce what the indictment referred to as "sham" investigations into electoral fraud.[335] In an effort to address this aspect of the Court's decision, Special Counsel Smith has filed a superseding indictment that maintains the primary charges against the former President but removes factual allegations relating to his communications with DOJ officials.[336]

In light of the uncertainty in how the Trump decision will apply in future cases, Congress may wish to use legislation to help define the contours of presidential immunity. Some Members have introduced various legislative measures in response to the *Trump* opinion. A joint resolution proposing a constitutional amendment would clarify that "[n]o officer of the United States, including the President . . . shall be immune from criminal prosecution" for violations of federal and state law.[337] In addition, S. 4973 would provide that Presidents "shall not be entitled to any form of immunity (whether absolute, presumptive, or otherwise)" from criminal prosecution for alleged violations of the criminal laws of the United States unless specified by Congress.[338] Congress's authority to substantially alter the presidential immunity outlined in *Trump*—which

[329] *Id*.

[330] *Id*. at 2372 (Jackson, J., dissenting).

[331] *Id*.

[332] *Id*. at 2376 (citations omitted).

[333] *Trump*, 144 S. Ct. at 2340.

[334] *Id*. at 2335.

[335] *Id*.

[336] Superseding Indictment, *United States v. Trump*, No. 23-cr-00257 (D.D.C. Aug. 27, 2024).

[337] H.R.J. Res. 193, 118th Cong. (as introduced by House, July 24, 2024).

[338] S. 4973, 118th Cong. (as introduced by Senate, Aug. 1, 2024).

derived from the Court's interpretation of the Constitution—may be limited.[339] Still, it is possible that Congress could constrain or expand the scope of presidential immunity that attaches to exercises of statutory authority delegated to the President.

[339] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution").

Appendix. List of Cases

This table includes cases listed on the Supreme Court's "granted and noted" list for its October 2023 Term,[340] in alphabetical order, with the following exceptions: (1) cases in which the Court granted certiorari but subsequently dismissed or remanded the case without issuing a decision on the merits and (2) cases in which the Court granted a writ of certiorari and set an argument date but subsequently removed that argument from its calendar. In most cases, the questions presented have been adapted from the Supreme Court's statement of the questions presented, which itself often restates the questions as framed by the petitioner in the case. The holdings have also been adapted in some cases from the syllabus published by the Supreme Court's Reporter of Decisions.

Acheson Hotels, LLC v. Laufer

Argued: 10/04/2023

Decided: 12/05/2023

Question Presented: Does a self-appointed Americans with Disabilities Act (ADA) "tester" have 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?

Holding: The Court dismissed the case as moot. The plaintiff, who had sued hundreds of hotels, filed a suggestion of mootness with the Court after a lower court sanctioned her attorney in some ADA suits for misconduct. In light of the plaintiff's request, her representations to the Court that she would not file any more suits, and the majority's conclusion that she was not trying to evade the Court's jurisdiction, the Court decided that it was an appropriate exercise of its discretion to dismiss the case as moot.

Opinion: Justice Barrett (for the Court); Justice Thomas (concurring in the judgment); Justice Jackson (concurring in the judgment)

CRS Resources: CRS Legal Sidebar LSB11110, *"Tester" Lawsuits Under the Americans with Disabilities Act*, by April J. Anderson (2024).

Alexander v. South Carolina State Conference of the NAACP

Argued: 10/11/2023

Decided: 05/23/2024

Questions Presented: A three-judge district court held that the legislature's design of South Carolina's first congressional district under the state's congressional redistricting plan established an unconstitutional racial gerrymander. (1) Did the district court err when it failed to apply the presumption of good faith and to holistically analyze the congressional district as whole? (2) Did the district court err when it failed to disentangle race from politics and found that race was the predominant factor in the legislature's redistricting plan?

Holding: The Court reversed the three-judge district court ruling. Supreme Court jurisprudence recognizes that, while redistricting maps may be held unconstitutional when a party demonstrates that race played a predominant role in motivating the legislature's design (racial gerrymander),

[340] *See Granted & Noted List*, SUP. CT. OF THE U.S. (July 1, 2024), https://www.supremecourt.gov/orders/23grantednotedlist.pdf.

race and partisan preference are correlated, and a finding that a redistricting map was based on partisan preferences (political gerrymander) is nonjusticiable. The majority held that a party challenging a map must disentangle race from politics to establish motivation, and courts must start with a presumption that the legislature acted in good faith in devising a redistricting plan. The Court held that the three-judge district court impermissibly inferred that the legislature acted in bad faith based on the racial effects of a political gerrymander in an area where race and partisan preference were closely correlated.

Opinions: Justice Alito (for the Court); Justice Thomas (concurring in part); Justice Kagen (dissenting)

Becerra v. San Carlos Apache Tribe[341]

Argued: 03/24/2024

Decided: 06/06/2024

Question Presented: The Indian Health Service (IHS) is an agency within the Department of Health and Human Services that administers health care programs for Native American tribes. Under the Indian Self-Determination and Education Assistance Act, a tribe can contract with IHS to assume responsibility for administering federal health care programs. Under federal law, a tribe's contract with IHS allows it to receive federal funding for the programs that it operates, including funds knowns as *contract support costs* that cover the tribe's costs to comply with its IHS contracts. Does the legal requirement that IHS pay "contract support costs" include funds not only to support IHS-funded activities but also to support the tribe's expenditure of income collected from third parties such as private insurers, Medicare, and Medicaid?

Holding: Contract support costs include expenses that a tribe incurs to collect and spend funds from third-party payers (such as Medicaid, Medicare, and private insurers) as required by the terms of the contract.

Opinion: Chief Justice Roberts (for the Court); Justice Kavanaugh (dissenting)

Bissonnette v. LePage Bakeries Park St., LLC

Argued: 02/20/2024

Decided: 04/12/2024

Question Presented: Section 1 of the Federal Arbitration Act (FAA) exempts the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." To be exempt from the FAA, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?

Holding: The exemption in Section 1 of the FAA for transportation workers engaged in foreign or interstate commerce extends to workers engaged in interstate transportation, regardless of whether their employers are in the transportation industry. In this case, the Court agreed that truck drivers for a baked goods company fell under the FAA's exemption, and thus the arbitration clauses in their employment contracts with the company were not enforceable under the FAA.

[341] *Becerra v. San Carlos Apace Tribe* was consolidated with *Becerra v. Northern Arapaho Tribe* for briefing, argument, and decision.

Opinion: Chief Justice Roberts (for the Court)

CRS Resources: CRS Legal Sidebar LSB11217, *Arbitration Law Update: The Supreme Court's October 2023 Term*, by Bryan L. Adkins (2024); CRS Legal Sidebar LSB11095, *Supreme Court to Consider Scope of Federal Arbitration Act's Exemption for Transportation Workers*, by Bryan L. Adkins (2023).

Brown v. United States[342]

Argued: 11/27/2023

Decided: 05/23/2024

Question Presented: Under the Armed Career Criminal Act (ACCA), an individual who had previously been convicted of a felony and who possesses a firearm faces a mandatory minimum term of imprisonment of 15 years for the firearm offense when the offender has, among other things, three previous convictions for "a serious drug offense." Courts determine whether a prior conviction is a serious drug offense using the categorical approach, which involves the courts determining whether the state's definition of the drug offense forming the basis of the defendant's conviction is the same as, or narrower than, the definition under federal law—in this case, the Controlled Substances Act (CSA). The circuit courts were split as to whether the "serious drug offense" definition depends on the federal drug schedules that were in effect at the time of the prior state drug offense, the time of the federal firearm offense, or the time of federal sentencing for the firearm offense. The question presented is whether a state crime constitutes a "serious drug offense" if it involved a drug that was on the federal schedules when the defendant possessed or trafficked in it but was later removed.

Holding: A state drug conviction qualifies as an ACCA predicate offense if it involved a drug on the CSA's controlled substances list at the time of that conviction.

Opinion: Justice Alito (for the Court), Justice Jackson (dissenting)

CRS Resources: CRS Legal Sidebar LSB11179, *What Time Is It for the ACCA?: Supreme Court Clarifies When State Drug Offenses Qualify as "Serious Drug Offenses"*, by Charles Doyle (2024); CRS Legal Sidebar LSB11077, *Armed Career Criminal Act (ACCA): When Does a Prior Drug Offense Qualify?*, by Charles Doyle (2023).

Campos-Chaves v. Garland[343]

Argued: 01/08/2024

Decided: 06/14/2024

Question Presented: Under the Immigration and Nationality Act (INA), the government must provide a "notice to appear" (NTA) to an alien for all removal proceedings notifying the alien of the time and place of removal hearings. There are two types of written notices described in the INA: paragraph (1) of 8 U.S.C. § 1229(a) provides that the alien be given a written NTA, which must set out, among other things, "[t]he time and place at which the proceedings will be held"; paragraph (2) of § 1229(a) states that "in the case of any change or postponement in the time and place of such proceedings," the agency must provide "a written notice" specifying "the new time or place of the proceedings" and "the consequences" of failing to attend. When an alien fails to

[342] *Brown v. United States* was consolidated with *Jackson v. United States* for briefing, argument, and decision.

[343] *Campos-Chaves v. Garland* was consolidated with *Garland v. Singh* for briefing, argument, and decision.

appear despite receiving notice, the immigration judge must order the alien removed in absentia if the government meets certain evidentiary burdens, including establishing by clear, unequivocal, and convincing evidence that the written notice was provided to the alien. An alien can later have the in absentia removal order rescinded if he can demonstrate that he did not receive notice "in accordance with paragraph (1) or (2)" of § 1229(a). What does it mean to demonstrate that the alien did not receive notice in accordance with the INA?

Holding: To rescind an in absentia removal order on the ground that the alien "did not receive notice in accordance with paragraph (1) or (2)," the alien must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed. In this case, because all of the aliens received notices under paragraph (2) for the hearings they missed, they cannot seek recession of their in absentia removal orders.

Opinion: Justice Alito (for the Court), Justice Jackson (dissenting)

Cantero v. Bank of America

Argued: 02/27/2024

Decided: 05/30/2024

Question Presented: Whether the National Bank Act of 1864 preempts state escrow interest laws as they apply to federally chartered banks.

Holding: To analyze federal preemption of state laws regulating national banks, lower courts must appropriately apply the preemption standard set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and a prior Court ruling. The Court remanded the case for the lower court to consider whether the challenged state law "prevents or significantly interferes with" federally chartered bank powers.

Opinion: Justice Kavanaugh (for the Court)

Chiaverini v. City of Napoleon, Ohio

Argued: 04/15/2024

Decided: 06/20/2024

Question Presented: To succeed on a Fourth Amendment malicious-prosecution claim under 42 U.S.C. § 1983, a plaintiff must show that a government official charged him without probable cause, leading to an unreasonable seizure of his person. If the government official brings multiple charges and one of those charges lacks probable cause, do the valid charges brought forth insulate the official from a Fourth Amendment malicious-prosecution claim relating to the invalid charge—that is, the charge without probable cause?

Holding: If a person brings suit against a government entity raising a Fourth Amendment malicious prosecution claim, probable cause supporting one criminal charge in the prosecution does not categorically bar the malicious prosecution claim relating to another, baseless charge.

Opinions: Justice Kagan (for the Court), Justice Thomas (dissenting), Justice Gorsuch (dissenting)

City of Grants Pass, Oregon v. Johnson

Argued: 04/22/2024

Decided: 06/28/2024

Question Presented: Whether a city ordinance prohibiting camping on public property violates the Eighth Amendment's prohibition on cruel and unusual punishment if enforced against homeless persons who lack access to temporary shelter.

Holding: City ordinances imposing generally applicable restrictions on camping on public property do not violate the Eighth Amendment's prohibition on cruel and unusual punishment if enforced against homeless persons who lack access to temporary shelter.

Opinion: Justice Gorsuch (for the Court); Justice Sotomayor (dissenting)

CRS Resources: CRS Legal Sidebar LSB11203, *The Eighth Amendment and Homelessness: Supreme Court Upholds Camping Ordinances in City of Grants Pass v. Johnson*, by Whitney K. Novak and Dave S. Sidhu (2024); CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024).

Coinbase, Inc. v. Suski

Argued: 02/28/24

Decided: 5/23/24

Question Presented: When parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?

Holding: When parties enter into two contracts—with one contract containing a provision that delegates to an arbitrator the authority to decide all disputes, including the threshold questions of arbitrability, and the other contract containing, either explicitly or implicitly, a clause providing that all contract disputes, including those over arbitrability, will be resolved by a court—a court, rather than an arbitrator, must decide which of the two contracts controls.

Opinion: Justice Jackson (for the Court)

CRS Resource: CRS Legal Sidebar LSB11217, *Arbitration Law Update: The Supreme Court's October 2023 Term*, by Bryan L. Adkins (2024).

Connelly v. United States

Argued: 03/27/2024

Decided: 06/06/2024

Question Presented: Whether the proceeds of a life insurance policy taken out by a closely held corporation on a shareholder to facilitate the redemption of the shareholder's stock should be considered by the Internal Revenue Service as a corporate asset when calculating the value of the shareholder's shares for purposes of calculating the federal estate tax.

Holding: A corporation's contractual obligation to redeem shares is not necessarily a liability that reduces a corporation's value for purposes of the federal estate tax. In this case, the corporation's obligation to redeem the deceased shares was not a liability that decreased the values of those shares.

Opinion: Justice Thomas (for the Court)

Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited

Argued: 10/03/2023

Decided: 05/16/2024

Question Presented: Did the court of appeals err in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB) violates the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, and err in vacating a regulation promulgated at a time when the CFPB was receiving such funding?

Holding: The statute that authorizes the funding mechanism for the CFPB is consistent with the Appropriations Clause of the Constitution.

Opinions: Justice Thomas (for the Court), Justice Alito (dissenting)

CRS Resource: CRS Insight IN12409, *Financial Services and General Government FY2025 Appropriations: CFPB's Funding and Structure Provisions*, by Karl E. Schneider and David H. Carpenter (2024).

Corner Post v. Board of Governors of the Federal Reserve System

Argued: 02/20/2024

Decided: 07/01/2024

Question Presented: Under 28 U. S. C. § 2401(a), the statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." When does a claim brought under the Administrative Procedure Act "accrue" for purposes of this provision—when an agency issues a rule regardless of whether that rule injures the plaintiff or when the rule first causes a plaintiff injury?

Holding: A claim "accrues" when the plaintiff has the right to assert it in court. An Administrative Procedure Act claim does not accrue for purposes of § 2401(a) until the plaintiff is injured by final agency action.

Opinions: Justice Barrett (for the Court), Justice Jackson (dissenting)

CRS Resources: CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, coordinated by Benjamin M. Barczewski (2024).

Culley v. Marshall

Argued: 10/30/2023

Decided: 05/09/2024

Question Presented: Does the Due Process Clause require a state or local government to provide a post-seizure preliminary hearing prior to a timely post-seizure forfeiture proceeding?

Holding: In civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing to determine whether the seized property should be held pending the forfeiture proceedings.

Opinions: Justice Kavanaugh (for the Court), Justice Gorsuch (concurring), Justice Sotomayor (dissenting)

Department of Agriculture Rural Development Rural Housing Service v. Kirtz

Argued: 11/06/2023

Decided: 02/08/2024

Question Presented: Whether the civil liability provisions of the Fair Credit Reporting Act of 1970—which authorizes suits for damages against "any person" who violates the act and defines "any person" to include "any" government agency—unequivocally and unambiguously waive the sovereign immunity of the United States.

Holding: A consumer may sue a federal agency for violating the terms of the Fair Credit Reporting Act, and the United States may be held liable for civil damages under the Act.

Opinion: Justice Gorsuch (for the Court)

Department of State v. Muñoz

Argued: 04/23/2024

Decided: 06/21/2024

Question Presented: Does a U.S. citizen-spouse have a constitutional right to live with his or her alien spouse in the United States that is implicit in the Fifth Amendment such that the denial of the alien spouse's visa deprives the U.S. citizen-spouse of this interest and, in turn, justifies an exception to doctrine prohibiting judicial review of visa denials?

Holding: A U.S. citizen does not have a fundamental liberty interest in having his or her alien spouse admitted to the United States, and the denial of a visa application for the alien spouse is not subject to judicial review.

Opinions: Justice Barrett (for the Court), Justice Gorsuch (concurring in judgment), Justice Sotomayor (dissenting)

Devillier v. Texas

Argued: 01/16/2024

Decided: 04/16/2024

Question Presented: Whether a person whose property is taken without compensation may seek redress under the self-executing Takings Clause of the Fifth Amendment even if the legislature has not affirmatively provided the person with a cause of action.

Holding: Texas law provides a cause of action that allows property owners to vindicate their rights under the Takings Clause. Therefore, the Court remanded proceedings so that the property owner may proceed with the cause of action under Texas law. The Court declined to reach the initial question presented, which was whether an authorizing statute is required to bring suit against a state under the Takings Clause.

Opinion: Justice Thomas (for the Court)

CRS Resource: CRS Legal Sidebar LSB11150, *Takings Claims in DeVillier v. Texas Awash in Procedural Matters*, by Kristen Hite (2024).

Diaz v. United States

Argued: 03/19/2024

Decided: 06/20/2024

Question Presented: Federal Rule of Evidence 704(b) provides that, "[i]n a criminal case, an expert witness must not must not state an opinion 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." In a prosecution for drug trafficking—where an element of the offense is establishing the defendant's mental state—does Rule 704(b) permit an expert witness for the government to testify that most drug couriers typically know that they are carrying drugs?

Holding: An expert witness's testimony that "most" people in a group have a particular mental state is not an opinion about "the defendant" and does not violate Rule 704(b).

Opinion: Justice Thomas (for the Court), Justice Jackson (concurring), Justice Gorsuch (dissenting)

Erlinger v. United States

Argued: 03/27/2024

Decided: 06/21/2024

Question Presented: The Armed Career Criminal Act (ACCA) imposes mandatory sentences of imprisonment for certain defendants who have previously committed three violent felonies or serious drug offenses on separate occasions. Does the Constitution require 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 ACCA?

Holding: The Fifth and Sixth Amendments require that a unanimous jury make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions for ACCA purposes.

Opinion: Justice Gorsuch (for the Court), Chief Justice Roberts (concurring), Justice Thomas (concurring), Justice Kavanaugh (dissenting), Justice Jackson (dissenting)

CRS Resource: CRS Legal Sidebar LSB11191, *Erlinger v. United States: Supreme Court Rules on Jury Determination for Prior Offenses for ACCA Sentencing Purposes*, by Charles Doyle (2024).

Federal Bureau of Investigation v. Fikre

Argued: 01/08/2024

Decided: 03/19/2024

Question Presented: Whether an individual's challenge to placement on the Terrorism Screening Database's No Fly List was rendered moot after he was removed from the list and the government represented that he would not be placed back on the list based on currently available information.

Holding: The government failed to demonstrate that the removal of the individual from the list mooted his challenge. The Court reasoned that, because the government's representation signified that the individual's past conduct would not warrant relisting, the case was not moot because such

representations do not speak to whether the government might relist him if he engages in the same or similar conduct in the future. The burden is on the government to establish that it cannot reasonably be expected to resume the challenged conduct.

Opinions: Justice Gorsuch (for the Court), Justice Alito (concurring)

Fischer v. United States

Argued: 04/16/2024

Decided: 06/28/2024

Question Presented: Section 1512(c)(1) of Title 18, U.S. Code, imposes criminal liability for anyone who "corruptly 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." Section 1512(c)(2) imposes criminal liability on anyone who corruptly "otherwise obstructs, influences, or impedes any official proceedings, or attempts to do so." Did the United States Court of Appeals for the District of Columbia (D.C. Circuit) err in determining that individuals alleged to have attempted to disrupt congressional certification of the 2020 presidential election results on January 6, 2021, may be charged with violating § 1512(c)(2) and that the "otherwise" should be read to apply to all forms of corrupt obstruction of an official proceeding other than the conduct that is covered in § 1512(c)(1)?

Holding: To prove a violation of § 1512(c)(2), the government must establish that the defendant impaired the availability or integrity for use in an official proceeding of records, documents, objects, or other things used in an official proceeding or attempted to do so. The Court held that § 1512(c)(2) should be read as limited by § 1512(c)(1) and that to violate § 1512(c)(2), obstructive conduct must involve some action as to a document, record, or other object with the intent to impair the object's availability or integrity for use in an official proceeding.

Opinion: Chief Justice Roberts (for the Court), Justice Jackson (concurring), Justice Barrett (dissenting)

CRS Resource: CRS Legal Sidebar LSB11126, *Fischer v. United States: Supreme Court Reads Federal Obstruction Provision Narrowly in Capitol Breach Prosecution*, by Peter G. Berris (2024); CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB11016, *Overview of the Indictment of Former President Trump Related to the 2020 Election*, by Peter G. Berris (2023).

Food & Drug Administration v. Alliance for Hippocratic Medicine[344]

Argued: 03/26/2024

Decided: 06/13/2024

Questions Presented: Mifepristone is a drug that the Food and Drug Administration (FDA) approved in 2000 for use in terminating early pregnancies, and the FDA has placed restrictions on the marketing and dispensing of the drug. In 2016 and 2021, the FDA changed its restrictions regarding use and distribution. Do respondents—doctors and associations of doctors who oppose

[344] *FDA v. Alliance for Hippocratic Medicine* was consolidated with *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine* for briefing, oral argument, and decision.

abortion—have Article III standing to challenge the FDA's 2016 and 2021 actions in lifting prior restrictions?

Holding: The medical associations and physicians lacked Article III standing to challenge FDA's actions in 2016 and 2021 regarding the marketing and dispensing of mifepristone.

Opinion: Justice Kavanaugh (for the Court)

CRS Resources: CRS Legal Sidebar LSB11183, *Medication Abortion Access Remains Unchanged as Supreme Court Rejects Legal Challenge on Standing Grounds*, by Jennifer A. Staman (2024); CRS Legal Sidebar LSB10919, *Medication Abortion: New Litigation May Affect Access*, by Jennifer A. Staman (2023).

Garland v. Cargill

Argued: 02/28/2024

Decided: 06/14/2024

Question Presented: In a 2018 final rule, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) classified bump stocks, an accessory that attaches to a semiautomatic weapon to increase the rate of fire, as machine guns for purposes of the National Firearms Act (28 U.S.C. § 5845(b)) and the federal statutory ban on the possession or transfer of new machine guns. Is a bump stock device a "machinegun" as defined in 26 U.S.C. § 5845(b)?

Holding: ATF exceeded its statutory authority by issuing a rule that classifies a bump stock as a "machinegun" under 26 U.S.C. § 5845(b).

Opinions: Justice Thomas (for the Court), Justice Alito (concurring), Justice Sotomayor (dissenting)

CRS Resources: CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB10920, *The Supreme Court Invalidates the ATF's Bump-Stock Ban*, by Dave S. Sidhu and Michael A. Foster (2024).

Gonzalez v. Trevino

Argued: 03/20/2024

Decided: 06/20/2024

Question Presented: In *Nieves v. Bartlett*, the Court held that a First Amendment retaliatory arrest claim will not succeed unless the plaintiff pleads and proves "the absence of probable cause for the arrest" and, if there was probable cause to make the arrest, unless the plaintiff provides "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Can the exception be satisfied only through specific evidence of arrests that never happened, and is the *Nieves* probable cause rule applicable only when arresting officers make a split-second decision to arrest the individual?

Holding: An individual raising a First Amendment retaliatory arrest claim may satisfy the *Nieves* evidentiary burden by presenting evidence that she was the only person arrested for engaging in a certain type of conduct under a long-standing criminal prohibition. An individual does not need to provide specific comparator evidence (i.e., evidence that other identifiable persons who engaged in the same conduct were not arrested).

Opinion: Per curiam, Justice Alito (concurring), Justice Kavanaugh (concurring), Justice Jackson (concurring), Justice Thomas (dissenting)

Great Lakes Insurance SE v. Raiders Retreat Reality Co., LLC

Argued: 10/10/2023

Decided: 02/21/2024

Question Presented: Under federal admiralty law, can a choice-of-law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the "strong public policy" of the state whose law is displaced?

Holding: Choice-of-law provisions in maritime contracts are presumptively enforceable under federal maritime law, with narrow exceptions not applicable in this case. The Court declined to establish a new exception—that the choice-of-law provision should yield to a strong public policy of a state—explaining that such disuniformity and uncertainty would undermine the purpose of choice-of law clauses in maritime contracts.

Opinions: Justice Kavanaugh (for the Court), Justice Thomas (concurring)

Harrington v. Purdue Pharma L.P.

Argued: 12/04/2023

Decided: 06/27/2024

Question Presented: Does the Bankruptcy Code authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that includes nonconsensual, third-party releases of claims against nondebtor third parties?

Holding: The Bankruptcy Code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants.

Opinions: Justice Gorsuch (for the Court), Justice Kavanaugh (dissenting)

CRS Resource: CRS Legal Sidebar LSB11201, *Harrington v. Purdue Pharma: Supreme Court Holds That a Chapter 11 Reorganization Plan Cannot Include a Nonconsensual Release of Claims Against Non-Debtors*, by Justin C. Chung and Alexander H. Pepper (2024).

Harrow v. Department of Defense

Argued: 03/25/2024

Decided: 05/16/2024

Question Presented: Judicial review of final decisions by the Merit Systems Protection Board requires that a petitioner seeing review file a petition for review "within 60 days after the Board issues notice of the final order or decision of the Board." Is the statutory 60-day deadline jurisdictional?

Holding: The statutory 60-day filing deadline is not jurisdictional, and equitable exceptions to the filing deadline are permissible.

Opinion: Justice Kagan (for the Court)

Lindke v. Freed[345]

Argued: 10/31/2023

Decided: 03/15/2024

Question Presented: 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.

Holding: A public official who prevents someone from commenting on an official social media page engages in state action under 42 U.S.C. § 1983 only if the official (1) possessed actual authority to speak on the State's behalf and (2) purported to exercise that authority when he spoke on social media.

Opinion: Justice Barrett (for the Court)

CRS Resources: CRS Legal Sidebar LSB11146, *Lindke v. Freed and Government Officials' Use of Social Media*, by Valerie C. Brannon (2024).

Loper Bright Enterprises v. Raimondo[346]

Argued: 01/17/2024

Decided: 06/28/2024

Question Presented: Whether the Court should overrule the *Chevron* doctrine or clarify whether statutory silence concerning controversial powers expressly but narrowly granted elsewhere in a statute constitutes an ambiguity requiring deference to the agency.

Holding: Overruling *Chevron*, the Court held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Opinions: Chief Justice Roberts (for the Court); Justice Thomas (concurring); Justice Gorsuch (concurring); Justice Kagan (dissenting)

CRS Resources: CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024); CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024).

Macquarie Infrastructure Corp v. Moab Partners, L.P.

Argued: 01/16/2024

Decided: 04/12/2024

Question Presented: Section l0(b) of the Securities Exchange Act of 1934 prohibits deception in connection with the purchase or sale of securities. A Securities and Exchange Commission (SEC) regulation, Item 303 of SEC Regulation S-K, requires a company to disclose known trends or

[345] On March 15, 2024, the Court issued a per curiam opinion in *O'Connor-Ratcliff v. Garnier*, vacating the Ninth Circuit's decision below and remanding the case in light of *Lindke v. Freed*. *See* O'Connor-Ratcliff v. Garnier, No. 22-324 (U.S. Mar. 15, 2024),

[346] *Loper Bright Enterprises v. Raimondo* was argued and decided with *Relentless, Inc., v. Department of Commerce*, No. 22-888 (U.S. June 28, 2024).

uncertainties that are likely to have a material impact on its financial position, regardless of whether the company had made any statements that would otherwise be misleading. SEC Rule 10b-5 makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Does the failure to make a disclosure required under Item 303 support a private claim under Rule 10b-5, even in the absence of an otherwise misleading statement?

Holding: Pure omissions are not actionable under Rule 10b-5 because the rule only "requires disclosure of information necessary to ensure that statements already made are clear and complete." The rule requires identifying affirmative assertions before determining if the statement made is misleading

Opinion: Justice Sotomayor (for the Court)

McElrath v. Georgia

Argued: 11/28/2023

Decided: 02/23/2024

Question Presented: Does the Double Jeopardy Clause of the Fifth Amendment prohibit a second prosecution for a crime for which a defendant was previously acquitted on one charge by a jury's verdict and convicted on another criminal charge by the same jury's verdict, despite both charges arising from the same facts?

Holding: The Double Jeopardy Clause barred a retrial on the acquitted charge. The jury's verdict acquitting the defendant (not guilty by reason of insanity) was an acquittal for purposes of the Double Jeopardy Clause.

Opinions: Justice Jackson (for the Court); Justice Alito (concurring)

McIntosh v. United States

Argued: 02/27/2024

Decided: 04/17/2024

Question Presented: Federal Rule of Criminal Procedure Rule 32.2(b)(2)(B) provides that, "[u]nless doing so is impractical," a federal district court "must enter the preliminary order [of forfeiture] sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant." May a district court enter a criminal forfeiture order outside the time limitations specified in the Federal Rules of Criminal Procedure 32.2?

Holding: A district court's failure to comply with Rule 32.2's requirement to enter a preliminary order before sentencing does not bar the district court judge from order forfeiture at sentencing, subject to appellate review for harmlessness.

Opinion: Justice Sotomayor (for the Court)

Moody v. NetChoice, LLC[347]

Argued: 02/26/2024

Decided: 07/01/2024

Questions Presented: Whether the state laws' content-moderation restrictions comply with the First Amendment and whether the laws' requirement that regulated platforms explain particular content-moderation decisions to affected users complies with the First Amendment.

Holding: The lower courts failed to conduct an appropriate analysis of the plaintiffs' claims that the state laws were facially unconstitutional under the First Amendment. The cases were remanded back to the appellate courts.

Opinion: Justice Kagan (for the Court); Justice Barrett (concurring opinion); Justice Jackson (concurring in part and concurring in the judgment); Justice Thomas (concurring in the judgment); Justice Alito (concurring in the judgment).

CRS Resource: CRS Legal Sidebar LSB11116, *State Social Media Laws at the Supreme Court*, by Valerie C. Brannon (2024).

Moore v. United States

Argued: 12/05/2023

Decided: 06/20/2024

Questions Presented: Internal Revenue Code § 965's "Mandatory Repatriation Tax" imposes a one-time tax on a U.S. shareholder's pro rata share of a specified foreign corporation's post-1986 untaxed and undistributed foreign earnings. Is this tax on unrealized foreign earnings an unapportioned direct tax in violation of the Sixteenth Amendment's Apportionment Clause?

Holding: The Mandatory Repatriation Tax does not exceed Congress's constitutional authority.

Opinions: Justice Kavanaugh (for the Court); Justice Jackson (concurring); Justice Barrett (concurring in judgment); Justice Thomas (dissenting)

CRS Resources: CRS Legal Sidebar LSB11185, *Supreme Court Declines to Decide Whether Sixteenth Amendment Requires "Realization" to Tax Income*, by Justin C. Chung (2024); CRS Legal Sidebar LSB11100, *Supreme Court Considers Scope of Congress's Sixteenth Amendment Income Taxing Power in Moore v. United States*, by Justin C. Chung (2024).

Muldrow v. City of St. Louis, Missouri

Argued: 12/06/2023

Decided: 04/17/2024

Question Presented: Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, or national origin. Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

[347] *Moody v. NetChoice, LLC* was decided with *NetChoice, LCC v. Paxton*.

Holding: An employee challenging a job transfer under Title VII must show that the transfer caused harm with respect to an identifiable term or condition of employment and need not establish separately that the harm incurred was significant.

Opinion: Justice Kagan (for the Court); Justice Thomas (concurring in judgment); Justice Alito (concurring in judgment); Justice Kavanaugh (concurring in judgment)

Murray v. UBS Securities, LLC

Argued: 10/10/2023

Decided: 02/08/2024

Question Presented: Under the whistleblower-protection provision of the Sarbanes-Oxley Act of 2002, no covered employer may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" protected whistleblowing activity. A whistleblower's claim brought under the Act is governed by the "legal burdens of proof" outlined in the statute. Under the governing statute, the whistleblower bears the initial burden of showing that engaging in a protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." The burden then shifts to the employer to show it "would have taken the same unfavorable personnel action in the absence of" the protected activity. Under the burden-shifting framework for cases brought under the statute, does a whistleblower have to prove that his employer acted with a "retaliatory intent," or is the lack of retaliatory intent part of the affirmative defense on which the employer bears the burden of proof?

Holding: A whistleblower seeking protections under the Sarbanes-Oxley Act must prove that the whistleblowing activity was a contributing factor in an unfavorable personnel action against the whistleblower, but the whistleblower need not show that the employer acted with retaliatory intent.

Opinions: Justice Sotomayor (for the Court); Justice Alito (concurring)

Murthy v. Missouri

Argued: 03/18/2024

Decided: 06/26/2024

Question Presented: Whether two states and five social media users who sued executive branch officials and agencies for alleged violations of the First Amendment have Article III standing.

Holding: The states and social media users failed to establish that they had standing to bring their case.

Opinions: Justice Barrett (for the Court); Justice Alito (dissenting)

National Rifle Association of America v. Vullo

Argued: 03/18/2024

Decided: 05/30/2024

Question Presented: A New York state official issued a press statement and guidance letters urging regulated banks and insurance companies to stop doing business with the National Rifle

Association (NRA) in the wake of a 2018 school shooting. Is such action by a government regulator a violation of the NRA's First Amendment right to free speech?

Holding: The NRA plausibly alleged that the New York state official violated the association's First Amendment rights by coercing regulated banks and insurance companies to stop doing business with the NRA. The First Amendment bars government officials from coercing private parties to act in order to punish or suppress speech, either directly or through private intermediaries, that it finds objectionable.

Opinion: Justice Sotomayor (for the Court); Justice Gorsuch (concurring); Justice Jackson (concurring)

CRS Resource: CRS Legal Sidebar LSB11186, *Government Coercion of Private Speech: National Rifle Association (NRA) v. Vullo*, by Whitney K. Novak (2024).

Office of the U.S. Trustee v. John Q. Hammons Fall 2006, LLC

Argued: 01/09/2024

Decided: 06/14/2024

Question Presented: In 2022, the Court held in *Siegel v. Fitzgerald* that the Bankruptcy Judgeship Act of 2017 violated the uniformity requirement of the Constitution's Bankruptcy Clause (art. I, § 8, cl. 4) by enabling the imposition of higher disbursement fees on certain debtors in federal judicial districts that have U.S. trustees but not in the districts that have bankruptcy administrators. What is the appropriate remedy for the constitutional uniformity violation found in *Siegel*?

Holding: Prospective parity, which would require imposing equal fees for otherwise identical debtors going forward, is the appropriate remedy to cure the disparity as a result of *Siegel's* holding that the statute violated the Bankruptcy Clause's uniformity requirement.

Opinion: Justice Jackson (for the Court); Justice Gorsuch (dissenting)

CRS Resource: CRS Legal Sidebar LSB11184, *United States Trustee v. John Q. Hammons Fall 2006, LLC: Congressional Intent in Determining Remedies for Violations of the Bankruptcy Clause Uniformity Requirement*, by Jeanne M. Dennis (2024).

Pulsifer v. United States

Argued: 10/02/2023

Decided: 03/15/2024

Question Presented: The "safety valve" provision (18 U.S. C. § 3553(f)(1)) of the federal sentencing statute allows federal judges to impose sentences below the mandatory minimum for certain nonviolent drug offenses if the individual can meet certain statutory conditions. Under the statute, a defendant satisfies the requirements if, among other things, he "does not have (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense, as determined under the sentencing guidelines; and (C) a prior 2-point violent offense, as determined under the sentencing guidelines." The question presented is whether the "and" means "and," so that a defendant satisfies the provision so long as he does not have (A), (B), and (C), or whether the "and" means "or," so that a defendant satisfies the provision so long as he does not have (A), (B), or (C).

Holding: A defendant is eligible for safety valve relief if the defendant satisfies each of the provision's three condition found in the safety valve provision. Section 3553(f)(1) creates an eligibility checklist, specifying the three necessary conditions for safety valve relief. An alternative reading would create superfluity and would not accurately take into account the seriousness of the defendant's crime, allowing relief for a defendant with numerous violent three-point offenses because he happens not to have a two-point offense.

Opinion: Justice Kagan (for the Court); Justice Gorsuch (dissenting)

CRS Resources: CRS In Focus IF12651, *Drug Offense Sentencing Relief Under the First Step Act and the U.S. Sentencing Guidelines*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB11145, *Supreme Court Clarifies Scope of Drug Offense Sentencing Relief Under the First Step Act*, by Dave S. Sidhu (2024).

Rudisill v. McDonough

Argued: 11/08/2023

Decided: 04/16/2024

Question Presented: Whether a veteran who has served two separate and distinct periods of qualifying service under the Montgomery GI Bill (which provides benefits to veterans who have served on active duty between 1985 and 2030) and under the Post-9/11 GI Bill (which provides benefits to veterans who have served on active duty since September 11, 2001) is entitled to receive a total of 48 months of education benefits as between both programs without first exhausting the Montgomery GI Bill benefit in order to obtain the more generous Post-9/11 GI Bill benefit.

Holding: A veteran with two distinct periods of qualifying service for education benefits under the Post-9/11 GI Bill and the Montgomery GI Bill was separately entitled to benefits under each, in any order, up to the statutory 48-month aggregate-benefits cap. The statutory provision requiring "coordination of entitlement" does not limit the veteran's entitlement to benefits.

Opinions: Justice Jackson (for the Court); Justice Kavanaugh (concurring); Justice Thomas (dissenting)

Securities and Exchange Commission v. Jarkesy

Argued: 11/29/2023

Decided: 06/27/2024

Question Presented: The Fifth Circuit held that the use of in-house administrative law judges (ALJs) by the Securities and Exchange Commission (SEC) to adjudicate securities fraud cases was unconstitutional. Do statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment?

Holding: When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.

Opinion: Chief Justice Roberts (for the Court); Justice Gorsuch (concurring); Justice Sotomayor (dissenting)

Sheetz v. County of El Dorado, California

Argued: 01/09/2024

Decided: 04/12/2024

Question Presented: Whether a "traffic impact mitigation" fee imposed by a California county to obtain a building permit is exempt from the unconstitutional-conditions doctrine, as applied in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, if it was authorized by legislation.

Holding: The Takings Clause does not distinguish between legislative and administrative permit conditions, and the *Nollan/Dolan* test applies regardless of whether the permitting condition is established administratively or through legislation.

Opinion: Justice Barrett (for the Court); Justice Sotomayor (concurring); Justice Gorsuch (concurring); Justice Kavanaugh (concurring)

CRS Resource: CRS Legal Sidebar LSB11098, *Sheetz v. County of El Dorado: The Court Explores Legislative Exactions and the Takings Clause*, by Adam Vann (2024).

Smith v. Arizona

Argued: 01/10/2024

Decided: 06/21/2024

Question Presented: Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by an expert conveying the testimonial statements of a non-testifying forensic analyst.

Holding: When an expert witness for the prosecution gives testimony that relies on a non-testifying forensic analyst's statements, and those statements are offered in support of the expert's opinion if true, then the statements implicate the Sixth Amendment's Confrontation Clause. As a result, a non-testifying forensic analyst's testimonial statements made out of court may not be introduced unless the analyst is unavailable and the defendant had a chance to conduct cross-examination.

Opinions: Justice Kagan (for the Court); Justice Thomas (concurring in part); Justice Gorsuch (concurring in part); Chief Justice Roberts (concurring in judgment)

Smith v. Spizzirri

Argued: 04/22/2024

Decided: 05/16/2024

Question Presented: When a lawsuit involves arbitrable claims, whether Section 3 of the Federal Arbitration Act requires a district court to stay a lawsuit pending arbitration or whether a district court has discretion to dismiss the lawsuit.

Holding: Section 3 of the Federal Arbitration Act compels the court to stay the proceedings when it finds that a lawsuit involves arbitrable claims.

Opinion: Justice Sotomayor (for the Court)

CRS Resources: CRS Legal Sidebar LSB11217, *Arbitration Law Update: The Supreme Court's October 2023 Term*, by Bryan L. Adkins (2024); CRS Legal Sidebar LSB11122, *Smith v.*

Spizzirri: Supreme Court to Consider Whether Federal Courts May Dismiss a Lawsuit Subject to Arbitration, by Bryan L. Adkins (2024).

Snyder v. United States

Argued: 04/15/2024

Decided: 06/26/2024

Question Presented: Section 666(a)(1)(B) of Title 18, U.S. Code makes it a crime for a state or local official to "corruptly solicit[] or demand[] for the benefit of any person, or accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." Does § 666 apply to gratuities, which are payments made to a public official after taking an official act?

Holding: Section 666(a)(1)(B) does not make it a crime for a state or local official to accept gratuities for past acts.

Opinion: Justice Kavanaugh (for the Court); Justice Gorsuch (concurring); Justice Jackson (dissenting)

CRS Resource: CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024).

Starbucks Corp. v. McKinney

Argued: 04/23/2024

Decided: 06/13/2024

Question Presented: Under the National Labor Relations Act, the National Labor Relations Board (NLRB) issues complaints alleging that employers committed unfair labor practices and adjudicates those complaints. The Act also authorizes, while the NLRB adjudication remains pending, a federal district court to grant NLRB's request for preliminary injunctive relief "as [the court] deems just and proper." Should courts evaluate the NLRB's requests for injunctive relief under the traditional, four-factor test for preliminary injunctions or under another standard?

Holding: District courts must apply the traditional four-factor test when considering NLRB's request for a preliminary injunction. The traditional four-factor test requires a plaintiff to show likely success on the merits, that the plaintiff is likely to suffer irreparable harm in the absence of a preliminary relief, that the balance of equities tips in favor of the plaintiff, and that the preliminary injunction is in the public interest.

Opinions: Justice Thomas (for the Court); Justice Jackson (concurring in part, dissenting in part, and concurring in the judgment)

Texas v. New Mexico

Argued: 03/20/2024

Decided: 06/21/2024

Question Presented: The Rio Grande Compact is an interstate agreement that apportions the waters of the Rio Grande River among Colorado, New Mexico, and Texas. The United States, an intervenor in a 2013 lawsuit filed by Texas against New Mexico and Colorado, objected to a

proposed consent decree reached by Texas and New Mexico in 2022 that would end litigation over the allocation of each's states share of the Rio Grande's waters under the compact.

Holding: The states' motion to enter the proposed consent decree was denied because the United States has a separate, distinct interest from the states in the Rio Grande Compact, and the consent decree would have disposed of the United States' interests without its consent.

Opinion: Justice Jackson (for the Court); Justice Gorsuch (dissenting)

Thornell v. Jones

Argued: 04/17/2024

Decided: 05/30/2024

Question Presented: Whether the U.S. Court of Appeals for the Ninth Circuit misapplied the factors set forth in *Strickland v. Washington*, which outlines the test to adjudicate an ineffective assistance of counsel claim.

Holding: The Ninth Circuit's interpretation and application of the factors under *Strickland* in adjudicating the defendant's ineffective assistance of counsel claim was in error.

Opinions: Justice Alito (for the Court); Justice Sotomayor (dissenting); Justice Jackson (dissenting)

Truck Insurance Exchange v. Kaiser Gypsum Company

Argued: 03/19/2024

Decided: 06/06/2024

Question Presented: Whether a debtor's insurer with financial responsibility for a bankruptcy claim is a "party in interest" that may "be heard on any issue" in a Chapter 11 bankruptcy.

Holding: An insurer with financial responsibility for a bankruptcy claim is a "party in interest" that can raise objections to a Chapter 11 reorganization plan.

Opinion: Justice Sotomayor (for the Court)

Trump v. Anderson

Argued: 02/08/2024

Decided: 03/04/2024

Question Presented: Whether the Colorado Supreme Court erred in determining that former President Trump is constitutionally disqualified from holding future office under Section 3 of the Fourteenth Amendment because he "engaged in insurrection" and, therefore, must be excluded from the 2024 presidential primary ballot.

Holding: The Colorado Supreme Court erred in excluding the former President form the primary ballot because the Constitution makes Congress, rather than the states, responsible for enforcing Section 3 of the Fourteenth Amendment against federal officeholders and candidates.

Opinion: Per curiam, Justice Barrett (concurring in part and concurring in the judgment); Justices Sotomayor, Kagan, and Jackson (concurring in judgment)

CRS Resources: CRS Legal Sidebar LSB11094, *Disqualification of a Candidate for the Presidency, Part I: Section 3 of the Fourteenth Amendment as It Applies to the Presidency*, by Jennifer K. Elsea, L. Paige Whitaker, and Juria L. Jones (2024); CRS Legal Sidebar LSB11096, *Disqualification of a Candidate for the Presidency, Part II: Examining Section 3 of the Fourteenth Amendment as It Applies to Ballot Access*, by L. Paige Whitaker, Jennifer K. Elsea, and Juria L. Jones (2024).

Trump v. United States

Argued: 04/25/2024

Decided: 07/01/2024

Question Presented: Whether—and, if so, to what extent—a former President enjoys immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

Holding: Former Presidents retain absolute immunity for official actions involving their core constitutional functions, at least presumptive immunity for other official acts, and no immunity from prosecution for unofficial acts.

Opinions: Chief Justice Roberts (for the Court); Justice Thomas (concurring), Justice Barrett (concurring in part); Justice Sotomayor (dissenting); Justice Jackson (dissenting)

CRS Resource: CRS Legal Sidebar LSB11194, *Presidential Immunity from Criminal Prosecution in Trump v. United States*, by Todd Garvey (2024).

United States v. Rahimi

Argued: 11/07/2023

Decided: 06/21/2024

Question Presented: Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by an individual subject to a domestic violence restraining order if that order includes a finding that the individual "represents a credible threat to the physical safety of [an] intimate partner or child," is unconstitutional under the Second Amendment.

Holding: Section 922(g)(8) is consistent with the Second Amendment.

Opinions: Chief Justice Roberts (for the Court); Justice Sotomayor (concurring); Justice Gorsuch (concurring); Justice Kavanaugh (concurring); Justice Barrett (concurring); Justice Jackson (concurring); Justice Thomas (dissenting)

CRS Resources: CRS Legal Sidebar LSB11212, *The Supreme Court's Narrow Construction of Federal Criminal Laws: 2023 Term*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB11108, *The Second Amendment at the Supreme Court: Challenges to Federal Gun Laws*, by Dave S. Sidhu (2024); CRS Legal Sidebar LSB11181, *Second Amendment Permits Temporarily Disarming Persons Subject to Domestic Violence Restraining Orders*, by Matthew D. Trout and Dave S. Sidhu (2024).

Vidal v. Elster

Argued: 11/01/2023

Decided: 06/13/2024

Question Presented: Whether Section 2(c) of the Lanham Act, which bars the registration of a trademark that "[c]onsists of or comprises a name ... identifying a particular living individual except by his written consent," violates the First Amendment.

Holding: Section (2) of the Lanham Act does not violate the First Amendment.

Opinion: Justice Thomas (for the Court); Justice Kavanaugh (concurring in part); Justice Barrett (concurring in part); Justice Sotomayor (concurring in the judgment)

Warner Chappell Music v. Nealy

Argued: 02/21/2024

Decided: 05/09/2024

Question Presented: Whether, under the discovery accrual rule applied by the circuit courts (which provides that a claim accrues when plaintiff discovers or should have discovered the infringing act) and the Copyright Act's three-year statute of limitations for civil actions (which requires that a plaintiff file suit "within three years after the claim accrued), a copyright plaintiff can recover damages for infringing acts that allegedly occurred more than three years before filing a lawsuit.

Holding: The Copyright Act's three-year statute of limitations does not impose a time limit on the recovery of damages for copyright infringements that occurred more than three years before a lawsuit was filed so long as the claim itself is timely. There is no time limit to recover monetary damages for infringing acts, and a copyright plaintiff with a timely claim (i.e., brought within three years of discovering infringement) is entitled to damages regardless of when the infringement occurred.

Opinions: Justice Kagan (for the Court); Justice Gorsuch (dissenting)

Wilkinson v. Garland

Argued: 11/28/2023

Decided: 03/19/2024

Question Presented: Under the Immigration and Nationality Act, the Attorney General has discretion to cancel the removal of a non-permanent resident who satisfies four eligibility criteria, including "that removal would result in exceptional and extremely unusual hardship" to the applicant's spouse, parent, or child who is a U.S. citizen or lawful permanent resident. Is this determination a mixed question of law and fact and, therefore, subject to judicial review, or is it a statutorily unreviewable discretionary judgment?

Holding: The application of a statutory legal standard (i.e., the exceptional and extremely unusual hardship standard) to an established set of fact is a "quintessential mixed question of law and fact" and subject to judicial review.

Opinion: Justice Sotomayor (for the Court); Justice Jackson (concurring in judgment); Chief Justice Roberts (dissenting); Justice Alito (dissenting)

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