

A LOOK AHEAD

Supreme Court of the United States October Term 2023

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2023 PREVIEW

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Supreme Court Institute Preview Report

Supreme Court October Term 2023

This report previews the Supreme Court’s argument docket for October Term 2023 (OT 23). The Court has thus far accepted 22 cases for review. The Court has calendared 6 arguments to be heard in the October Sitting and 7 in the November Sitting.

Section I of the report highlights some especially noteworthy cases the Court will hear. Section II organizes the cases accepted for review by subject matter and provides a brief summary of each.

SECTION I: TERM HIGHLIGHTS

United States v. Rahimi

This case involves the constitutionality of 18 U.S.C. 928(g)(8), which prohibits the possession of a firearm by a person subject to a restraining order meeting several preconditions. Most important, a restraining order must either include a finding that the person poses a credible threat to the physical safety of an intimate partner, or it must explicitly prohibit the use of physical force against an intimate partner.

The key decisions bearing on the constitutionality of Section 922(g)(8) are *District of Columbia v. Heller* and *New York State Rifle v. Bruen*. In *Heller*, the Court held that the Second Amendment guarantees an individual right to possess firearms in the home for purposes of self-defense. In *Bruen*, the Court held that the Second Amendment guarantees an individual right to carry firearms outside the home for purposes of self-defense.

Heller described the right guaranteed by the Second Amendment as “presumptively” belonging to “all Americans.” But *Heller*’s holding was more limited: the Court described its decision as establishing the right of “law abiding, responsible citizens” to use arms in defense of the home. And the Court stated that its decision did not cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill. Similarly, *Bruen* characterized *Heller* as holding that the Second Amendment protects the right of “an ordinary, law-abiding citizen” to possess a handgun in the home for self-defense. And at various points, the Court described its holding that individuals have a right to carry firearms outside the home as similarly limited. Significantly, the Court gave its presumptive approval to shall-issue licensing schemes that are designed to ensure that those bearing arms are “law-abiding, responsible citizens.” It’s hard to see how those schemes could be constitutional unless it is also constitutional to restrict firearms to law-abiding, responsible citizens.

Bruen also established a two-step inquiry for deciding whether a firearms regulation is constitutional. At the first step, when “the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” At the second step, “the government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”

Bruen also provided guidance on how to conduct the historical inquiry. If the challenged regulation addresses a societal problem that has been around since the 18th century, the absence

of a similar historical regulation is evidence that the modern regulation is unconstitutional. So too, if earlier generations addressed the same problem in different ways, that could be evidence that the modern regulation is unconstitutional. The Court envisioned a more nuanced approach in cases implicating unprecedented societal concerns or dramatic technological changes. The Court also stated that the historical approach can involve reasoning by analogy. The analogy to a historical regulation need not be “an exact match.” At the same time, the modern and historical regulations must impose a comparable burden and the burden must be comparably justified.

The government’s defense of Section 922(g)(8) relies first and foremost on the Court’s statements in *Heller* and *Bruen* that imply that the government may disarm persons who are not “law-abiding, responsible persons.” That understanding, the government argues, is consistent with English Law that allowed the government to disarm individuals who were dangerous, proposed Second Amendment precursors that limited the guarantee to people who were peaceable and not dangerous, and commentators who recognized the government’s authority to disarm individuals who were not peaceable.

The government also relies on Founding era state laws disarming loyalists who refused to swear allegiance, laws that authorized confiscating arms of those who used them to spread terror, and surety laws that required a gun owner to post a bond if there was reason to fear that he would pose a danger to another. The government also cites somewhat later state laws that banned the sale of firearms to minors, persons of unsound mind, intoxicated persons, and tramps.

This history and tradition, the government argues, establishes that Congress may disarm anyone who is not responsible, which includes anyone whose possession of a firearm would pose a danger of harm to himself or others. The government argues that the persons who are prohibited by Section 922(g)(8) from possessing a firearm fit that description because armed domestic abusers pose a threat to their domestic partners, to the police, and to the public.

Respondent makes three arguments in response. First, he argues that the plain text of the Amendment covers individuals who are subject to restraining orders because it protects the right of “the people,” and that term encompasses all Americans, not some subset of Americans, such as law-abiding, responsible citizens. Under *Bruen*, respondent argues, any conflict between the Second Amendment’s text, and stray statements in *Heller* and *Bruen*, must be resolved in favor of the text.

Second, respondent argues that this is a case in which Congress is addressing a general societal problem that the framing generation addressed through different means, such as recognizing domestic violence as grounds for divorce and imposing criminal sanctions other than disarming the abuser. Under *Bruen*, respondent argues, that is evidence that Section 922(g)(8) is unconstitutional.

Third, respondent argues that the government has failed to identify any historical analogue to Section 922(g)(8). The surety laws imposed a much lighter burden on the right to bear arms, and the other laws did not disarm individuals to avoid private violence. [Respondent and the Fifth Circuit offer other distinctions between the historic gun regulations and Section 922(g)(8), but they will not be discussed here].

The government responds to each of those points as follows. First, the government argues that history and tradition establish that the government can disarm persons who are not law-abiding, responsible citizens, regardless of whether they are among the people. Second, the government argues that the absence of any framing era law disarming domestic abusers does not support invalidation of Section 922(g)(8) because there is no requirement of a historical twin. The absence of such a twin is particularly unilluminating, the government argues, because there

were no civil protective orders at the time of the framing, past generations generally took a hands-off approach to domestic violence, and guns did not pose the same threat to domestic partners that they do today. Finally, the government argues the line between protecting society generally and protecting identified individuals is a false dichotomy: Crimes against individuals destroy the peace of the community, and armed domestic abusers not only pose a threat to their partners, but also endanger society generally.

It seems very unlikely that the Court would sustain Section 928(g)(8) at the first step of the *Bruen* analysis. Just as domestic abusers are presumptively entitled to other rights that are given to “the people,” such as the First Amendment right to peaceably assemble, and the Fourth Amendment right to be secure against unreasonable search or seizure, they are likewise presumptively entitled to protection under the Second Amendment.

At the same time, it is hard to believe that the Court would invalidate Section 928(g)(8) because there was no prohibition on possession of firearms by domestic abusers at the time of the framing. *Bruen* does say that a gun restriction that addresses a longstanding problem in a way that is different from the way the Framers addressed it is evidence of its unconstitutionality. But it also says there is no requirement of a historical twin. And it seems unlikely in the extreme that the center block of conservatives (the Chief Justice, Justice Kavanaugh, and Justice Barrett) will sign on to a decision that says domestic abusers have a Second Amendment right to keep their guns to threaten and possibly kill their domestic partners because the Framers didn’t care all that much about domestic abuse. None of them has expressed a preference for originalism run amok.

That leaves the question of whether there is a sufficiently analogous historical tradition supporting Section 928(g)(8), and that depends on the level of generality at which that tradition is defined. The government has broadly described the level of generality as people who are not law-abiding and responsible. The Court has used that phrase itself, suggesting that the Court believes that the phrase captures the relevant historical tradition. But the phrase’s indeterminacy cries out for further elaboration. The government seems to recognize as much, because, at the end of the day, it says this case implicates only those who are irresponsible, and it defines an irresponsible person as someone whose possession of a firearm poses a danger to himself or others.

Respondent would define the tradition of disarming dangerous persons more narrowly to encompass only those who pose a danger to the public generally, not those who threaten private violence. But for the reasons the government has given, that distinction does not reflect a real dichotomy. Both threaten public order. And people who pose a risk to particular individuals often pose a risk to the public more generally. Moreover, neither respondent nor the Fifth Circuit have cited any evidence that any court or commentator in the framing era thought it was unconstitutional to strip persons of gun rights when they posed a danger to identified individuals. And to the extent it is relevant, there is a modern-day consensus reflected in both federal law and the law of 48 states that removing guns from domestic abusers who pose a danger to their partners does not violate the Second Amendment. For those reasons, the Court will likely say, in the words of then-Judge Barrett, that history and tradition support allowing the government to disarm persons who either “fall into dangerous categories or bear individual markers of risk.”

Under that standard, Section 928(g)(8) is most easily defended as applied to orders that include a finding that a person poses a credible threat to the physical safety of the intimate partner. A finding of that kind meets Justice Barrett’s test by definition. As for the alternative trigger—an express prohibition against the use of physical force against an intimate partner—the Court may view the answer as less clear. The government argues that Congress reasonably

determined that a court would expressly forbid the use of physical force against an intimate partner only if it perceived a real danger that the person would use such force. That may be true. But it is at least possible that express prohibitions on the use of physical force might be a relatively standard feature of restraining orders or issued out of an abundance of caution. Absent some empirical evidence on this question, the Court may wish to avoid resolving the question whether this half of the statute is constitutional. And it doesn't have to resolve that issue to resolve this case. Because there was a finding that respondent posed a credible threat to the physical safety of his partner, the Court can uphold the application of the statute to respondent on that basis without reaching any other issue.

Loper Bright Enterprises v. Raimondo

In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court adopted a two-step method for review of agency interpretations of a statute. First, a court must assess, in accordance with all the ordinary tools of statutory construction, whether Congress has directly spoken to the precise question at issue. If Congress's intent is clear, that is the end of the matter. Second, if the statute is silent or ambiguous with respect to the specific issue, a Court must defer to the agency's interpretation, provided it is reasonable. The question is whether the Court should overrule *Chevron's* two-step method and replace it with de novo review of all agency interpretations of a statute.

Petitioner argues that the Court should not apply the ordinary *stare decisis* considerations in deciding whether to overrule *Chevron* because interpretive methods do not enjoy strong *stare decisis* protection. At most, interpretive methods enjoy the weak form of *stare decisis* accorded to procedural rules. Such rules may be cast aside when they have not engendered reliance interests, are judge-made, and experience has revealed their weaknesses.

Petitioner further contends that, even if ordinary *stare decisis* considerations were applicable, *Chevron* should be overruled. Petitioner argues that *Chevron* is egregiously wrong as a constitutional matter three times over. First, it violates Article III because it requires courts to violate their duty under *Marbury v. Madison* to say what the law is. Second, to the extent that *Chevron* permits Congress to delegate to agencies the power to make policy, it violates Article I's requirement that only Congress may exercise legislative power. Third, *Chevron* also violates due process because it is inconsistent with the principle that a court must decide a case without a precommitment to favor one side or the other.

Petitioner also argues that *Chevron* violates the Administrative Procedure Act (APA) requirement that courts "shall decide all relevant questions of law," and "interpret constitutional and statutory provisions." That language, petitioner argues, means that courts must interpret statutes de novo. In addition, since all agree that constitutional interpretation is de novo, the pairing of constitutional with statutory interpretation reinforces that statutory interpretation is also de novo. If that were not enough, the APA's specification of substantial evidence review for facts and arbitrary and capricious review for other non-legal questions shows that when Congress wants deferential review, it says so.

Petitioner also contends that *Chevron* has spawned negative consequences. Specifically, *Chevron* has proven unworkable because courts have wildly different views of whether a statute is clear or ambiguous. *Chevron* has incentivized agencies to aggressively squeeze their policy goals into statutes, and incentivized Congress to stay out of the business of governing. And *Chevron* has adversely affected the lives of citizens who are subject to agency overreach.

The government has not yet filed its brief on the merits. But the best arguments for preserving *Chevron* are these: First, ordinary *stare decisis* considerations apply because courts have applied *Chevron* countless times; undoing it would call into question countless prior interpretations of statutes, and Congress has been free to overrule *Chevron*, but has chosen not to.

Second, *Chevron* is not unconstitutional, much less egregiously so. The judicial duty to exercise independent judgment in declaring the law is not violated if a court concludes, in the exercise of independent judgment, that Congress has instructed the court to defer to an agency's reasonable understanding of the law. There is no delegation problem because *Chevron* requires the agency's interpretation of a statute to be reasonable in light of a statute's purposes, which is more than sufficient to satisfy the current nondelegation doctrine. The major questions doctrine, in any event, precludes *Chevron* deference on major questions, and, and even for Justices who want to revitalize the nondelegation doctrine, that is sufficient to avoid nondelegation issues. As far as due process goes, *Chevron* does not reflect case-specific bias in favor of the agency. It reflects Congress's judgment that agencies are best positioned to execute Congress's goals when the statute itself is not clear. More generally, none of the constitutional objections account for mandamus review. If Congress may limit an Article III court to reviewing executive action for clear violations of legal duty, there is no constitutional objection to applying virtually the same standard of review under *Chevron*.

Third, *Chevron* does not violate the APA instruction to "decide" all questions of law and questions of statutory interpretation for the same reason it does not violate Article III. A court defers under *Chevron* only after it independently decides that Congress has not clearly resolved the issue and has instead entrusted the resolution of the issue to the agency. *Chevron*'s consistency with the APA duty to decide on the meaning of statutes is obvious when Congress expressly requires deference to agency interpretations (e.g., exempting from overtime pay executives as defined by the Secretary). But the principle is the same when Congress implicitly requires deference by leaving ambiguity in a statute.

Fourth, *Chevron* has not resulted in adverse consequences. The standard for application of *Chevron*—that the statute does not clearly resolve the issue and there is more than one reasonable interpretation—is no more difficult to apply than other comparable standards. Examples are the mandamus standard of violating a clear duty to act, AEDPA's requirement of deference to reasonable state court interpretations of federal law, and the major question doctrine's clear congressional authorization requirement. The claim that *Chevron* incentivizes agency overreach, incentivizes congressional inaction, and harms the citizenry is not supported by any evidence. On the other hand, *Chevron* has produced concrete benefits, such as promoting national uniformity and political accountability.

There are reasonable arguments for and against *Chevron*. It is therefore hard to say it is egregiously wrong. Nonetheless, the Court seems poised to overrule it. For years, *Chevron* has been the decision "that must not be named." That phenomenon is hard to explain unless five Justices have already concluded that it does not properly state the law. The other evidence that five Justices have already decided to throw *Chevron* overboard, however, is not overwhelming. It's true that the Article III and APA reasons that Justice Gorsuch gave for rejecting *Auer* (*v. Robbins*) deference in *Kisor v. Wilkie* apply equally to *Chevron*. And it's true that three other Justices joined that opinion, including Justice Kavanaugh. But Justice Kavanaugh also wrote a concurring opinion that seems to stake out a different position—when a court reaches a conclusion about the best meaning of a text, it should not defer to agency interpretations.

Even assuming that Justice Kavanaugh is on board, that still leaves petitioner one vote shy. In his concurring and controlling opinion in *Kisor*, the Chief Justice preserved his option to vote to overrule *Chevron*. But he has also previously said that *Chevron* is consistent with Article III and the APA. Because those are the two leading grounds for overruling *Chevron*, it seems unlikely that the Chief Justice will supply the fifth vote for an overrule.

That leaves Justice Barrett. As petitioner points out, she joined Justice Gorsuch’s concurring opinion in *U.S. v. Texas*, and that opinion contains a sentence stating that the APA requires a court to apply *de novo* review to questions of law. But the opinion was devoted to a topic having nothing to do with *Chevron*. Joining an opinion that contains a single sentence on *de novo* review, when the opinion is devoted to an entirely different topic, would seem like an unusual way for Justice Barrett to express her disagreement with *Chevron* or her willingness to overrule it. That’s not to say that Justice Barrett will not end up joining a decision to overrule *Chevron*. She may well. It’s only to say that it is somewhat of a stretch to say she already expressed that view by joining the *U.S. v. Texas* concurrence.

The leading alternative to overruling *Chevron* is to adopt Justice Kavanaugh’s apparent view that *Chevron* applies only when a court concludes there is no one best reading of the statute. But that seems like a flat misreading of *Chevron*. It applies, as Justice Scalia stated, when there is more than one “reasonable” reading of a statute, not just when there is no one best reading. And it applies, as the Court said in *Chevron*, even when the agency reaches a different conclusion than the reviewing court would have reached if the question had initially arisen in a judicial proceeding, *i.e.*, even when the agency’s interpretation is not the best reading.

The doctrine would be pointless otherwise. In interpreting statutes when there is no agency interpretation, no court has ever said there are two equally good interpretations of a statute, so we’ll just throw up our hands. Instead, no matter how close the question, courts always pick what they think is the best interpretation, even if it is best by a hair. Two equally good interpretations of a statute happen as often as two equally qualified candidates for a job, which is to say never. So, if the Court clarifies that *Chevron* only applies when there is no one best reading of a statute, it will have the same practical effect as overruling *Chevron*. We will either never hear from it again, or it will occasionally show up at the back end of an opinion or in a footnote that says, because we have concluded that x is the best reading of the statute, *Chevron* does not apply. Still, the Court may ultimately prefer a “clarification” of that kind to an express overrule when the two paths lead to the same result.

There is an outside chance that the Court will instead tighten up *Chevron* in the same way it tightened up *Auer* in *Kisor*. The government will almost surely suggest something along those lines. [Tossing *Brand X (Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.)* might be a good start]. Maybe the Court will think that the major question doctrine has taken a sufficient bite out of *Chevron* and that *Chevron*’s potential to provide guidance to the regulated community and generate uniformity without the Court having to step in make it worth preserving in some form. But for a Court that believes the administrative state is out of control, and it’s the Court’s job to rein it in, tightening up *Chevron* will likely not be enough. The Court is therefore likely to either overrule *Chevron* or neuter it. It’s hard to say which.

Consumer Financial Protection Bureau v. Consumer Financial Services Association

Under federal law, the Federal Reserve Board transfers to the CFPB “the amount determined by the CFPB’s Director to be reasonably necessary to carry out the CFPB’s

authorities, taking into account the amount available to the CFPB from the preceding year. The amount transferred shall not exceed 12% of the total operating expenses of the Federal Reserve System, or \$5967.6 million adjusted for inflation.” The question presented is whether this method of funding the CFPB is consistent with the Appropriations Clause, which provides that “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.”

Respondents contend that three features of the CFPB’s funding mechanism render it unconstitutional. First, and most important, while the Appropriations Clause requires Congress to set the amount of funding, the statute allows the CFPB to self-determine the amount of funding it needs each year subject only to an “illusory” cap. Second, Congress gave up its appropriations power without any temporal limit. The effect of the second feature is to reverse the baseline under which the President must negotiate with Congress annually or periodically. Instead, the CFPB can continue to set its own funding forever unless prohibited by Congress. Third, the funding is available to carry out any of the CFPB’s authority, and the CFPB wields core executive power: It issues final regulations, it oversees adjudications, it initiates prosecutions, and it determines what penalties to impose.

The government argues first that the Appropriations Clause does not require Congress to specify a dollar amount of an agency’s funding. Instead, an appropriation is simply a law making a particular source of funding available for particular uses. Even if a dollar amount requirement existed, the government argues, Congress satisfied that requirement by providing a cap on the amount funding. Next, the government argues that the Appropriations Clause does not, except in one respect, restrict Congress’s authority to choose the duration of the appropriations it makes. The Constitution’s two-year limit on the duration of appropriations for the Army, the government argues, shows that Congress is otherwise free to determine the duration of an appropriation. Finally, the government argues that the Appropriations Clause does not draw any distinction between agencies that exercise core executive powers and those that exercise non-core executive powers.

There are two key questions raised by the parties. First, is the CFPB’s cap illusory? Respondents say it is because the CFPB has never come close to spending up to the cap. The government responds that the cap is below the budgets of various agencies with similar funding mechanisms, that there is no judicially manageable standard for determining when a cap is illusory, and that allowing a court to set a cap would be inconsistent with the Framers’ determination that the judiciary would have no influence over funding.

Assuming the cap is so high as to be equivalent to the absence of a cap, the next question is whether that matters under the Appropriations Clause. Because neither the text of the Appropriations Clause nor precedent have much to say about the answer to that question, the resolution of the question largely comes down to what lessons can be drawn from historical practice.

Respondents argue there is no historical counterpart that has combined a funding level determined by the agency, the absence of any duration limit, and the ability to use funding for core executive duties. The government responds that the combination of those features is commonplace in agencies such as the Federal Reserve Board, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). Respondents say that the Federal Reserve exercises sui generis powers, and that the market constrains how high the OCC and the FDIC may set their fees. The government responds that those distinctions are irrelevant for purposes of the Appropriations Clause: The Federal Reserve Board still exercises

substantial executive power, and the Appropriations Clause is concerned with control exercised by Congress, not constraints imposed by private parties that agencies regulate.

The Court is likely to have an aversion to the degree of independence Congress sought to achieve for the CFPB. Indeed, the Court already said as much in *Seila Law LLC v. CFPB*, albeit in relation to Congress's attempt to make the CFPB independent of the President. For respondents to prevail, however, it appears that they will have to convince the Court that there is a judicially manageable way for the Court to determine when a cap is illusory, that the CFPB's cap is well over that line, and that there are valid Appropriations Clause distinctions between the CFPB's funding mechanism and the long-established funding mechanisms for other agencies. That is a formidable challenge. Whether that challenge can be surmounted remains to be seen.

Securities and Exchange Commission v. Jarkesy

The Securities and Exchange Act authorizes the SEC to adjudicate claims of securities fraud and impose civil penalties for any violations. The most important question presented (and the only one discussed here) is whether such an agency adjudication violates a person's Seventh Amendment right to be tried by a jury. That issue is important because it has potentially broad implications for whether the SEC and other agencies may conduct agency adjudications or must instead bring their actions in federal court.

The government argues that, under the public rights doctrine, the Seventh Amendment is not implicated in SEC adjudications that seek penalties. *Crowell v. Benson* established that private rights generally involve the liability of one private party to another, whereas public rights involve matters that arise between the federal government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. Under the public rights doctrine, Congress may assign public rights for adjudication in administrative agencies rather than Article III courts, and the Seventh Amendment imposes no independent constraint on agency adjudication.

At a minimum, the government argues, *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n* establishes that the public rights doctrine allows Congress to create new statutory obligations, impose civil penalties for their violation, and commit to administrative adjudication whether a violation has occurred. The government argues that this case fits squarely within the holding of *Atlas Roofing*. The Securities and Exchange Act creates new statutory obligations, and it authorizes the SEC to determine whether a violation has occurred, and whether civil penalties should be imposed.

Respondent embraces the Fifth Circuit's quite different view. The Fifth Circuit said that the public rights doctrine is not applicable to SEC adjudications for two independent reasons: first, SEC actions resemble common law actions for fraud, and second, jury trials would not dismantle the statutory scheme because Congress has authorized the SEC to file actions in Article III courts, where a jury trial would be required.

Neither prong of the Fifth Circuit's analysis has much going for it. The SEC brings its action in the public interest to remedy harm to the public, not to vindicate private rights. And the SEC can bring a fraud action without proving either reliance or harm, as would be required under the common law. Those differences between the statute and the common law are enough to show that the SEC is vindicating a public right, not a private one. Indeed, those differences parallel the differences between the administrative action at issue in *Atlas Roofing* and its common law analogue. An agency action under OSHA is brought in its sovereign capacity and a showing of

harm is not required, whereas the common law remedy for negligent workplace hazards is brought by private parties and proof of harm is required. It makes no difference whether the Supreme Court's decision in *Tull v. United States* would require a jury trial if the SEC brought suit in federal court. *Atlas Roofing* authorizes agency adjudications of public rights even if a jury trial would be required if the action were instead brought in federal court.

The Fifth Circuit's alternative holding that jury trials are required because they would not dismantle the statutory scheme takes exactly the wrong lesson from *Atlas Roofing*. The Court held in that case that when Congress authorizes administrative adjudication, requiring jury fact finding, by definition, undoes the statutory scheme. It's true that, unlike in *Atlas Roofing*, Congress authorized the SEC to file suit in federal court, where a jury trial would be required. But it also authorized the SEC to adjudicate the claim administratively. Requiring a jury trial would destroy one of those options.

Nor does the option to try a claim in federal court have anything to do with whether the SEC is vindicating a public right. Under the public rights doctrine, Congress may assign public rights to courts or administrative agencies. And Congress has authorized both options numerous times, including for the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau, the Environmental Protection Agency, the Food and Drug Administration, and the Postal Service.

The Fifth Circuit derived its test from the Supreme Court's decision in *Granfinanciera, S.A. v. Nordberg*. But it badly misread that decision. That case established a test for determining when an Article III court and a jury trial are required in a suit brought to determine the liability of one private party to another. The Court expressly distinguished cases brought by the federal government in its sovereign capacity to vindicate public rights.

Atlas Roofing may seem a little jarring insofar as it approves administrative imposition of civil penalties. But so are the line of cases that preceded it, including cases that authorize agencies to impose penalties and fines and for underpayment of taxes, for violations of the immigration laws, and for undervaluing imported merchandise. Moreover, the SEC's administrative imposition of civil penalties is subject to judicial review, blunting some of the concerns that might otherwise be raised.

If the Court were willing to start over, it's possible that some or even a majority of the Justices would be attracted to a doctrine that would disable Congress from giving administrative agencies authority to impose civil penalties unless there was a framing era analogue. And it's also possible that Justices who are inclined toward that view would be willing to limit *Atlas Roofing* in one or more of the ways suggested by the Fifth Circuit. But if the past term is any guide, a majority of the Court is likely to be inclined to follow the most straightforward reading of precedent, and that reading favors the government. At the same time, because a majority of the Court likely has real concerns about the fairness of administrative adjudication, there remains a real possibility that the Court will find a way to distinguish or limit the *Atlas Roofing* line of precedent.

Harrington v. Purdue Pharma

Purdue Pharma (Purdue) manufactured OxyContin, a painkiller that significantly contributed to the opioid epidemic. Until recently, the Sackler families owned Purdue. To protect themselves from lawsuits, the Sacklers withdrew \$11 billion from Purdue and transferred it overseas. Purdue subsequently filed for bankruptcy.

Under a proposed reorganization plan, Purdue would distribute money to opioid victims, the Sacklers would contribute several billion dollars to fund the plan (recently increased to up to \$6 billion), and the Sacklers would be relieved of personal liability. The plan not only releases the claims of those who consent to the plan; it also releases the claims of those who do not. The question presented is whether the Bankruptcy Code authorizes a court to approve a reorganization plan that releases third party claims against non-debtors without the consent of the third parties.

Respondents, which include Purdue, a group of opioid victims, and a group of unsecured creditors, argue that the Bankruptcy Code authorizes such third-party releases. They rely on two provisions of the Code, Sections 105(a) and 1123(b)(6). Section 105(a) gives a bankruptcy court authority to issue “any order . . . that is necessary or appropriate to carry out the provisions” of the Code. Section 1123(b)(6) provides that a reorganization plan may “include any other appropriate provision not inconsistent with the applicable provisions of this title.” Respondents argue that those two Code provisions provide broad residual authority to issue orders to modify creditor-debtor relationships.

Respondents argue that the extension of the releases to the Sacklers, even though they are non-debtors, represents an appropriate modification of creditor-debtor relations because resolving the overlapping claims against the Sacklers is the only viable path to a mass settlement and Purdue’s reorganization. Without the releases, the plan would fall apart and the likely result would be liquidation. Other factors strongly support the appropriateness of the plan, including that the Sacklers contributed substantial assets to the reorganization, creditors overwhelmingly support the plan, and the plan provides for the fair payment of released claims.

The government argues that Sections 105(a) and 1123(b)(6) are subject to the background understanding that the subject of bankruptcy is the relations between a debtor and its creditors, not the relationship between creditors and non-debtors. That limitation, the government argues, reflects the Code’s basic structure: The debtor incurs a host of obligations, and in exchange, the Code authorizes discharge of the debtor’s liabilities. To extend relief to non-debtors, the government argues, would allow non-debtors to reap the benefits of bankruptcy without incurring any of its obligations. Thus, unless Congress has expressly authorized relief for non-debtors, as it has for asbestos-related bankruptcies, such relief is not appropriate.

Beyond that, the government argues that the releases at issue here extend to fraud-based claims that the Sacklers could not have had discharged even if they had submitted to bankruptcy. Whatever the limits of Sections 105(a) and 1123(b)(6), the government argues, they cannot reasonably be interpreted to authorize broader relief for the Sacklers than they could have obtained had they sought relief through bankruptcy itself. Finally, the government argues that a plan that extinguishes all opioid claims against the Sacklers without an opportunity for an objecting claimant to opt out would raise serious due process questions that can be avoided by interpreting the Code not to authorize such releases.

There is considerable appeal to the idea that a court ought to have authority to relieve non-debtors of personal liability if that is the only viable path to producing a mass settlement, the vast majority of claimants approve the plan, and the settlement offers billions of dollars in relief that might not otherwise be available. Moreover, the text of Sections 105(a) and 1123(b)(6) is broad enough to encompass such relief. On the other hand, the Code does not expressly authorize extinguishing the personal liability of non-debtors, except for asbestos-related bankruptcies. There is something unattractive about letting the Sacklers off the hook after they stripped Purdue of \$11 billion dollars and put the money out of the reach of opioid victims. And, even though due

process does not preclude extinguishing claims against debtors who have filed for bankruptcy, it is not clear that due process concerns are not raised by extinguishing claims against non-debtors without offering an opt out or some other method to protect the interests of non-consenting third parties. How the Court will weigh these competing considerations is difficult to predict.

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Administrative Law

Appropriations

Consumer Financial Protection Bureau v. Community Financial Services Association of America, No. 22-448

Questions Presented:

Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

Summary:

The Appropriations Clause of the Constitution states that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.” Congress has provided that the Consumer Financial Protection Bureau (CFPB) shall receive annual funding up to a capped amount from the Federal Reserve Board, which is itself funded through congressionally authorized bank assessments. Within the limits of the cap, the CFPB determines the amount it receives from the Board, and those funds are then permanently available until expended. The principal question presented is whether the CFPB’s funding mechanism violates the Appropriations Clause. This case also presents the question whether, if the funding mechanism is unconstitutional, a regulation issued with funds received through the funding mechanism should be vacated.

The CFPB’s Payday Lending Rule limits the number of times companies may attempt to withdraw money from consumer bank accounts with insufficient funds. Respondents, two associations of companies subject to the Payday Rule, brought suit in federal court, arguing that the rule should be invalidated because the CFPB’s funding mechanism violates the Appropriations Clause. The district court ruled in favor of the CFPB.

The Fifth Circuit reversed, holding that the CFPB’s funding mechanism violates the Appropriations Clause. The court reasoned that the CFPB’s funding mechanism impermissibly insulates CFPB funding from congressional control through two principal features. First, on the front end, the CFPB does not receive an annual appropriation from Congress. Instead, it receives the funding it requests from the Federal Reserve Board, which itself receives its funding through bank assessments. The court viewed that arrangement as doubly insulating the funds from congressional control. Second, funds that the CFPB receives are permanently available until expended, a feature the court viewed as eliminating any back-end congressional control. As a remedy, the court vacated the Payday Rule, on the ground that it was a product of the unconstitutional funding mechanism.

The CFPB contends that its funding mechanism does not violate the Appropriations Clause. It argues that the text of the Appropriations Clause gives Congress unrestricted authority to determine the specificity of the amount, duration, and source of appropriations. Historical practice, the CFPB further argues, establishes that Congress can make lump-sum appropriations committed to an agency’s discretion, provide appropriations that remain in place until Congress repeals them, and fund agencies through fees and assessments. Its funding mechanism is consistent with text and history, the CFPB argues, because Congress prescribed the amount (a

cap otherwise subject to agency discretion), the duration (permanent until expended), and the source (Federal Reserve System earnings). The CFPB contends that even if its funding mechanism were unconstitutional, the proper remedy would be either to sever the unconstitutional features of the funding mechanism or enjoin the CFPB from using its funds to enforce the Payday Rule against respondents.

Decision Below:

51 F.4th 616 (5th Cir. 2022)

Petitioners’ Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondents’ Counsel of Record:

Noel J. Francisco, Jones Day

Chevron Deference

***Loper Bright Enterprises v. Raimondo*, No. 22-451**

Question Presented:

Whether the Court should overrule *Chevron U.S.A. Inc. v. Natural Resources Defense Council* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Summary:

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Supreme Court held that when a statute delegates regulatory authority to an agency, and Congress’ intent with respect to a particular issue is “ambiguous,” courts must defer to any “reasonable” interpretation adopted by the agency. The principal question presented in this case is whether *Chevron* should be overruled.

The Magnuson-Stevens Act (MSA) provides that the National Marine Fisheries Service (NMFS) may require fishing vessels to carry observers to collect data for conservation purposes. The statute gives NMFS express authority to require payment for observers in three circumstances. NMFS adopted a rule that requires certain vessels to pay observers outside the three circumstances. In promulgating the rule, NMFS relied on the combination of its authority to require vessels to “carry” observers and its authority to promulgate rules that are “necessary or appropriate” for implementing a fishery-management plan. Petitioner Loper Bright Enterprises brought suit in federal court, challenging the authority of NMFS to require payment outside the three statutorily identified circumstances. The district court ruled in favor of NMFS.

The D.C. Circuit affirmed. Applying *Chevron*, the court concluded that MSA’s text is ambiguous on whether NMFS can require vessels to fund observers outside the three statutorily identified circumstances. It further concluded that NMFS’ view that it had such authority was reasonable.

Petitioner contends that *Chevron* should be overruled. Petitioner argues that *Chevron* strips from courts the ultimate interpretive authority to say what the law is. Petitioner further contends that *Chevron* promotes executive-branch aggrandizement by permitting agencies to bypass congressional bicameralism and presentment wherever an ambiguous section of code

could reasonably authorize a new regulation. Petitioner also argues that *Chevron* makes it difficult for the public to discern the meaning of laws—requiring citizens not only to understand statutory text but also to anticipate the permissible scope of agency interpretations. Finally, petitioner contends that courts are incapable of applying *Chevron* in a consistent manner, because judges take such varied approaches in determining whether a statute is ambiguous.

Decision Below:

45 F.4th 359 (D.C. Cir. 2022)

Petitioners’ Counsel of Record:

Paul D. Clement, Clement & Murphy PLLC

Respondents’ Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

The Securities and Exchange Act

Securities & Exchange Commission v. Jarkesy, No. 22-859

Questions Presented:

1. Whether statutory provisions that empower the Securities and Exchange Commission to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.
2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.
3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

Summary:

The Securities and Exchange Act authorizes the Securities and Exchange Commission (SEC) to adjudicate claims of securities fraud and impose civil penalties for any violations. The first question presented is whether such an agency adjudication violates a person’s Seventh Amendment right to be tried by a jury. The Act also authorizes the SEC to choose between administrative and judicial enforcement. The second question presented is whether conferring such a choice, without supplying an intelligible principle to guide the choice, violates the nondelegation doctrine. SEC administrative law judges (ALJs) have two layers of for-cause protection: they may only be fired by the SEC for cause, and it has been assumed that SEC Commissioners may only be fired by the President for cause. The third question presented is whether granting two layers of for-cause protection to ALJs violates Article II.

Respondent George Jarkesy established two hedge funds with respondent Patriot28, LLC. The SEC brought an administrative proceeding against respondents for securities fraud. The ALJ found that respondents committed securities fraud. The SEC affirmed the ALJ’s findings and ordered respondents to pay a civil penalty.

The Fifth Circuit reversed. It first held that administrative enforcement proceedings imposing civil penalties for securities fraud violate the Seventh Amendment. The court acknowledged that Congress may assign agencies authority to adjudicate public rights without

violating the Seventh Amendment. It concluded, however, that security fraud actions for civil penalties are not public rights actions because they mirror common law fraud actions and are not incompatible with the statutory scheme or uniquely suited for administrative adjudication. The court next held that conferring authority on the SEC to choose between administrative and judicial enforcement, without supplying an intelligible principle to guide the choice, violated the nondelegation doctrine. The court reasoned that an intelligible principle was required because Congress did not authorize only the exercise of executive power, but effectively gave the SEC the legislative power to decide which defendants should receive Article III's protections and which should not. Finally, the court held that conferring two layers of for-cause protection on ALJs violates Article II. The court read the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* to preclude such protection because ALJs are inferior federal officers exercising considerable executive power.

The government first argues that the SEC's authority to adjudicate securities fraud claims and impose civil penalties does not violate the Seventh Amendment. The government contends that the exception to the Seventh Amendment for adjudications involving public rights is applicable when, as here, Congress creates new statutory obligations, provides for civil penalties, and entrusts an administrative agency with the function of deciding whether a violation occurred. As long as those conditions are satisfied, the government argues, it makes no difference whether the new actions resemble common law actions or are uniquely suited for administrative adjudication. The government next argues that conferring authority on the SEC to choose between administrative and judicial enforcement, without supplying an intelligible principle to guide the choice, does not violate the nondelegation doctrine. It contends that the intelligible principle requirement applies only when Congress delegates regulatory authority, not when, as here, Congress confers enforcement discretion, a classic executive power. Finally, the government argues that Congress' conferral of two layers of for-cause protection on ALJs does not violate Article II. It contends that the holding in *Free Enterprise Fund* extends only to officers who perform enforcement and policy making functions, not to those who perform only an adjudicative function.

Decision Below:

34 F.4th 446 (5th Cir. 2022)

Petitioner's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondents' Counsels of Record:

Sidney Michael McColloch, S. Michael McColloch, PLLC

Civil Rights

The Americans with Disabilities Act

***Acheson Hotels, LLC v. Laufer*, No. 22-429**

Question Presented:

Does a self-appointed Americans with Disabilities Act "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?

Summary:

The Americans with Disabilities Act (ADA) prohibits public accommodations from discriminating against persons with disabilities in the services they provide. The Attorney General’s Reservation Rule interprets the ADA to require hotel owners to describe the accessibility features of their hotels in sufficient detail to enable persons with disabilities to determine if the hotel meets their accessibility needs. The ADA gives a cause of action for injunctive relief to any person subjected to discrimination based on disability. The question presented is whether an ADA “tester” has suffered a cognizable Article III injury when she visits a hotel website that fails to provide the accessibility information she would need to decide whether the hotel meets her accessibility needs, when she lacks any intention to visit the hotel.

Deborah Laufer (respondent) is a person with multiple disabilities. As a self-described ADA “tester,” respondent visits hotel-reservation websites to determine whether they comply with the Reservation Rule and the ADA. When respondent visited the website of a hotel in Maine owned by Acheson Hotels (petitioner), the website did not provide any accessibility information. Respondent filed suit, alleging that petitioner violated the Reservation Rule and the ADA. The district court dismissed the case for lack of Article III standing.

The First Circuit reversed, holding that respondent has Article III standing to sue. The court reasoned that *Havens Realty Corp. v. Coleman* establishes that a tester who is deprived of information to which she is legally entitled suffers an Article III injury. The court concluded that respondent suffered such an informational injury when she was deprived of the information she would need to decide whether the hotel met her accessibility needs, even though she lacked any intent to visit the hotel.

Petitioner contends that because respondent has no intention to visit the hotel, she has not suffered a legally cognizable injury. Petitioner argues that *TransUnion LLC v. Ramirez* holds that an informational injury that does not cause any adverse effect cannot constitute a legally cognizable injury. Because respondent did not claim she suffered any adverse effect from failing to obtain accessibility information, petitioner argues, she lacks standing under *TransUnion*. Petitioner argues that, even assuming *Havens Realty* survives *TransUnion*, it is distinguishable because neither the Reservation Rule nor the ADA personally entitle a non-traveler like respondent to accessibility information.

Decision Below:

50 F.4th 259 (1st Cir. 2022)

Petitioner’s Counsel of Record:

Adam G. Unikowsky, Jenner & Block LLP

Respondent’s Counsel of Record:

Kelsi Brown Corkran, Institute for Constitutional Advocacy and Protection

Racial Gerrymandering

Alexander v. South Carolina State Conference of the NAACP, No. 22-807

Questions Presented:

- (1) Did the district court err when it failed to apply the presumption of good faith and to holistically analyze District 1 and the General Assembly's intent?
- (2) Did the district court err in failing to enforce the alternative-map requirement in this circumstantial case?
- (3) Did the district court err when it failed to disentangle race from politics?
- (4) Did the district court err in finding racial predominance when it never analyzed District 1's compliance with traditional districting principles?
- (5) Did the district court clearly err in finding the General Assembly used a racial target as a proxy for politics when the record showed only that the General Assembly was aware of the race, that race and politics are highly correlated, and that the General Assembly drew districts based on election data?
- (6) Did the district court err in upholding the intentional discrimination claim when it never even considered whether—let alone that—District 1 has a discriminatory effect?

Summary:

The Fourteenth Amendment prohibits racial gerrymandering. Plaintiffs can prove a racial gerrymandering claim by establishing that race was the predominant factor in moving a substantial number of voters into or outside a district, even if the goal of such racial sorting is to achieve a partisan end. The principal question presented is whether the district court erred in finding that race was the predominant factor in the drawing of South Carolina Congressional District (CD) 1. The Fourteenth Amendment also prohibits intentional vote dilution. To prove such a claim, plaintiffs must show both a racially dilutive intent and a racially dilutive effect. This case also presents the question whether the district court erred in its assessment of plaintiffs' vote-dilution claim.

In its most recent redistricting, the South Carolina legislature made massive changes in the population of CD 1 but retained the same racial percentages as before. The South Carolina State Conference of the NAACP and a Black voter (plaintiffs) filed suit, alleging both a racial gerrymandering claim and a racial vote-dilution claim.

The district court found that race was the predominant factor in the drawing of CD 1. It found that the legislature set a racial target for CD 1 because that was the most effective way to ensure a Republican tilt. The court found that the legislature implemented that racial target by carving up Charleston County based on race. And it found that the legislature's mapmaker was not credible in asserting that he used only political data in drawing the district's lines. Relying largely on the same findings, the court separately found that the State engaged in intentional discrimination against Black voters.

South Carolina argues that politics rather than race was the predominant factor in the drawing of CD 1. The State contends that the district court's contrary finding is based on legal and factual errors, including failing to credit the State's direct evidence that politics predominated in the drawing of CD 1, failing to require plaintiffs to submit an alternative map that achieved the same partisan tilt with a significantly higher percentage of minority voters, and

failing to evaluate CD 1 as a whole. Finally, the State argues that there was no evidence that CD 1 was adopted with a racially discriminatory purpose or resulted in a racially discriminatory effect.

Decision Below:

No. 3:21-cv-3302 (D.S.C. 2023)

Petitioner’s Counsel of Record:

John M. Gore, Jones Day

Respondent’s Counsel of Record:

Leah C. Aden, NAACP Legal Defense & Educational Fund, Inc.

Title VII – Employment Discrimination

Muldrow v. City of St. Louis, No. 22-193

Question Presented:

Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

Summary:

Title VII prohibits an employer from discriminating against its employees on the basis of certain personal characteristics, including sex, with respect to “terms, conditions, or privileges of employment.” The question presented in this case is whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.

Respondent, the City of St. Louis Police Department, transferred petitioner Jatonya Muldrow from its Intelligence Division to the Fifth District. Petitioner sued alleging that her transfer constituted sex discrimination in the terms and conditions of her employment in violation of Title VII. The district court granted respondent’s motion for summary judgement.

The Eighth Circuit affirmed, holding that Title VII does not prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage. The court reasoned that proof of a significant disadvantage is required because, otherwise, every trivial personnel action that an employee did not like would form the basis for a discrimination suit.

Petitioner contends that Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage. Petitioner argues that Title VII’s text comprehensively prohibits any employment decision that “discriminates” in the “terms or conditions . . . of employment” and does not contain any requirement that the plaintiff separately establish some minimum level of actionable harm. Petitioner further argues that because the position to which an employee is assigned is perhaps the most fundamental term or condition of employment, a transfer to a new position necessarily alters an employee’s terms or conditions of employment. There is therefore no need or justification, petitioner argues, for a court to make a separate finding that the transfer caused a significant disadvantage.

Decision Below:

30 F.4th 680 (8th Cir. 2022)

Petitioner’s Counsel of Record:

Brian Wolfman, Georgetown Law Appellate Courts Immersion Clinic

Respondent’s Counsels of Record:

Sheena Renee Hamilton, City of St. Louis Civil Law Department

Constitutional Law

First Amendment – Public Officials

Lindke v. Freed, No. 22-611

Questions 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.

Summary:

An individual’s actions are subject to First Amendment constraints when they are engaged in state action. The question presented in this case is whether a public official’s social-media activity constitutes state action only if the official used the account to perform a governmental duty or acted under the authority of his office.

Respondent James Freed is the City Manager of Port Huron, Michigan. Respondent maintains a Facebook page where he posts both personal information and information about City policies. When respondent posted information about the City’s COVID-19 policies, petitioner Kevin Lindke left critical messages on respondent’s page. In response, respondent blocked petitioner from leaving any further comments. Petitioner brought suit under Section 1983, claiming that respondent’s actions violated the First Amendment. The district court determined that respondent’s Facebook activity was not state action and granted summary judgment for respondent.

The Sixth Circuit affirmed, holding that a public official’s posts on a social-media account constitute state action only when the official is performing an actual or apparent duty of his office or invoking state authority. The court reasoned that only in those two circumstances can an official’s operation of a social-media account be fairly attributed to the state. Applying that two-factor analysis, the court concluded that respondent’s social media posts were not state action because no state law compelled him to operate a Facebook page, the page did not belong to the office of the city manager, and neither state funds nor employees were used to maintain the page.

Petitioner argues that public officials act under color of law when they use social media to invoke the pretense of governmental authority and to perform governmental functions. Petitioner contends that the historical meaning of “under color of law,” the phrase that Section 1983 uses to capture state action, includes public officials who have invoked the pretense of government authority. Petitioner further contends that in dual-role cases, where a public official committed the challenged conduct but claims to have acted in a personal capacity, the key

considerations are whether the public official appears to be acting in an official capacity and whether the official is performing a public function. Petitioner argues that, in light of those considerations, respondent was engaged in state action because he conveyed the impression that his Facebook page was an official communication outlet, and he used it to perform the functions of his office.

Decision Below:

37 F.4th 1199 (6th Cir. 2022)

Petitioner Counsel of Record:

Allon Kedem, Arnold and Porter Kaye Scholer LLP

Respondent Counsel of Record:

Victoria Read Ferres, Fletcher, Fealko, Shoudy & Francis, P.C.

O'Connor-Ratcliff v. Garnier, No. 22-324

Questions Presented:

Whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.

Summary:

The Supreme Court has held that the First Amendment's constraints apply only to "state action." Under Supreme Court precedent, a person is engaged in state action only when their conduct is "fairly attributed to the State." The question presented in this case is whether public officials who block individuals from their personal social-media accounts are engaged in state action.

Petitioners are public officials who use their personal Facebook and Twitter accounts to communicate with the public about their jobs as elected members of the Poway Unified School District Board of Trustees (District). Respondents, who are parents of children attending the District, repeatedly left critical messages on petitioners' accounts. In response, petitioners blocked respondents from their accounts. Respondents brought suit, claiming that petitioners' conduct in blocking them constituted state action in violation of the First Amendment. The district court agreed and entered judgment for respondents.

The Ninth Circuit affirmed, holding that petitioners' blocking of respondents was state action violating the First Amendment. The court reasoned that petitioners' actions could be fairly attributed to the state because they identified themselves on their accounts as public officials and communicated to the public about their official duties.

Petitioners argue that they were not engaged in state action when they blocked respondents from their personal accounts. Petitioners contend that an official's use of a personal social-media account is fairly attributed to the state only when the official is either relying on government authority or carrying out a governmental duty. Petitioners contend that they did not do either because they derived their authority to use their accounts from Facebook and Twitter, not the District, and because they created and maintained their accounts to pursue their personal interests, rather than to perform their official duties.

Decision Below:

41 F.4th 1158 (9th Cir. 2022)

Petitioners' Counsel of Record:

Hashim M. Mooppan, Jones Day

Respondents' Counsel of Record:

Cory J. Briggs, Briggs Law Corporation

First Amendment – Trademark***Vidal v. Elster*, No. 22-704****Question Presented:**

Whether the refusal to register a [trademark] under Section 1052(c) [of Title 15] violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure.

Summary:

Section 1052(c) of Title 15 provides that a trademark shall be refused registration if it consists of a name identifying a living individual without “his written consent.” When registration is denied, the mark may still be used in commerce, but the owner does not obtain the benefits of registration, such as the foreclosure of certain defenses in infringement actions and the treatment of the mark as prima facie valid. The question presented in this case is whether the refusal to register a mark under Section 1052(c) violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure.

Respondent Steve Elster applied for federal registration of the trademark TRUMP TOO SMALL. An examiner in the U.S. Patent and Trademark Office refused registration under Section 1052(c), and USPTO’s Trademark and Appeal Board affirmed.

The Federal Circuit reversed, holding that the refusal to register a mark under Section 1052(c) violates the First Amendment when the mark contains criticism of a government official or public figure. The court viewed Section 1052(c) as a restriction on speech, triggering either intermediate or strict scrutiny. It then concluded that Section 1052(c) fails both forms of scrutiny because criticism of public officials lies at the core of the First Amendment, and the government does not have any legitimate interest in protecting public officials from such criticism.

The government argues that the refusal to register a trademark under Section 1052(c) does not violate the First Amendment when the mark contains criticism of a government official or public figure. It contends that Section 1052(c) is a condition on a government benefit rather than a restriction on speech because it places no constraints on respondent’s freedom to use his mark, but rather simply fails to provide certain ancillary benefits. The government argues that conditions on benefits are consistent with the First Amendment as long as they are reasonable and viewpoint-neutral. That standard is satisfied here, the government argues, because Section 1052(c) is admittedly viewpoint-neutral, and it furthers the government’s interest in protecting the privacy and publicity rights that living persons have in their own names.

Decision Below:

26 F.4th 1328 (Fed. Cir. 2022)

Petitioner’s Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice
Respondent's Counsel of Record:
Jonathan Ellis Taylor, Gupta Wessler PLLC

Second Amendment

United States v. Rahimi, 22-915

Question Presented:

Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

Summary:

In *New York State Rifle & Pistol Association, LLC v. Bruen*, the Supreme Court held that “when the Second Amendment’s plain text covers an individual’s conduct,” the government carries the burden of demonstrating any regulation of that conduct is “consistent with the Nation’s historical tradition of firearm regulation.” Section 922(g)(8) prohibits a person from possessing a firearm if that person is subject to a domestic-violence restraining order, provided that in issuing the order a court (1) found the person posed a credible physical threat to an intimate partner or child or (2) explicitly prohibited the person from using, attempting to use, or threatening to use physical force against an intimate partner or child. The question presented is whether Section 922(g)(8) facially violates the Second Amendment.

Respondent Zackey Rahimi was found in possession of firearms while he was subject to a domestic-violence restraining order that contained a finding that he posed a credible physical threat to his ex-girlfriend, and expressly prohibited him from committing violence against her. A federal grand jury indicted respondent for violating Section 922(g)(8). Respondent moved to dismiss, arguing Section 922(g)(8) violates the Second Amendment. The district court denied the motion. Petitioner then pleaded guilty, reserving his Second Amendment challenge, and the court sentenced him to imprisonment.

The Fifth Circuit reversed, holding that Section 922(g)(8) facially violates the Second Amendment. The court first concluded that the Second Amendment’s plain text covers individuals subject to a protective order. It reasoned that *District of Columbia v. Heller*’s statement that the Second Amendment’s protections extend only to “law-abiding, responsible” individuals, excludes only felons, the mentally ill, and other groups historically stripped of their Second Amendment rights. The court then concluded that the government failed to show that Section 922(g)(8) was sufficiently analogous to any longstanding regulation. It reasoned as follows: An English statute disarming dangerous individuals was not a forerunner to American laws. The colonial and early state laws disarming categories of individuals deemed to be dangerous, such as those deemed disloyal, were designed to protect the public rather than identified individuals. The state laws disarming individuals convicted of going armed offensively were too few and did not last long enough to reflect a tradition, involved criminal convictions, were designed to protect the public rather than identified individuals, and applied only to individuals adjudicated to be threats. Finally, the surety laws did not impose a comparable burden because they did not prohibit public carry if the offender posted a surety.

The government argues that Section 922(g)(8) is facially constitutional. The government contends that Section 922(g)(8) falls within the exception recognized in *Heller* that allows the government to disarm persons who are not “law-abiding, responsible” individuals. The government also argues that Section 922(g)(8) fits squarely within the historical tradition of disarming individuals who pose a danger to others. While the government acknowledges that Section 922(g)(8) differs from each of the historical regulations in some way, it argues that Section 922(g)(8) is sufficiently analogous to each because it imposes similar burdens for similar reasons. What is critical, the government argues, is that Section 922(g)(8), like the historical regulations, allows ordinary, law-abiding individuals to keep and bear arms while disarming individuals who pose a danger to others.

Decision Below:

61 F.4th 443 (5th Cir. 2023)

Petitioner’s Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondent’s Counsel of Record:

James Matthew Wright, Federal Public Defender’s Office for the Northern District of Texas

Fourteenth Amendment – Civil Forfeiture

***Culley v. Marshall*, No. 22-585**

Question Presented:

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the “speedy trial” test employed in *United States v. \$8,850* and *Barker v. Wingo*, or the three-part due process analysis set forth in *Mathews v. Eldridge*.

Summary:

Under *Barker v. Wingo*, courts determine whether a delay violates the Speedy Trial Clause of the Sixth Amendment by balancing (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to speedy trial, and (4) the prejudice to the defendant. Under *Mathews v. Eldridge*, courts determine what procedures satisfy the Due Process Clause of the Fifth Amendment by balancing (1) the private interest affected, (2) the risk of an erroneous deprivation through the procedures used and the value of other safeguards, and (3) the government’s interest. The question presented in this case is whether, when the government seizes property for civil forfeiture, *Barker* or *Mathews* provides the proper test for determining whether due process requires a prompt post-seizure probable cause hearing in which owners of the property may challenge the legitimacy of the government retaining the property pending the outcome of the forfeiture proceeding.

Police in the City of Satsuma, Alabama, seized petitioner Halima Culley’s car after arresting her son, who was driving the car, for possession of drugs. Police in the Town of Leesburg, Alabama, seized petitioner Lena Sutton’s car after arresting her friend, who was driving her car, for possession of drugs. In both cases, no probable cause hearing was held, and the cars were returned to petitioners only after they prevailed on innocent-owner defenses in civil

forfeiture proceedings many months later. Petitioners filed suit in federal court, alleging that the failure to provide a prompt post-seizure probable cause hearing violated due process. The district courts ruled against petitioners.

The Eleventh Circuit affirmed. Invoking prior circuit precedent, the court held that *Barker* governs whether due process requires a prompt post-seizure probable cause hearing pending the outcome of a civil-forfeiture proceeding. Based on that same precedent, the court held that, under *Barker*, due process requires a timely merits determination, not a prompt probable cause hearing.

Petitioners argue that *Mathews* governs whether due process requires a prompt probable cause hearing. They contend that *Mathews* applies when the government seeks to retain property before a final judgment is rendered, while *Barker* applies when there are delays in rendering final judgment. *Mathews* applies here, petitioners argue, because they seek to challenge the legitimacy of the government’s retention of their vehicles pending forfeiture proceedings and not the speed with which the proceedings are conducted. Petitioners further argue that *Mathews* requires a prompt post-seizure probable cause hearing. Petitioners contend that individuals have an important interest in the possession of their vehicles; that there is a substantial risk of an erroneous deprivation absent a probable cause hearing; and that the government may rely on other means, such as an appropriate bond, to protect its interest in property not being sold or destroyed during the pendency of proceedings.

Decision Below:

No. 21-13805 (11th Cir. 2022)

Petitioners’ Counsel of Record:

Shay Dvoretzky, Skadden, Arps, Slate, Meagher & Flom LLP

Respondents’ Counsel of Record:

Edmund G. LaCour Jr., Solicitor General, Office of the Alabama Attorney General

Sixteenth Amendment – Taxation of Unrealized Sums

***Moore v. United States*, No. 22-800**

Question Presented:

Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

Summary:

Under Article I, Section 9, Clause 4, Congress may not impose a “direct” tax unless it is apportioned among the states, meaning that each state pays in proportion to its population. The Sixteenth Amendment exempts from that apportionment requirement taxes on “incomes, from whatever source derived.” The question presented is whether a tax on an unrealized gain is a direct tax that must be apportioned or a tax on income.

Petitioners Charles and Kathleen Moore invested in a foreign company. The company generated profits, but instead of distributing dividends, it reinvested all earnings in the company. Petitioners, therefore, did not realize their gains. A federal statute, the Tax Cuts and Jobs Act, treats such reinvested earnings as deferred income subject to a one-time mandatory repatriation tax (MRT). After paying their tax liability, petitioners filed suit challenging the constitutionality

of the MRT on the ground that it is a direct tax that is not apportioned, rather than a tax on income. The district court ruled for the government.

The Ninth Circuit affirmed, holding that a realized gain is not a requirement for a tax on income and that undistributed earnings also qualify as income. The court rejected petitioners' reliance on *Eisner v. Macomber's* description of income as a gain that is received or drawn by the recipient for his separate use. The court concluded that subsequent Supreme Court cases make clear that *Macomber* did not provide a universal definition of income.

Petitioners contend that a tax on income is limited to realized gains. Petitioners argue that *Macomber* held that a realized gain is an essential component of a tax on income and that subsequent Supreme Court decisions have confirmed, rather than undercut, *Macomber's* holding. Petitioner also argues that at the time of ratification, as today, "income" was universally understood to mean a gain "which comes in and is received."

Decision Below:

36 F.4th 930 (9th Cir. 2022)

Petitioner's Counsel of Record:

Andrew M. Grossman, Baker & Hostetler LLP

Respondent's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Criminal Law

Armed Career Criminal Act

Brown v. United States, No. 22-6389

Question Presented:

Which version of federal law should a sentencing court consult under [the Armed Career Criminal Act]'s categorical approach?

Summary:

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence when a person convicted of being a felon in possession of a firearm has previously been convicted of three serious drug offenses. A state-law drug crime counts as a serious drug offense when it involves a controlled substance as defined in the Controlled Substances Act (CSA). Congress frequently changes the schedule of drugs listed in the CSA. The question presented is which version of the CSA's drug schedule is applicable in deciding whether a state drug crime constitutes a serious drug offense: the schedule in effect at the time of the state conviction, the schedule in effect at the time of federal offense, or the schedule in effect at the time of federal sentencing. The same question is at issue in *Jackson v. United States*, and the two cases have been consolidated for oral argument.

Petitioner Justin Brown was convicted of being a felon in possession of a firearm. Petitioner had previously been convicted of five state-law drug crimes. If the schedule in effect at the time of the state law conviction or the federal offense was applicable, petitioner had previously been convicted of five serious drug crimes. But if the schedule in effect at the time of the federal sentence was applicable, petitioner had previously been convicted of only one serious

drug crime. The district court used the schedule in place at the time of the federal offense and sentenced petitioner to ACCA's 15-year mandatory minimum sentence.

The Third Circuit affirmed, holding that the schedule in effect at the time of the federal offense is applicable. The court relied on the federal savings statute, which specifies that the repeal of a statute does not extinguish any penalty unless the repealing statute expressly so provides. Because the court viewed the most recent change to the federal drug schedule as a non-retroactive repeal of the previous penalties for drug offenses, it concluded that the schedule in effect at the time the federal crime was committed was applicable.

Petitioner argues that ACCA requires courts to apply the federal schedules in effect at the time of federal sentencing. Petitioner contends that ACCA's term "as defined in" refers most naturally to current drug schedules, not superseded versions. Petitioner also contends that ACCA's cross-reference to the CSA's drug schedules implicates the reference canon, under which a reference to an external body of law incorporates the law as it evolves. Petitioner further contends that a time-of-sentencing approach furthers ACCA's purpose of incapacitating dangerous offenders because it adheres to Congress' current judgment on the dangerousness of particular drugs. Finally, petitioner argues that the savings statute is inapplicable because the new drug schedule amended only the CSA, and the penalties for petitioner's offense flow from the felon-in-possession statute and ACCA, not the CSA.

Decision Below:

47 F.4th 147 (3d Cir. 2022)

Petitioner's Counsel of Record:

Ronald A. Krauss, Federal Public Defender's Office of Pennsylvania

Respondent's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Jackson v. United States, No. 22-6640

Question Presented:

Whether the "serious drug offense" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense.

Summary:

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence when a person convicted of being a felon in possession of a firearm has previously been convicted of three violent felonies or serious drug offenses. A state drug crime counts as a serious drug offense when it involves a controlled substance as defined in the Controlled Substances Act (CSA). Congress frequently changes the schedule of drugs listed in the CSA. The question presented is which version of the CSA's drug schedule is applicable in deciding whether a state drug crime constitutes a serious drug offense: the schedule in effect at the time of the state conviction, the schedule in effect at the time of the federal offense, or the schedule in effect at the time of federal sentencing. The same question is at issue in *Brown v. United States*, and the two cases have been consolidated for oral argument.

Petitioner Eugene Jackson was convicted of being a felon in possession of a firearm. Petitioner had previously been convicted of two violent felonies and two state drug crimes. If the schedule in effect at the time of the state conviction was applicable, petitioner had previously been convicted of two violent felonies and two serious drug crimes. But if the schedule in effect at the time of the federal offense was applicable, petitioner had previously been convicted of only two violent felonies. The district court used the schedule in place at the time of the state convictions and sentenced petitioner to ACCA's 15-year mandatory minimum sentence.

The Eleventh Circuit affirmed, holding that the schedule in effect at the time of the state conviction is applicable. The court relied on the Supreme Court's holding in *McNeill v. United States* that, in determining whether a state conviction must involve a penalty of at least 10 years, courts must use the maximum sentence that was in effect at the time of the prior state conviction. Following *McNeill's* interpretation of the ACCA phrase "previous convictions" as calling for a "backward-looking inquiry," and the Court's concern about changes in law erasing an earlier conviction, the Eleventh Circuit concluded that courts must use the federal drug schedules in place at the time of state conviction.

Petitioner argues that ACCA requires courts to apply federal schedules in effect at the time of the federal offense. Petitioner contends that because ACAA incorporates CSA drug schedules, and those schedules are constantly evolving, state drug convictions should be compared to CSA schedules at the time of the federal offense, not to outdated and superseded schedules. Petitioner further contends that there is agreement that courts must compare the elements of the state offense to the version of ACCA in effect when the federal firearms offense is committed, because of the general rule that the penalty for a federal crime comes from the law in place when the crime is committed. By the same logic, petitioner argues, courts must look to the drug schedules in effect at the time of the federal offense to determine whether a state conviction constitutes a serious drug offense. Finally, petitioner contends that *McNeill* is inapplicable because it addressed only how courts should assess the elements of and maximum punishment for a prior state offense, and not the federal criteria against which those state law attributes should be compared.

Decision Below:

55 F.4th 846 (11th Cir. 2022)

Petitioner's Counsel of Record:

Andrew L. Adler, Federal Public Defender's Office of Florida

Respondent's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Double Jeopardy

McElrath v. Georgia, No. 22-721

Question Presented:

Does the Double Jeopardy Clause of the Fifth Amendment prohibit a second prosecution for a crime of which a defendant was previously acquitted?

Summary:

Under Georgia law, repugnant verdicts are verdicts that cannot logically or legally coexist. When the Georgia Supreme Court finds that an acquittal on one count and a guilty

verdict on another are repugnant, it will vacate and permit retrial on both. The question presented is whether, when verdicts are vacated as repugnant, a retrial on the count on which the defendant was acquitted violates the Double Jeopardy Clause.

Petitioner Damien McElrath was charged with felony murder and malice murder for killing Diane McElrath. The jury found petitioner guilty of felony murder and not guilty by reason of insanity of malice murder. On appeal, the Georgia Supreme Court held that the verdicts were repugnant, vacated both the conviction and the acquittal, and remanded for retrial on both charges. Petitioner filed a motion to preclude retrial on the acquitted count as a violation of the Double Jeopardy Clause. The district court denied the motion.

The Georgia Supreme Court affirmed, holding that, when verdicts are vacated as repugnant, retrial on the count on which the defendant was acquitted does not violate the Double Jeopardy Clause. The court distinguished between verdicts that are repugnant and ones that are merely inconsistent. The court reasoned that repugnant verdicts are valueless and therefore void because courts cannot decipher what factual finding or determination they reflect. Because the court viewed a repugnant verdict as equivalent to no verdict at all, it concluded that a repugnant verdict on an acquitted count does not terminate jeopardy.

Petitioner contends that the Double Jeopardy Clause prohibits a second prosecution on an acquitted count even if the acquittal was vacated as repugnant. Petitioner argues that Supreme Court precedent establishes that the Double Jeopardy Clause prohibits a second trial on an acquitted count, even if the acquittal is inconsistent with a guilty verdict. Because repugnant verdicts are simply a subcategory of inconsistent verdicts, petitioner argues, the precedent governing inconsistent verdicts also applies to repugnant verdicts.

Decision Below:

880 S.E.2d 518 (Ga. 2022)

Petitioner’s Counsel of Record:

Richard A. Simpson, Wiley Rein, LLP

Respondent’s Counsel of Record:

Stephen John Petrany, Office of the Georgia Attorney General

First Step Act

***Pulsifer v. United States*, No. 22-340**

Question Presented:

Whether the “and” in 18 U.S.C. § 3553(f)(1) means “and,” so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *and* (C) a 2-point offense, or whether the “and” means “or,” so that a defendant satisfies the provision so long as he does not have (A) more than 4 criminal history points, (B) a 3-point offense, *or* (C) a 2-point violent offense.

Summary:

The federal safety-valve provision allows a district court to sentence a defendant below the statutory minimum if the defendant satisfies five requirements. Under the criminal-history requirement, a defendant must “not have—(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense ...; (B) a prior 3-point offense ...; and

(C) a prior 2-point violent offense.” The question presented in this case is whether a defendant is ineligible for the safety valve if he has any one of the three criminal-history indicators (A, B, or C) or instead is ineligible only if he has all three (A, B, and C).

Petitioner Mark Pulsifer pleaded guilty to one count of distributing at least 50 grams of methamphetamine. He was subject to a mandatory-minimum sentence of 15 years unless he was eligible for the safety valve. Petitioner had two of the three criminal history indicators, but not all three (A and B, but not C). The district court concluded that petitioner was ineligible for the safety valve and imposed the statutory minimum.

The Eighth Circuit affirmed, holding that a defendant is ineligible for the safety valve if he has any one of the three criminal-history indicators. The court reasoned that the criminal-history requirement uses “and” in its conjunctive sense. It further concluded, however, that the criminal-history requirement uses the conjunctive “and” in a “distributive” rather than a “joint sense,” meaning that the requirement that a defendant “not have” certain criminal history indicators is distributed across all three conditions – he must not have A; he must not have B; and he must not have C. If “and” were instead interpreted in its joint sense, the court reasoned, it would make the A condition superfluous because satisfying the B condition (a 3-point offense) and the C condition (a 2-point offense) would necessarily satisfy the A condition (more than four criminal history points).

Petitioner argues that a defendant is eligible for the safety valve unless he has all three criminal indicators. Petitioner contends that under the ordinary meaning of “and,” every requirement in a list connected by “and” must be met, not just one. By contrast, petitioner argues that when Congress intends that only one requirement in a list must be met, it uses the term “or.” Petitioner contends that adopting a “distributive” reading of “and” is just another way of saying that “and” means “or.” Petitioner also points out that everyone agrees that “and” is used in its joint sense in connecting the five safety-valve eligibility requirements. Petitioner argues that under the presumption of consistent usage, “and” must be interpreted the same way in the criminal-history requirement.

Decision Below:

39 F.4th 1018 (8th Cir. 2022)

Petitioner’s Counsel of Record:

Shay Dvoretzky, Skadden, Arps, Slate, Meagher & Flom LLP

Respondent’s Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Immigration

Notice of Hearing

Garland v. Singh, Garland v. Mendez-Colin, No. 22-884

Campos-Chaves v. Garland, No. 22-674

Question Presented:

The question presented is 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 rescission.

Summary:

Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a noncitizen may be removed after failing to appear at his removal hearing only if he received notice in accordance with paragraph (1) or (2) of 8 U.S.C. § 1229(a). Paragraph (1) requires written notice to appear (NTA) specifying “the time and place at which the proceedings will be held.” Paragraph (2) requires written notice of a “change” in time or place specifying “the new time or place of the proceedings.” The question presented is whether the failure to receive, in a single document, all of the information specified in paragraph (1) precludes a supplemental notice of hearing (NOH) from providing adequate notice under paragraph (2). The government filed a single petition from the Ninth Circuit's decisions in *Singh* and *Mendez-Colin*. Only the former will be summarized. The Court also granted review in *Campos-Chaves v. Garland* (22-674), which raises the same issue and was consolidated for argument. It will also not be summarized.

The government sent respondent Singh an NTA listing the removal hearing time as TBD (to be determined). The government subsequently sent respondent an NOH with a specific time, and later sent him a second NOH with a new time. Respondent did not appear at the hearing, and an immigration judge ordered him removed in absentia. Respondent moved to rescind the order on the ground that he did not receive adequate notice of the time for the hearing. An immigration court denied respondent's motion, and the Board of Immigration Appeals dismissed his appeal.

The Ninth Circuit granted respondent's petition and remanded, holding that paragraph (1) required all the specified information to be received in a single document, and that there cannot be valid notice under paragraph (2) unless there has been a valid notice under paragraph (1). The Court reasoned that the holding in *Niz-Chavez v. Garland* that the government must supply all the relevant information in a single document to satisfy paragraph (1) applies to all removal proceedings, not just the stop-time rule at issue in that case. The court further concluded that the term “or” that precedes paragraph (2) does not support the government's two-step approach because paragraph (2) presupposes valid notice under paragraph (1). The court viewed *Pereira v. Sessions*, another stop-time case, as having already adopted that interpretation of paragraph (2) based on its conclusion that it is not possible for there to be a “change” in time under paragraph (2) unless the NTA initially specified a time.

The government argues that the lack of a specific time in an NTA does not preclude the government from providing adequate notice under paragraph (2). The government contends that the term “or” that precedes paragraph (2) means that a notice that complies with paragraph (2) is sufficient even if the original notice did not satisfy paragraph (1). The government argues that the term “change” in paragraph (2) does not suggest otherwise because a change from TBD to a specific time is still a “change” in time. The government contends that even if the first NOH is not a change, a subsequent NOH changes the time from the previous NOH and therefore satisfies paragraph (2). Finally, the government argues that *Pereira* involved only the stop-time rule, and did not suggest that an NOH that replaced a TBD with a specific time would be invalid under paragraph (2).

Decision Below:

Singh v. Garland, 24 F.4th 1315 (9th Cir. 2022)

Petitioner’s Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondent’s Counsel of Record:

Saad Ahmad, Saad Ahmad and Associates

Cancellation of Removal***Wilkinson v. Garland, No. 22-666*****Question Presented:**

Whether an agency determination that a given set of established facts does not rise to the statutory standard of “exceptional and extremely unusual hardship” is a mixed question of law and fact reviewable under § 1252(a)(2)(D), as three circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and two other circuits have concluded.

Summary:

The Immigration and Nationality Act (INA) gives the Attorney General discretion to cancel removal proceedings. To be eligible for cancellation of removal, a nonpermanent resident must satisfy four criteria, including that removal would result in “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a citizen or permanent resident of the United States. An immigration judge initially rules on cancellation applications and a denial of cancellation may be appealed to the Board of Immigration Appeals (BIA). The BIA’s judgment regarding the granting of relief is unreviewable except for constitutional claims and questions of law. The Supreme Court has held that a mixed question of law and fact is a reviewable question of law. The question presented is whether BIA’s conclusion that the facts do not establish “exceptional and extremely unusual hardship” is reviewable as a mixed question of law and fact or is instead an unreviewable discretionary determination.

Petitioner Situ Wilkinson was admitted to the United States on a visitor visa but overstayed. Years later, petitioner was arrested on drug charges, and placed in removal proceedings. Petitioner applied for cancellation of his removal on the grounds that his son would suffer “exceptional and extremely unusual hardship” should petitioner be removed. The immigration judge found that such hardship was not present, and the BIA affirmed.

The Third Circuit dismissed the petition for review, holding that the question whether an individual meets the hardship standard is an unreviewable discretionary determination. The court relied on the Supreme Court’s holding in *Patel v. Garland* that the term “judgment” in the provision generally barring judicial review encompasses any decision relating to the granting or denying of discretionary relief.

Petitioner contends that the hardship determination is a reviewable mixed question of law and fact, and not an unreviewable discretionary judgment. Petitioner argues that the holding in *Guerrero-Lasprilla v. Barr* that the application of the due diligence standard is a reviewable mixed question even though it involves a qualitative assessment of case-specific facts, is equally applicable to hardship determinations. Petitioner also contends that the INA’s text draws a sharp distinction between eligibility requirements and the favorable exercise of discretion, indicating that only the latter is an unreviewable discretionary determination.

Decision Below:

No. 21-3166 (3rd Cir. 2022)

Petitioner's Counsel of Record:

Jaime A. Santos, Goodwin Procter LLP

Respondent's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Other Public Law**Bankruptcy*****Harrington v. Purdue Pharma L.P., No. 23-124*****Question Presented:**

Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.

Summary:

A company that files for bankruptcy may seek a court-approved reorganization. Section 105(a) of the Bankruptcy Code states that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. Section 1123(b)(6) provides that a reorganization plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." The question presented is whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization, non-consensual releases of third-party claims against non-debtors.

Purdue Pharma manufactured OxyContin, a painkiller that significantly contributed to the opioid epidemic. Until recently the Sackler families owned Purdue. To protect themselves from lawsuits, the Sacklers withdrew \$11 billion from Purdue and transferred it overseas. Purdue subsequently filed for bankruptcy. Under a proposed reorganization plan, Purdue would distribute money to opioid victims, the Sacklers would contribute several billion dollars to fund the plan, and the Sacklers would be relieved of personal liability. The bankruptcy court confirmed the plan, but the district court vacated the confirmation order.

The Second Circuit reversed, holding that the Code authorizes a court to approve non-consensual releases of third-party claims against non-debtors as part of a reorganization plan. The court reasoned that Sections 105(a) and 1123(b)(6) authorize any appropriate action that the Code does not expressly forbid, and that the Code does not expressly forbid non-consensual releases of third-party claims against non-debtors.

The government argues that the Bankruptcy Code does not authorize non-consensual releases of third-party claims against non-debtors. The government contends that the Code's structure establishes a quid pro quo: the debtor seeking relief must shoulder a host of obligations, and, in exchange, the debtor receives a discharge of all debts, except those that are nondischargeable. The government argues that discharging the personal liability of non-debtors would be inconsistent with that basic structure because it would allow non-debtors to reap the benefits of bankruptcy without incurring any of its obligations. The government further argues

that the hundreds of Code provisions that address the relationship between a debtor and its creditors, combined with the absence of any provision addressed to the discharge of a non-debtor's liability outside the asbestos context, demonstrate that Congress intended to authorize non-debtor releases in asbestos bankruptcies alone. Finally, the government argues that general provisions, like Sections 105(a) and 1123(b)(6), cannot be used to circumvent the Code's basic structure.

Decision Below:

69 F.4th 45 (2d Cir. 2023)

Petitioner's Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondent Pharma's Counsel of Record:

Gregory G. Garre, Latham & Watkins, LLP

Fair Credit Reporting Act

Department of Agriculture Rural Development Rural Housing Service v. Kirtz, No. 22-846

Question Presented:

Whether the civil-liability provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, unequivocally and unambiguously waive the sovereign immunity of the United States.

Summary:

Waivers of the sovereign immunity of the United States must be unequivocal. The Fair Credit Reporting Act (FCRA) provides that "any person" may be held civilly liable for failing to comply with any FCRA requirement. The Act's definition of a "person" includes any "government or governmental subdivision or agency." The question presented in this case is whether FCRA unequivocally waives the United States' immunity from civil liability.

The Department of Agriculture Rural Development Rural Housing Service (USDA) loaned money to respondent Reginald Kirtz. After USDA reported respondent's loan as past due to a consumer reporting agency, respondent notified USDA that he had paid off the loan in full. When USDA did not issue a correction, respondent filed suit, alleging that USDA violated the requirement in FCRA to investigate reports of inaccurate information and correct the information if found to be inaccurate. Respondent sought damages for the violations. The district court dismissed on sovereign immunity grounds.

The Third Circuit reversed, holding that FCRA unequivocally waives the immunity of the United States from civil liability. The court reasoned that an unequivocal waiver arises from the combination of two provisions: first, the FCRA imposes civil liability on any "person," and second, FCRA defines person to include any "government" or "governmental subdivision or agency." The court also viewed it as significant that the definition applies to "this subchapter," which includes both FCRA's requirements and FCRA's civil-liability provisions.

USDA argues that FCRA does not unequivocally waive the immunity of the United States from civil liability. USDA contends that because the original Act imposed civil liability only on consumer reporting agencies and "users of information," and not on persons as such, the definition of "person" in the original Act could not have waived the immunity of the United

States from civil liability. USDA further argues that the definition of person cannot possibly apply to every FCRA provision because it would lead to the absurd conclusion that the United States or one of its agencies may be criminally prosecuted. Against that background, USDA argues, an amendment extending civil liability to any person cannot be understood as an unequivocal waiver of the United States' immunity from civil liability.

Decision Below:

46 F.4th 159 (3rd Cir. 2022)

Petitioner Counsel of Record:

Elizabeth B. Prelogar, Solicitor General, Department of Justice

Respondent Counsel of Record:

Matthew Benjamin Weisberg, Weisberg Law

Maritime Law

***Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC*, No. 22-500**

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?

Summary:

Federal law generally governs admiralty cases, with state law filling any gaps. In their admiralty contracts, parties often choose the state law that will apply in the absence of established federal law. The question presented in this case is whether, under federal admiralty law, a choice-of-law clause in a maritime contract can be rendered unenforceable if enforcement is contrary to the “strong public policy” of the state in which a claim is brought.

Petitioner Great Lakes issued an insurance policy to respondent Raiders Retreat to cover damage to respondent's vessel. The policy included a choice-of-law provision stating that, in the absence of established federal law, New York substantive law would govern any disputes. The policy also included a forum-selection clause, allowing suits to be filed in either Pennsylvania or New York federal court. After respondent's vessel suffered damage, petitioner filed suit in Pennsylvania seeking a declaration that the policy was void. Respondent asserted counterclaims under Pennsylvania law. The district court dismissed the counterclaims on the ground that the policy's choice-of-law provision made Pennsylvania law inapplicable.

The Third Circuit vacated and remanded, holding that, under federal admiralty law, a choice-of-law clause is unenforceable when its enforcement is contrary to the strong public policy of the forum state. The court relied on the holding in *The Bremen v. Zapata Off-Shore Co.* that a forum-selection clause is valid unless it would contravene a strong public policy of the forum in which the suit is brought. The court remanded for a determination whether enforcing the policy's choice-of-law provision would violate a strong public policy of Pennsylvania.

Petitioner contends that state public policy cannot render a choice-of-law clause unenforceable. Petitioner argues that, throughout the nation's history, federal policy, rather than state policy, has governed maritime choice-of-law clauses. Petitioner argues that *The Bremen* is consistent with that tradition because the relevant “forum” it identified was the American forum,

not the forum of a particular state. Petitioner further argues that Congress' identification of one narrow exception to the enforcement of choice-of-law clauses implies that Congress expects they will otherwise be enforced. Finally, petitioner contends that maritime law's goals of uniformity and predictability would be undermined if choice-of-law clauses were subject to the different policies of 50 states.

Decision Below:

47 F.4th 225 (3d Cir. 2022)

Petitioner Counsel of Record:

Jeffrey B. Wall, Sullivan & Cromwell LLP

Respondent Counsel of Record:

Howard J. Bashman, Law Offices of Howard J. Bashman

Sarbanes-Oxley Act

Murray v. UBS Securities, LLC, No. 22-660

Question Presented:

Under the burden-shifting framework that governs Sarbanes-Oxley cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?

Summary:

The Sarbanes-Oxley Act makes it unlawful to discriminate in employment actions against employees who engage in protected whistleblowing activity. An employee alleging discrimination must show that protected activity was a "contributing factor" in an employer's unfavorable action. If the employee makes that showing, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected activity. The question presented is whether a whistleblowing employee must show that the employer acted with retaliatory intent.

Petitioner Trevor Murray worked for respondent UBS Securities as a research strategist. While research strategists are required to certify to the Securities and Exchange Commission that their reports are created independently and reflect their own views, two leaders of petitioner's trading desk allegedly pressured him to skew his reports to support UBS business strategies. After petitioner complained to his supervisor, respondent fired him. Petitioner sued in district court alleging he was fired for protected whistleblowing activity. The district court's instructions did not require petitioner to prove that respondent acted with retaliatory intent. The jury found for petitioner.

The Second Circuit vacated and remanded, holding that a whistleblowing plaintiff must prove that the employer acted with retaliatory intent. The court reasoned that the term "discriminate" requires a conscious decision to act on the basis of an employee's whistleblowing activity and therefore necessarily requires proof of retaliatory intent.

Petitioner contends that a whistleblowing plaintiff is not required to prove retaliatory intent. Petitioner argues that the ordinary meaning of "contributing factor" requires a plaintiff to prove that his protected activity affected an adverse action, not that the action was taken with

retaliatory intent. Petitioner further argues that Congress' requirement that the government prove retaliatory intent in a criminal provision of the Act confirms that proof of such an intent is not required by the contributing-factor provision. Finally, petitioner argues that the term "discriminate" simply means a difference in treatment and therefore does not impose a retaliatory-intent requirement.

Decision Below:

43 F.4th 254 (2nd Cir. 2022)

Petitioner's Counsel of Record:

Robert Lloyd Herbst, Herbst Law, PLLC

Respondent's Counsel of Record:

Eugene Scalia, Gibson, Dunn & Crutcher LLP

Veterans

***Rudisill v. McDonough*, No. 22-888**

Question Presented:

Whether a veteran who has served two separate and distinct periods of qualifying service under the Montgomery GI Bill, 38 U.S.C. § 3001 et seq., and under the Post-9/11 GI Bill, 38 U.S.C. § 3301 et seq., is entitled to receive a total of 48 months of education benefits as between both programs, without first exhausting the Montgomery benefit to obtain the more generous Post-9/11 benefit.

Summary:

The Montgomery GI Bill and the Post-9/11 GI Bill each provide veterans with educational benefits of up to 36 months. Veterans eligible for multiple educational programs, including those two, cannot obtain more than a total of 48 months of benefits. Section 3327 of the Post-9/11 program establishes a further limit on certain veterans who have used some but not all their Montgomery benefits: if they subsequently make an election to receive benefits under this program, they are limited to the number of months of unused Montgomery benefits. The question presented is whether the Section 3327 limit applies to veterans with multiple periods of qualifying service.

Petitioner James Rudisill has multiple periods of qualifying service. After his first two periods of military service, he used a portion of his Montgomery benefits. After his third period of service, he sought to use Post-9/11 benefits. The VA limited petitioner's Post-9/11 benefits to the months remaining under his Montgomery entitlement, rather than the months remaining under the 48-month cap. The Board of Veterans' Appeals denied his appeal. The Court of Appeals for Veterans Claims (Veterans Court) reversed the VA's decision, and a panel of the Federal Circuit affirmed.

The en banc Federal Circuit reversed the Veterans Court decision, holding that the Section 3327 limit applies to veterans with multiple periods of qualifying service. The court reasoned that nothing in the text of Section 3327 limits its application to veterans with a single period of service. Instead, the court found that by its terms, Section 3327 unambiguously applies to any veteran who is eligible to receive benefits under the Montgomery program, has used but

retains unused benefits under the Montgomery program, and makes an election to receive benefits under the Post-9/11 program.

Petitioner argues that the Section 3327 limit does not apply to veterans with multiple periods of service. Petitioner contends that, in context, the only veterans who make an “election” to receive benefits under the Post-9/11 program are veterans with a single period of service. Petitioner argues that the heading in a related provision – “Bar to duplication of educational benefits” – indicates that 3327 is concerned only with double dipping, a concern that is not implicated when a veteran qualifies for both Montgomery and Post-9/11 benefits with distinct periods of service. Petitioner also contends that the reference in that same related provision to “coordination” of benefits makes sense only as applied to veterans with a single period of service because veterans with multiple periods of service separately qualify for both Montgomery and Post-9/11 benefits.

Decision Below:

James R. Rudisill v. Denis McDonough, Secretary of Veterans Affairs, No. 20-1637 (Fed. Cir. en banc judgment entered December 15, 2022)

Petitioner Counsel of Record:

Misha Tseytlin, Troutman Pepper Hamilton Sanders LLP

Respondent Counsel of Record:

Elizabeth B. Prelogar, Solicitor General

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