A LOOK AHEAD

Supreme Court of the United States October Term 2025

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A LOOK AHEAD AT OCTOBER TERM 2025

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Supreme Court Institute Preview Report
Supreme Court October Term 2025

This report previews the Supreme Court's argument docket for October Term 2025 (OT 25). The Court has thus far accepted 34 cases for review. Section I of the report highlights some especially noteworthy cases that 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

***Chiles v. Salazar*, No. 24-539**

Colorado, like more than 20 other states, prohibits mental health care professionals from engaging in "conversion therapy" with minors. The prohibition reflects a judgment that conversion therapy is neither safe nor effective for minors. The Colorado statute defines conversion therapy to include treatment that seeks to change an individual's gender identity or sexual orientation. Talk therapy with that purpose falls within the statute's prohibition. The question the Supreme Court will decide is whether the statute's application to talk therapy that seeks to change a minor's gender identity or sexual orientation violates the Free Speech Clause of the First Amendment. The answer to that question is likely to turn on whether the law's application to talk therapy is subject to strict scrutiny, intermediate scrutiny, or rational basis review.

In general, a state may not regulate speech based on its content. A regulation is content based if it turns on either the subject matter or the viewpoint of the speech. Such a regulation is generally subject to strict scrutiny and may be upheld only if a state can show that it is narrowly tailored to further a compelling interest. The Court has only rarely held that such a regulation satisfies that demanding standard.

The Court has not subjected all content-based regulation of speech to strict scrutiny. For example, the Court has held that states have greater discretion to regulate conduct that incidentally burdens speech. In some contexts, the Court has held that such a regulation is subject to intermediate scrutiny—it is upheld if it is substantially related to achieving an important state purpose. In other contexts, it has held that such a regulation is subject to rational basis review: it is constitutional if it rationally furthers a legitimate state end. Rational basis review almost always leads to a holding that a state statute is constitutional. Intermediate scrutiny leads to less predictable results.

Two cases illustrate the scope of the exception for regulating conduct that incidentally burdens speech. In *National Institute of Family and Life Advocates (NIFLA) v. Becerra,* the Court held unconstitutional a California law that required clinics that serve pregnant women to notify them that California offers low-cost abortions. The Court acknowledged that laws regulating professional conduct that incidentally burden speech do not trigger strict scrutiny, and it gave as an example a law that requires informed consent to a medical procedure. Such a law,

the Court explained, requires speech only as part of the *practice* of medicine. But it concluded that the statute at issue did not fall within that exception because the required speech was not tied to a medical procedure.

In *Holder v. Humanitarian Law Project,* the Court upheld a statute that prohibited material support for terrorist organizations as applied to support that took the form of legal training on the use of international law. Even as it upheld the statute as applied, the Court rejected the government's argument that the statute's application to training on the use of international law could be sustained as a regulation of conduct that incidentally affected speech. The Court explained that while the law may be described as directed to conduct, the conduct triggering coverage consisted of communicating a message.

In addition to the exception to strict scrutiny for laws that incidentally burden speech, history and tradition can also play a role in deciding whether a content-based restriction triggers strict scrutiny. For example, in *Vidal v. Elster* the Court held that content-based, but viewpoint neutral, trademark laws are not subject to strict scrutiny because they have long existed alongside the First Amendment without anyone questioning their constitutionality.

The State's defense of its law is this: The First Amendment poses no barrier to a state's regulation of professional health care treatments that fall short of a reasonable standard of care. Under that principle, the State argues, it should make no difference whether a treatment that fails to meet the standard of care is carried out through conduct, through a combination of conduct and speech, or solely through speech. The State argues that Colorado's regulation of talk therapy that seeks to change a minor's gender identity or sexual orientation falls within that principle because it is a substandard medical treatment that is both unsafe and ineffective for minors.

The State first invokes history and tradition in support of its rule. The State asserts that both medical practice and licensing laws have long regulated medical treatments to ensure that they do not fall below a reasonable standard of care. That tradition, the State asserts, applies to the words that healthcare professionals use in their treatment of patients, reflecting the common sense understanding that substandard medical treatment that is carried out through words can be no less threatening to public health than substandard treatment that is carried out in other ways. At no time, the State claims, have such laws been thought to violate the First Amendment.

The State also argues that regulating substandard treatment that is carried out through speech is consistent with *NIFLA*'s recognition that informed consent laws and medical malpractice laws do not trigger strict scrutiny even though both regulate treatment that is carried out through speech. The key factor supporting the constitutionality of those laws, the State argues, is that they do so to protect patients from substandard medical treatment.

Finally, the State argues that the regulation of substandard treatment that is carried out through speech does not impermissibly regulate speech based on content. The State asserts that consideration of content is inherent in determining whether a treatment carried out through speech falls short of a reasonable standard of care. For example, Colorado argues, states do not engage in impermissible content-based speech regulation when they prohibit a healthcare professional from advising a patient with anorexia to eat less rather than more, or from advising a cardiology patient with high blood pressure and cholesterol to eat fattier foods and cut out any exercise. In both cases, the content of the speech is considered solely to determine whether the doctor engaged in substandard medical care of his patient. The Colorado law's application to talk therapy, the State argues, is no different.

The State also says that its law does not favor speech that encourages gender transition over speech that encourages gender detransition because either is permitted as long as the speech

does not seek to change a minor's current gender identity. On the other hand, both would be prohibited if the speech sought to change a minor's current identity.

Chiles, a licensed talk therapist, argues that the Colorado statute directly burdens speech based on its subject matter and its viewpoint. She argues that the statute regulates speech based on subject matter because it prohibits speech that seeks to change gender identity and sexual orientation but does not prohibit speech that seeks to change any other aspect of a minor's identity. She argues that the statute is viewpoint based because it permits speech that encourages gender transition but prohibits speech that encourages gender detransition.

Chiles argues that history and tradition provide no support for Colorado's statute. She contends that the State's invocation of a tradition of regulating healthcare professionals in their treatment of patients frames the inquiry at too high a level of generality. She argues that the right inquiry is whether there is a tradition of restricting mental health treatment conducted solely through speech based on content and viewpoint, and the State can point to no such history.

Chiles also argues that *Holder* conclusively establishes that the exception for regulation of conduct that incidentally burdens speech is inapplicable. Chiles contends that here, as in *Holder,* while the law may be described as directed to conduct, the conduct triggering coverage consists of nothing but speech. To say that the law regulates conduct, Chiles argues, is mere wordplay. She further contends that *NIFLA* similarly provides no support for the Colorado statute. Here, as in *NIFLA*, she argues, the statute regulates speech as such; the regulation of speech is not incidental to the regulation of a non-speech medical procedure. More generally, Chiles points out, *NIFLA* cautioned against giving professional speech reduced constitutional protection because governments throughout history have manipulated the content of doctor-patient discourse to suppress unpopular ideas or information.

There is no way a majority of the Court will think that the Colorado law is not content based. Colorado may be right that the law does not favor transition speech over detransition speech. But it does favor speech that seeks to support a minor's current identity over speech that seeks to change a minor's current identity, and it's hard to see why that distinction is not content based. The real question in this case is therefore whether consideration of content to determine whether speech-based treatment satisfies a reasonable standard of care is constitutionally suspect.

The State's strongest argument is based on the history and tradition of medical malpractice law. If a patient brought a malpractice action against a talk therapist who sought to change her gender identity on the ground that the treatment was inconsistent with a reasonable standard of care, and the standard of care were exactly the same content-based standard of care that the State relies on here, it seems unlikely that the Court would think that the suit would trigger strict scrutiny. That would seem to result in a staggering expansion of strict scrutiny to routine and legitimate medical malpractice claims. It is true that the patient would have to introduce evidence of harm caused by the treatment, such as suffering from anxiety and depression. But that should not affect whether the suit triggers strict scrutiny in the first place. The suit would still be premised on the defendant's speech having a particular content—one that seeks to change a minor's gender identity.

The same would be true of malpractice actions that challenge medical advice to a diabetic that they don't have to worry about sugar consumption or advice to an alcoholic that a drink a day won't kill them. Those suits would attack substandard medical care that is premised on the content of the speech. Neither of these examples would seem to fall within the sphere of speech connected to a nonspeech medical procedure. They presumably would satisfy the compelling interest test. But under the Court's recent decision in *Free Speech Coalition v. Paxton*, strict

scrutiny is supposed to be strict in theory and almost always fatal in fact. If most medical malpractice actions that challenge medical advice as failing to satisfy a reasonable standard of care do not pose a First Amendment problem, why would you treat them as suspect in the first place?

If a medical malpractice claim premised on the content of a defendant's speech does not trigger strict scrutiny, there is a strong argument that the same would not be true of Colorado's licensing standard. In both cases, a medical professional's speech is considered only to determine whether the medical professional's treatment of a patient falls short of a reasonable standard of care. If there is a valid distinction between a licensing standard and medical malpractice, it has not yet appeared in Chiles's filings.

There is also a certain logic to the State's argument that when it comes to licensing standards that concern a medical professional's care of patients, it should not matter whether substandard care is carried out through speech, rather than conduct. They both implicate the same concern with a healthcare professional's substandard treatment of a patient. In both cases, the same kind of judgment about the safety and effectiveness of the care must be made. In both cases, the content of the speech is considered only in determining whether a medical professional's treatment of a patient falls short of a reasonable standard of care. And in both cases, the license a medical professional has obtained from the state certifies that they have the training and experience to provide reasonable medical care, enlarging the state's interest in ensuring that reasonable care is delivered.

Chiles seems right that the State's rule cannot be justified under the speech incidental to conduct exception. Under *Holder,* that doctrine does not apply when the "conduct" that triggers coverage is speech, as is true here. Nor does the State's rule follow directly *NIFLA.* Unlike the consent laws approved in *NIFLA,* the Colorado statute regulates speech that has no connection to a nonspeech medical procedure. At the same time, neither of those cases would preclude a holding that strict scrutiny also does not apply when the state considers the content of speech to decide whether a licensed medical professional's care of a patient falls beneath a reasonable standard of care.

Chiles's argument that is most likely to resonate with the Court is that the State's proposed rule would not only require the creation of a new exception to strict scrutiny for content-based laws, but also that strict scrutiny is needed to screen out state regulation of the medical profession that seeks to suppress controversial ideas, a concern the Court emphasized in *NIFLA*. After its experience in *United States v. Skrmetti*, some Justices are very likely to be concerned that a medical consensus can too easily be built on politics and the desires of interest groups, rather than on science. And this particular law is very likely to strike some, if not many, of the Justices that way.

Those competing considerations—the State's traditional and entirely legitimate interest in regulating a healthcare professional's treatment of a patient to ensure that it does not fall below a reasonable standard of care versus the risk that such laws may be used to suppress controversial ideas—will determine the outcome here. How the Court comes out after balancing those competing considerations is not necessarily a foregone conclusion.

The parties have vigorously debated the sufficiency of the evidence supporting the State's prohibition on talk therapy that seeks to change the gender identity and sexual orientation of a minor. If the Court agrees that rational basis review is applicable, the State ought to prevail on that issue. The State, at a minimum, has rationally concluded that conversion therapy carried out through talk therapy is both harmful and ineffective. If the Court selects either strict scrutiny or

intermediate scrutiny as the right standard, it likely would remand to the court of appeals to decide in the first instance whether the law passes muster under that standard.

***West Virginia, et al. v. B.P.J.*, No. 24-43**
***Little v. Hecox*, No. 24-38**

These two cases involve state statutes that limit participation on female sports teams to biological females. The *West Virginia* case involves both a Title IX and an Equal Protection challenge; the *Little* case involves only an Equal Protection challenge. Because the two statutes are so similar, and because *West Virginia* involves both claims, only the *West Virginia* case will be discussed here.

The West Virginia statute provides that athletic teams designated for female students shall not be open to male students. The statute defines "male" as "an individual whose biological sex determined at birth is male." The question is whether the statute violates either Title IX or the Equal Protection Clause insofar as it categorically excludes all birth sex males whose gender identity is female from female sports teams.

Title IX prohibits a federal fund recipient from subjecting an individual in one of its programs or activities to "discrimination" "on the basis of sex." B.P.J., a transgender female, who was designated male at birth but has identified as female since third grade, argues that West Virginia's categorical exclusion of transgender females from female sports teams constitutes discrimination on the basis of sex within the meaning of Title IX.

Respondent does not directly dispute that the term "sex" in Title IX refers to a person's biological sex as determined at birth. Instead, she relies on the holding in *Bostock v. Clayton County* that discrimination based on transgender status is a form of discrimination because of sex under Title VII, even if sex is interpreted to mean sex designated at birth. Because Title IX uses the same discrimination because of sex language as Title VII, respondent argues, *Bostock*'s holding governs Title IX.

Respondent accepts that, under both Title VII and Title IX, the term "discriminate" entails more than differential treatment. It means treating an individual worse than others who are similarly situated and employing distinctions that injure protected individuals. That requirement is satisfied here, respondent argues, because birth sex males who identify as females are treated worse than birth sex females who identify as females. Only the latter can play on a team that corresponds to their gender identity.

It makes no difference, respondent argues, that cisgender males are also excluded from female teams. That's because cisgender males still have an opportunity to participate in athletics on a male team and need not deny their gender identity to do so. By contrast, transgender females are effectively excluded from all non-coed sports, and even if they could make a male team, they would have to deny their gender identity to do so.

The State argues that Title IX has always been understood to allow separate sports teams based on biological sex. The Javitz Amendment directed the predecessor to the Department of Education to issue reasonable regulations regarding athletics, and the predecessor agency then issued a regulation that authorizes schools to sponsor separate teams for members of each sex. That history, the State argues, reflects the understanding that creating sports teams for members of each biological sex does not constitute discrimination because of sex within the meaning of Title IX.

The reason separate sports were not understood to constitute discrimination because of sex, the State asserts, is obvious: If female sports teams were not permitted, the vast majority of females would be deprived, because of a biological disadvantage, of any meaningful opportunity to compete in sports. For the same reason, the State argues, *Bostock* is not applicable. Whereas sex is not relevant to a candidate's qualifications for employment, sex is a relevant in sports. Only separate female sports teams can ensure that female athletes have an equal opportunity to participate in sports.

On her equal protection claim, respondent argues that, while framed as a sex-based classification, the purpose of the West Virginia law was to exclude transgender females from female sports teams. But whether viewed as a sex classification or a transgender classification, respondent argues, West Virginia's law is subject to heightened scrutiny.

Respondent further argues that issues of fact preclude a decision on whether the West Virginia law satisfies heightened scrutiny. In particular, there is a dispute about whether birth sex males who have not undergone puberty enjoy a competitive advantage over birth sex females. Respondent argues that because there is no such advantage, the West Virginia law violates equal protection as applied to respondent.

The State argues that the West Virginia law classifies based on sex, not gender identity. It further argues that the sex classification is justified because biological males and biological females are not similarly situated—biological males have an inherent competitive advantage in sports. And due to that physiological advantage, the States asserts, biological males would displace biological females if they were allowed to compete together, denying females an equal opportunity to participate in sports.

Finally, the State argues that an as-applied challenge that considers whether a particular transgender female has as a competitive advantage is not permissible under the Equal Protection Clause. According to the State, permitting such an as-applied challenge would effectively transform intermediate scrutiny into strict scrutiny. Under intermediate scrutiny, the State asserts, the Equal Protection Clause does not require a case-by case inquiry into whether a particular birth sex male does or does not have a competitive advantage. It is enough that there is a substantial relationship between a person's birth sex and whether they have a competitive advantage, a requirement that is easily satisfied here.

While this case presents some tricky doctrinal issues, the Court will almost surely rule for the State. For the Court, the case will be this simple: Allowing birth sex males to participate on female teams would give them an unfair competitive advantage over birth sex females, and neither Title IX nor the Equal Protection Clause should be read to require that untenable result.

***Louisiana v. Callais*, No. 24-109**
***Robinson v. Callais,* No. 24-110**

Louisiana adopted a redistricting plan that contained a single majority-minority district. After minority voters challenged the plan, a district court (the *Robinson* court) found that the failure to draw a second majority-minority district likely violated Section 2 of the Voting Rights Act (Section 2), and the Fifth Circuit affirmed. Louisiana then created a new plan with a second majority-minority district (District 6). A group of non-Black voters (appellees) challenged District 6 as an unconstitutional racial gerrymander. A different district court ruled for appellees (the *Callais* court), finding that the State's new plan was predominately motivated by race, and

that Section 2 did not furnish a justification because the State's plan was not reasonably compact. Louisiana and the Robinson plaintiffs appealed.

Last term, the principal questions presented by Louisiana and Robinson were whether race predominated in the drawing of District 6 and if so, whether that reliance on race was narrowly tailored to further a compelling interest in complying with Section 2. After briefing and oral argument, the Court failed to decide the case. Instead, it ordered reargument and added the question whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution. That is the question that will be discussed here. The question implicates the interaction between a state's obligation to comply with Section 2 of the Voting Rights Act and the Fourteenth Amendment's prohibition against racial gerrymandering.

Section 2 requires a state to draw a majority-minority district when necessary to ensure that minority voters have an equal opportunity to participate in the political process and elect candidates of their choice. In *Thornburg v. Gingles*, the Court held that, to establish a violation of Section 2's equal opportunity standard, plaintiffs must establish three preconditions: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a reasonably configured district; (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a block usually to defeat the minority group's preferred candidates. Plaintiffs must then show that the totality of the circumstances establish a denial of an equal opportunity to elect.

A state's use of race to draw district lines violates the Equal Protection Clause's prohibition against racial gerrymandering when district lines are predominantly motivated by race and the state fails to show that its use of race is narrowly tailored to further a compelling interest. The Court has assumed that Section 2 provides a state with a compelling interest in using race to draw a district's lines when it has good reason to believe that a failure to do so would violate Section 2. A district is not narrowly tailored if race is used more than reasonably necessary to comply with Section 2.

In its briefing on the question posed by the Court, Louisiana argues that its intentional creation of a second majority-minority district at the behest of the *Robinson* court violates the Constitution. It argues that Section 2 does not provide a justification for race-based districting because its requirement to use race in drawing district lines is itself unconstitutional. Drawing on the Court's decision in *Students for Fair Admissions v. Harvard (SFFA),* it argues that race-based districts are categorically unconstitutional for three independent reasons.

First, Louisiana argues that *SFFA* establishes that government action resting on racial stereotypes is per se impermissible, and that race-based districting under Section 2 inevitably rests on an impermissible racial stereotype that all members of a racial minority think alike, share the same interests, and vote the same. By focusing on whether the "minority group" could constitute a majority in a reasonably configured district and whether the "minority group" is politically cohesive, the State argues, the first two *Gingles* preconditions expressly treat racial minorities as a homogenous class. And by asking whether the white majority votes sufficiently as a block to defeat "the minority's preferred candidate," the third precondition assumes that any given minority voter will prefer the same candidate preferred by others in their racial class.

Second, Louisiana argues that *SFFA* establishes that any use of race as a negative violates the Equal Protection Clause and that race-based districting under Section 2 treats race as a negative. The intentional use of race to give members of one race additional political power, the State argues, logically means the diminution of the power of other groups.

Third, the State argues that *SFFA* requires any use of race to be limited in time, and Section 2 contains no such limitations. It is not enough, the State argues, that Section 2 does not apply unless there is a denial of equal voting opportunity under current conditions. Under *SFFA,* the State argues, any statute that requires the use of race must have a mandatory time limit.

Alternatively, the State argues that if strict scrutiny were applicable, the same three factors—use of racial stereotypes, use of race as a negative, and no time limit—preclude Section 2 from providing a compelling justification for race-based districting. The State also makes three additional arguments: First, the only compelling interests the Court has recognized are preventing imminent threats to human safety and remedying intentional discrimination, and Section 2 does neither; second, Section 2's equal opportunity standard is too amorphous to serve as a compelling interest; and third, race-based districting exceeds Congress's authority to enforce the Fourteenth and Fifteenth Amendments because there was no evidence of a pattern of intentional discrimination when Section 2 was enacted, and there is certainly no evidence of such a pattern today.

The Robinson plaintiffs start at the opposite end. They argue that Section 2 falls within Congress's authority to enforce the Fourteenth and Fifteenth Amendments by appropriate legislation. They rely on the Court's holdings in *City of Rome v. United States* and *Oregon v. Mitchell* that Congress may use its enforcement authority to bar practices that have a discriminatory effect in order to deter and remedy intentional discrimination. And they note that Congress enacted Section 2's results test only after finding contemporaneous evidence of intentional dilution and a substantial risk that such discrimination would go undetected without a results test. The Robinson plaintiffs also note that the Court only recently upheld Section 2 as appropriate enforcement legislation in *Allen v. Milligan*.

The Robinson plaintiffs further argue that Section 2 has the following built-in safeguards that keep it within Congress's enforcement authority. First, the *Gingles* preconditions ensure that Section 2's remedies are justified by current conditions. To the extent that increasing racial integration prevents the construction of reasonably configured majority-minority districts, or racial polarization in voting recedes, the *Gingles* preconditions would preclude a finding of a Section 2 violation. By contrast, where the state cracks or packs minority neighborhoods that could otherwise be combined to form a reasonably compact majority-minority district and pervasive racial block voting persists, there is a substantial risk that the cracking or packing reflects intentional discrimination. Second, the factors that are considered under the totality of circumstances are ones the Court also considers in deciding whether there is intentional vote dilution (*Rogers v. Lodge.*). Finally, Section 2's disclaimer of any right to proportional representation, and the Court's insistence that race may not be used any more than reasonably necessary to comply with Section 2's equal opportunity to elect standard, further prevent Section 2 from exceeding Congress's enforcement authority.

Finally, the Robinson plaintiffs argue that because Section 2 provides a remedy only when there is a denial of equal opportunity to elect under current conditions, there is no need for Section 2 to have a sunset date. Such an arbitrary time limit, they assert, would leave minority voters exposed to the very risk of being subjected to intentionally discriminatory practices that Congress enacted the results test to prevent.

It is certainly possible that the Court will accept the State's invitation to hold that Section 2 was unconstitutional the day it was enacted. But the Court has applied Section 2 in numerous cases over the last 40 years, and it recently upheld the constitutionality of Section 2 in *Milligan*

as an appropriate way to prevent intentional vote dilution. It would take a lot of audacity to suddenly discover that Section 2 has been unconstitutional all along. The State says the reasoning of *SFFA* compels that conclusion. But *SFFA* was decided the same term as *Milligan* and was directed to the use of race to promote diversity in higher education. It is hardly a controlling precedent on the constitutionality of a statute seeking to prevent intentional vote dilution.

The State's argument that is more likely to appeal to a majority of the Court is that race-based districting cannot extend indefinitely into the future. Justice Kavanaugh's *Milligan* concurrence indicated that he was prepared to entertain that argument, and there are almost surely four other Justices who are prepared to accept it. The Court could implement that view in two ways. It could take the position that however long Congress may authorize using race in redistricting, anything this long is too long. That is similar to the approach that Justice Kavanaugh seemed to adopt in *SFFA* when he read into prior precedent a 25-year rule for race-based admissions. The alternative method would be to follow the *Shelby County v. Holder* path—current burdens must be justified by current conditions.

The Robinson plaintiffs are right that Section 2, as interpreted in *Gingles*, focuses on current conditions. But it does not take into account the kind of current conditions that *Shelby County* thought relevant in deciding whether Section 5 could be permissibly extended: whether there remains sufficient current evidence of intentional discrimination to justify a prophylactic rule that does not require proof of intentional discrimination. As the Robinson plaintiffs explain, *Shelby County* is potentially distinguishable on many grounds. But that will not necessarily prevent a majority of the Court from extending the same kind of analysis to Section 2.

It is evident from the fact that the Court posed a question on the constitutionality of intentionally creating a majority-minority district that there is a substantial chance the Court will invalidate Section 2 insofar as it requires race-based districting. But that does not mean it will.

A holding that one of the most momentous and successful pieces of legislation that Congress has ever enacted is unconstitutional insofar as it requires the use of race to ensure equal voting opportunity would potentially have staggering consequences. The upshot of a such a holding could be to permit states to dismantle all such districts, dramatically reducing the number of Black representatives in Congress and in state and local legislative bodies, undoing 40 years of progress. And it could engender a fairly widespread public perception that the Court is indifferent to the amount of intentional racial discrimination that persists today.

The Court could find some other narrower way to rule that Louisiana's plan is unconstitutional—for example, that there is no compelling justification for a district that is as noncompact as Louisiana's second majority-minority district. It all comes down to the Chief Justice and Justice Kavanaugh, and there is no way to predict which way they will come down.

***Trump v. V.O.S. Selections,* No. 25-250**
***Learning Resources, Inc. v. Trump,* No. 24-1287**

The International Emergency Economic Powers Act (IEEPA) authorizes the President to regulate the importation of any foreign property. The authority may be exercised only after the President has declared a national emergency. Following such a declaration, IEEPA authority may be used only to deal with an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States.

The President invoked authority under IEEPA to impose two kinds of tariffs: First, the President imposed drug trafficking tariffs on almost all goods from Mexico, Canada, and China, purportedly because those countries contributed to the flow of drugs into this country. Second, the President imposed reciprocal tariffs on nearly every country, purportedly to address the negative effects of large and persistent trade deficits. The question presented is whether these tariffs fall within the President's authority under IEEPA.

The parties join issue on six different issues that are briefly summarized here:

1. Whether the power to regulate imports encompasses the power to impose tariffs.

The challengers argue that the President's power to "regulate" imports does not encompass the power to impose tariffs on imports. They argue that IEEPA conspicuously omits any mention of tariffs, and every time Congress has expressly given the President power to impose tariffs, it has imposed strict procedural, temporal, and substantive limits.

The challengers further argue that if there is any ambiguity about the scope of the President's power, it should be resolved by the Major Questions Doctrine. They characterize the President's claim to be that IEEPA gives him authority to impose tariffs at whatever level he wants, for however long he wants, on whatever countries or goods he wants. That claim, the challengers say, has vast economic and political significance, requiring an explicit grant of congressional authority. And whatever else can be said about the text of IEEPA, it does not explicitly grant the President such vast power.

In response, the government argues that the ordinary meaning of "regulate"—to control or to adjust by rule—covers the imposition of tariffs. As proof, the government quotes the Court's statement in *Gibbons v. Ogden*, that "the right to regulate commerce, even by the imposition of duties, was not controverted by the Framers." And the government embraces Judge Taranto's point in his dissent from the Federal Circuit's opinion that, given that Congress authorized the President to prohibit imports, it would be anomalous to think that Congress withheld a less extreme and more flexible tool for pursuing the same objectives.

The government also argues that the Major Questions Doctrine is inapplicable for multiple reasons: IEEPA unambiguously authorizes tariffs; the Major Questions Doctrine does not apply to the President at all; Congress can be expected to delegate major questions to the President when a predicate for the action is a national emergency; the canon does not apply in the area of national security or foreign affairs; and Congress has long delegated capacious authority over tariffs to the President.

2. Whether, if the power to regulate imports encompasses the power to impose tariffs at all, that power is limited to modest adjustments.

The State challengers argue that, even if the term "regulate" authorizes the President to impose some tariffs, that term connotes modest changes to the tariff schedule, not unlimited authority to rewrite the amount, duration, and scope of the tariffs. The States note that one of the government's selected synonyms for "regulate" is "adjust," and that term's ordinary meaning connotes only minor alterations or modifications.

The government responds that interpreting IEEPA to allow some tariffs, but not ones without limit on amount, duration, or scope, is atextual. Such an interpretation, the government

adds, would put judges in the untenable position of deciding how much is too much, how long is too long, and how many countries or goods are too many.

3. Whether there is an unusual and extraordinary threat.

The challengers argue that the President violated the IEEPA requirement that his action must be premised on an "unusual" and "extraordinary" threat. Because the trade deficits that serve as the justification for the President's reciprocal tariffs have persisted for many years with little change over time, they argue, there is nothing unusual or extraordinary about them.

The government's certiorari filing does not specifically respond to that argument. But Judge Taranto rejected the argument on the ground that the President did not rely on trade deficits per se as posing an unusual and extraordinary threat; instead, he relied on the supposedly calamitous effects those deficits were having on domestic manufacturing and military preparedness today.

4. Whether IEEPA, as interpreted by the President, would constitute an unconstitutional delegation of legislative power.

The challengers argue that if IEEPA were read to give the President the authority he claims, it would constitute an unconstitutional delegation of legislative authority. They note that in *Federal Communications Commission v. Consumers' Research*, the Court recently upheld a delegation of authority to tax only because the statute set a ceiling and floor on the tax rate, while IEEPA sets neither.

The government responds that the nondelegation doctrine has no salience in the area of national security and foreign affairs. Even if the doctrine applies, the government argues, Congress was simply required to set forth an intelligible principle for the President to apply, and it did that here. In particular, the President may only impose tariffs to deal with an unusual and extraordinary foreign threat to national security, foreign policy, or the economy of the United States.

5. Whether the President's reciprocal tariffs violate Section 122.

The challengers argue that even if IEEPA could be read to give the President some tariff authority, tariffs designed to address large and serious trade deficits are governed by Section 122 of the Trade Act. Under Section 122, the President cannot increase tariffs by more than 15% and the tariffs cannot last longer than five months without congressional approval. Yet almost all of the President's tariffs exceed the 15% cap, and all apply indefinitely.

The government responds that IEEPA and Section 122 are independent sources of Presidential authority to impose tariffs. Section 122 is available to address balance-of-payment deficits, regardless of whether they rise to the level of a declared emergency, while IEEPA is available to address emergencies, regardless of whether there are balance-of-payment deficits.

6. Whether the drug trafficking tariffs deal with the identified threat.

The States argue that the drug trafficking tariffs do not deal with the drug trafficking threat. Instead, they tax goods that are completely unrelated to that threat. For example, taxing tomatoes, the States say, does not deal with the fentanyl crisis.

The government responds that taxes on unrelated goods puts pressure on the responsible governments to address the drug trafficking problem. There is nothing in the term "deal with," the government argues, that precludes dealing with a problem through leverage.

Some of the challengers' arguments are more likely to resonate with the Court than others. The argument that while IEEPA may give the President some authority to impose tariffs, it does not give him unbounded authority to rewrite the amount, duration, and scope of the current tariff schedule could seem like an attractive middle ground. But in the end, it is hard to imagine the Court being attracted to the idea that IEEPA requires it to police when tariffs are too high, or too long, or imposed on too many countries.

The argument that there is nothing new under the sun about trade deficits has a lot of surface appeal. But the Court's inclination to give the President deference, particularly in the area of foreign affairs, will make them reluctant to go behind the President's explanation for why longstanding deficits are suddenly an emergency today. The Court is unlikely to accept as fact the President's delusional belief that "[o]ne year ago, the United States was a dead country, and now, because of the trillions of dollars being paid by countries that have so badly abused us, American is a strong, financially viable and respected country again." But that is unlikely to stop the Court from deferring to the President's representation that longstanding deficits have suddenly caused a crisis in manufacturing and military readiness.

The Court has not found a nondelegation problem in forever. And as the recent decision in *Consumers' Research* makes clear, there is basically nothing left of it. The Court is not about to revitalize the doctrine in the field of foreign affairs.

The States' "deal with" argument is the longest of longshots. It is hard to get past the government's response that applying leverage is one way to deal with a problem.

That leaves two arguments that are most likely to be the focus of the Court's attention: that the term "regulate" does not encompass the power to impose tariffs, and that Section 122 governs balance-of-payments tariffs. There are serious arguments on both sides of both issues.

What gives the challengers fighting chances is the breadth of power the President is claiming, and the untrustworthiness of the person claiming it. Because this case implicates foreign affairs, I don't think the Court will apply the Major Questions Doctrine as such. And I also don't think the Court will set aside the deference doctrines that apply to determinations made by a President simply because the current President is untrustworthy. But the scope of the power claimed and the untrustworthiness of the person claiming it may affect how some of the Justices view the challengers' two featured arguments. Whether that will get the challengers all the way to five, however, is an entirely different question.

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Constitutional Law

Article I

EX POST FACTO CLAUSE

***Ellingburg v. United States,* No. 24-482**

Question Presented:

Whether criminal restitution under the Mandatory Victim Restitution Act is penal for the purposes of the Ex Post Facto Clause.

Summary:

The Ex Post Facto Clause in Article I prohibits the retroactive application of a penal law that increases punishment for a crime. Before the enactment of the Mandatory Victim Restitution Act (the Act), federal law compelled restitution payments for twenty years after a judgment against a criminal defendant. The Act changed the period of repayment to twenty years after judgment or twenty years after release from imprisonment, whichever is later. The question presented is whether a restitution order under the Act is penal for purposes of the Ex Post Facto Clause.

Petitioner Holsey Ellingburg, Jr. robbed a bank. A jury convicted him of that offense, and the court sentenced him to imprisonment. The court also ordered petitioner to pay $7,567.25 in restitution. At the time that petitioner committed his offense, his restitution obligation would have ended in 2016, twenty years after his judgment of conviction. Under the Act, petitioner's restitution obligation continues until 2042, twenty years after his release from imprisonment. Petitioner moved to terminate his restitution obligation, alleging that the Act violates the Ex Post Facto Clause as applied to defendants who committed their offense before its enactment. The district court denied his motion.

The Eighth Circuit affirmed, holding that restitution orders under the Act are not penal and may therefore be retroactively applied. The court relied on reasoning in a prior court decision that restitution under the Act is civil rather than penal because its purpose is to make victims whole, not to punish perpetrators.

Petitioner argues that restitution orders under the Act are penal for purposes of the Ex Post Facto Clause. Petitioner contends that the following structural elements of the Act demonstrate that Congress intended for restitution orders under the Act to be penal: Congress placed restitution orders under the Act in the criminal code alongside criminal fines; it made them part of the defendant's sentence; and it authorized the Attorney General to collect the payments. Petitioner also relies on Court precedent, describing restitution as a penalty that works to deter crime.

Decision Below:
113 F.4th 839 (8th Cir. 2024)
Petitioner's Counsel of Record:
Lisa S. Blatt, Williams & Connolly LLP
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

Court-Appointed Amicus in Support of the Judgment:
John F. Bash, Quinn Emanuel Urquhart & Sullivan, LLP

First Amendment

CONTENT-BASED REGULATION

***Chiles v. Salazar*, No. 24-539**

Question Presented:

Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause.

Summary:

A state may generally regulate conduct that incidentally involves speech without violating the First Amendment. The First Amendment generally forbids a state from regulating speech based on its content or viewpoint. Colorado's Minor Conversion Therapy Law (MCTL) prohibits licensed mental health professionals from engaging in "conversion therapy" with minors. The statute defines conversion therapy to include treatment that seeks to change an individual's gender identity. Talk therapy with that purpose falls within the MCTL's prohibition. The question presented is whether such a law, as applied to talk therapy, regulates conduct that incidentally involves speech or directly regulates speech based on its content and viewpoint.

Petitioner Kaley Chiles, a licensed mental health professional, seeks to provide talk therapy to minors with gender dysphoria who wish to align their gender identity with their understanding of Christianity. After concluding that the MCTL prohibits such talk therapy, petitioner filed suit in federal court, alleging that the statute violates the First Amendment. The district court denied petitioner's motion for a preliminary injunction.

The Tenth Circuit affirmed, holding that a prohibition on a medical professional from engaging in talk therapy that seeks to change an individual's gender identity regulates conduct that incidentally involves speech. The court reasoned that such a law targets medical treatments that are harmful or ineffective, regardless of whether they are carried out through speech. As such, the court concluded, the effect of such a statute on speech (talk therapy) is incidental to its regulation of conduct (medical treatments).

Petitioner contends that a statute that prohibits a medical professional from engaging in talk therapy to change a minor's gender identity directly regulates speech based on its content and viewpoint. Petitioner argues that such a regulation is content based because it is imposed based on the communicative content of what is said: support for aligning a person's gender identity with that person's birth sex. Petitioner also argues such a law is viewpoint based because it forbids talk therapy to support alignment of a person's gender identity with their birth sex, while permitting talk therapy to support gender transition. Finally, petitioner contends that labeling such a law a regulation of conduct ignores that, as applied to talk therapy, the law exclusively regulates speech.

Decision Below:
116 F.4th 1178 (10th Cir. 2024)
Petitioner's Counsel of Record:

John J. Bursch, Alliance Defending Freedom
Respondent's Counsel of Record:
Shannon Wells Stevenson, Office of the Colorado Attorney General

RIPENESS

***First Choice Women's Resource Centers v. Platkin,* No. 24-781**

Question Presented:

Where the subject of a state investigatory demand has established a reasonably objective chill of its First Amendment rights, is a federal court in a first-filed action deprived of jurisdiction because those rights must be adjudicated in state court?

Summary:

Article III's standing requirement, and its parallel ripeness requirement, require a plaintiff to show that an asserted injury is actually occurring or imminent rather than speculative. The question presented is whether a plaintiff's asserted chill of a First Amendment right can support Article III ripeness when the asserted chill results from a non-self-executing subpoena.

The New Jersey Attorney General (respondent) issued a subpoena to petitioner First Choice, a faith-based pregnancy center, seeking records that would identify petitioner's donors. Petitioner brought suit against respondent, alleging that the subpoena created a reasonably objective chill of its First Amendment rights because disclosure of the identity of its donors would impair its ability to retain current donors and recruit new ones. The district court dismissed for lack of ripeness. The state court then issued an order enforcing the subpoena but reserved the question of its constitutionality and ordered the parties to negotiate its scope. Petitioner then refiled its federal complaint, but the district court once again dismissed for lack of ripeness.

The Third Circuit affirmed, holding that the asserted chill on petitioner's First Amendment rights resulting from a non-self-executing subpoena was insufficient to establish Article III ripeness. In reaching that conclusion, the court relied on the following considerations: petitioner can continue to assert its constitutional claim in state court; the parties have agreed to negotiate to narrow the subpoena's scope; respondent seeks donor information from only two websites; petitioner's affidavits do not show enough of an injury; the state court will adequately adjudicate petitioner's claims; and any future federal litigation would likewise adequately adjudicate them.

Petitioner contends that the chill of a party's First Amendment rights resulting from a non-self-executing subpoena is sufficient to establish Article III ripeness without regard to whether the same claim may be litigated in state court. Petitioner argues that because the subpoena itself chilled its First Amendment rights, it makes no difference whether it has been enforced. Petitioner further argues that Section 1983 gives it the right to proceed in federal court without having to exhaust any state court remedy. Finally, petitioner argues that if required to litigate first in state court, it may be deprived of a federal forum altogether because if the state court rejects the claim, preclusion law would prevent relitigation in federal court.

Decision Below:
2024 WL 5088105 (3d Cir. 2024)
Petitioner's Counsel of Record:

Erin M. Hawley, Alliance Defending Freedom
Respondent's Counsel of Record:
Jeremy M. Feigenbaum, Office of the New Jersey Attorney General

Fourth Amendment

WARRANTLESS ENTRY – EMERGENCY-AID EXCEPTION

***Case v. Montana,* No. 24-624**

Question Presented:

Whether law enforcement may enter a home without a search warrant based on less than probable cause that an emergency is occurring, or whether the emergency-aid exception requires probable cause.

Summary:

Under the Fourth Amendment, police generally need a warrant to enter a house absent exigent circumstances. One exigent circumstance is the need for emergency aid. Under that exception, police may enter a house without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. The question presented is whether the emergency aid exception requires probable cause to believe that an emergency is occurring or whether a lower standard of suspicion is sufficient.

Petitioner Trevor Case threatened suicide during a phone call with his girlfriend, and she reported the threat to the police. When officers arrived at petitioner's house, they observed through an open window an empty holster, a beer can, and a notebook. After officers entered the house, petitioner pointed what appeared to be a gun at one of them, and the officer fired back, hitting petitioner. Petitioner was then arrested and charged with assault. Petitioner moved to exclude evidence found in his house based on the absence of probable cause. The district court denied the motion.

The Supreme Court of Montana affirmed, holding that the emergency aid exception does not require probable cause to believe that an emergency is occurring, but instead requires only an objective basis to suspect a person is in need of help. The court reasoned that a probable cause requirement would impede an officer's duty to ensure the wellbeing of people in imminent peril.

Petitioner argues that the emergency aid exception requires probable cause to believe that an emergency is occurring. Petitioner contends that the Court has already applied the probable cause requirement to other exigent circumstances, and there is no reason to treat the emergency aid exception differently. Petitioner further contends that permitting entry into a house on less than probable cause would seriously weaken protection afforded to the home and increase the risk of a violent, avoidable confrontation.

Decision Below:
553 P.3d 985 (Mont. 2024).
Petitioner's Counsel of Record:
Fred A. Rowley, Jr., Wilson Sonsini Goodrich & Rosati, P.C.
Respondent's Counsel of Record:
Christian B. Corrigan, Montana Department of Justice

Fifth Amendment

DOUBLE JEOPARDY

Barrett v. United States, No. 24-5774

Question Presented:

Whether the Double Jeopardy Clause permits two sentences for an act that violates 18 U.S.C. § 924(c) and§ 924(j).

Summary:

The Fifth Amendment's Double Jeopardy Clause prohibits cumulative punishment for the same offense (including lesser offenses that are included in a greater offense), unless the legislature authorizes such punishment. Penalties for crimes committed while using a firearm are detailed in 18 U.S.C. § 924. Section 924(c) (the lessor included offense) is violated when a person uses a firearm during and in relation to a crime of violence. Section 924(j) (the greater offense) is violated when the use of a firearm during and in relation to a crime of violence causes the death of another. The question presented is whether Congress authorized cumulative punishments for one act that violates both 924(c) and 924(j).

Petitioner Dwayne Barrett participated in an armed robbery that resulted in the death of the victim. He was convicted under both Section 924(c) and (j) for that conduct. The district court imposed a sentence on the 924(j) conviction, but not on the 924(c) conviction.

The Second Circuit vacated and remanded, holding that Congress intended to authorize separate punishments under both Section 924(c) and 924(j) for the same act. In reaching that conclusion, the court relied on two structural features of Section 924(c). First, it mandates a minimum prison term, without regard to whether the use of a firearm causes actual harm. Second, it provides that no term of imprisonment shall run concurrently with any other term of imprisonment. In the court's view, those two features mean that a district court is obligated to impose a sentence for a 924(c) conviction and that the sentence must run consecutively to a term of imprisonment under Section 924(j).

Petitioner contends that Congress did not authorize separate punishments under Sections 924(c) and 924(j) for the same act. Petitioner argues that when Congress wants separate punishments for the same offense it expressly says so, as it did when it required punishment for use of a gun during and in relation to a crime of violence to be "in addition to" the punishment for the underlying crime of violence. Petitioner further contends that Section 924(c)'s requirements of a mandatory minimum sentence and a consecutive sentence speak only to the appropriate sentence for a Section 924(c) conviction that is otherwise permissible, not to the distinct question of whether a defendant sentenced under Section 924(j) may also be sentenced under Section 924(c) in the first place.

Decision Below:
102 F.4th 60 (2nd Cir. 2023)
Petitioner's Counsel of Record:
Matthew B. Larsen, Federal Defenders of New York
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

Court-Appointed Amicus in Support of the Judgment:
Charles L. McCloud, Williams & Connolly LLP

Sixth Amendment

RIGHT TO COUNSEL

***Villarreal v. Texas,* No. 24-557**

Question Presented:

Whether a trial court abridges the defendant's Sixth Amendment right to counsel by prohibiting the defendant and his counsel from discussing the defendant's testimony during an overnight recess.

Summary:

In *Geders v. United States*, the Supreme Court held that a trial court order barring a defendant from consulting with his lawyer about anything during an overnight recess called while the defendant was testifying violates the defendant's Sixth Amendment right to counsel. In *Perry v. Leeke*, the Court held that a trial court order forbidding a defendant from consulting with his attorney during a brief recess called while the defendant was testifying does not violate the defendant's Sixth Amendment right to counsel. The question presented is whether a trial court order barring a defendant from conferring with his counsel about his ongoing testimony during an overnight recess violates the defendant's Sixth Amendment right to counsel.

Petitioner David Asa Villarreal was charged with murder. During his trial, he testified in his own defense. In the middle of petitioner's testimony, the trial court ordered an overnight recess and instructed petitioner not to consult with his attorney about his testimony during the recess. A jury convicted petitioner of murder, and the Court of Appeals of Texas affirmed his conviction.

The Court of Criminal Appeals of Texas affirmed, holding that an order barring a defendant from conferring with his counsel about his ongoing testimony during an overnight recess does not violate a defendant's Sixth Amendment right to counsel. The court reasoned that the controlling factor distinguishing *Geders* and *Perry* is whether an order interferes with a constitutionally protected communication. Because the court viewed *Perry* as establishing that a defendant has no Sixth Amendment right to confer with his attorney about his ongoing testimony, it concluded that an order restricting such communication is permissible. The court added that allowing a defendant to consult his attorney about his ongoing testimony would interfere with a trial's truth-seeking function.

Petitioner argues that a trial court's order barring discussion of a defendant's ongoing testimony during an overnight recess violates the defendant's Sixth Amendment right to counsel. Petitioner contends that the distinguishing feature between *Geders* and *Perry* is the length of the recess. According to petitioner, *Geders* recognized that a defendant must have unrestricted access to his attorney during an overnight recess to discuss trial strategy even though that discussion will inevitably include some consideration of the defendant's ongoing testimony. Petitioner further argues that a rule permitting a court to bar discussions about a defendant's testimony would be unworkable, because it will often be impossible for courts and attorneys to distinguish between conversations about trial strategy and those about ongoing testimony.

Decision Below:
707 S.W.3d 138 (Tex. Crim. App. 2024)
Petitioner's Counsel of Record:
Stuart Banner, UCLA School of Law Supreme Court Clinic
Respondent's Counsel of Record:
Andrew N. Warthen, Bexar County Criminal District Attorney's Office

Eighth Amendment

INTELLECTUAL DISABILITY

***Hamm v. Smith,* No. 24-872**

Question Presented:

Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an Atkins claim.

Summary:

In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled individuals. As in many states, to establish intellectual disability in Alabama, a claimant must demonstrate both (1) significantly subaverage intellectual functioning, meaning an IQ of 70 or below, and (2) significant and substantial deficits in adaptive behavior. In *Hall v. Florida,* the Court held that courts assessing IQ scores must account for the test's standard error of measurement (SEM). When the SEM's lower bound is 70 or below, the Court concluded that a defendant must be able to present additional evidence of intellectual disability, including adaptive deficits. The question presented is whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim.

Respondent Smith was convicted of capital murder in Alabama state court and sentenced to death. Following the Supreme Court's decision in *Atkins*, respondent sought to vacate his death penalty on the ground that he is intellectually disabled. In support of his application, respondent presented IQ scores of 75, 74, 72, 78, and 74. State courts denied relief, but a federal district court vacated his death sentence and the Eleventh Circuit affirmed. The Supreme Court vacated and remanded to the Eleventh Circuit to clarify whether it gave conclusive weight to the fact that the low end of the standard error range for respondent's lowest test was 69, or whether it used a holistic approach that considered all the relevant evidence, including expert testimony.

On remand, the Eleventh Circuit clarified that it had applied a holistic approach and had not relied solely on the fact that the low end of the standard error range for respondent's lowest score was 69. The court further clarified the nature of its holistic review, explaining that if a holistic review of multiple scores does not foreclose the conclusion that a defendant has significantly subaverage intellectual functioning, the defendant must have an opportunity to present evidence of his adaptive deficits. The court concluded that respondent's multiple scores, viewed together, did not rule out subaverage intellectual functioning because, taking into account the standard error range of each, four of the five scores individually suggest that respondent's true IQ may be 70 or lower.

Alabama contends that courts assessing an *Atkins* claim must consider the cumulative effect of multiple IQ scores to determine whether an individual's true IQ is 70 or below. A pattern of IQ scores above 70, the State argues, weighs strongly against a finding that a defendant's true IQ is 70 or below. The State also contends that a court may assess multiple IQ scores using various methods, including averaging (here, 74.6), identifying the median and mode (here, 74), and computing a composite score (not calculated). The State further argues that a court may not simply count how many of the scores, viewed individually, could be consistent with a true IQ of 70 and weigh that number against the number of scores that could not. That approach, the State argues, does not analyze the scores jointly, fails to consider that the error range on a single test is greater than the error range on several tests, and automatically counts in the defendant's favor scores that are equally consistent with a true IQ above 70.

Decision Below:
2024 WL 4793028 (11th Cir. 2024)
Petitioner's Counsel of Record:
Edmund G. LaCour Jr., Solicitor General, Office of the Alabama Attorney General
Respondent's Counsel of Record:
Kacey L. Keeton, Federal Defenders for the Middle District of Alabama

Fourteenth Amendment

EQUAL PROTECTION

***Little v. Hecox,* No. 24-83**

Question Presented:

Whether laws that seek to protect women's and girls' sports by limiting participation to women and girls based on sex violate the Equal Protection Clause of the Fourteenth Amendment.

Summary:

Under Idaho's Fairness in Women's Sports Act (the Act), student sports are designed "based on biological sex," and sports designated for biological females are not open to biological males. Healthcare providers may determine a person's biological sex based on "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels." By excluding all biological males from participation in female sports, the Act operates as a categorical ban on transgender females participating in female sports. The question presented is whether the Act violates the Equal Protection Clause of the Fourteenth Amendment

Respondent Lindsay Hecox is a transgender woman who wanted to compete on the Boise State University women's track and cross-country teams. She filed suit against petitioners, the Idaho Governor and other state officials, alleging that the Act violates the Equal Protection Clause. The district court granted a preliminary injunction.

The Ninth Circuit affirmed, holding that the Act likely violates the Equal Protection Clause. The court first concluded that the Act's provision excluding biological males from female sports teams discriminates based on transgender status. The court reasoned that while the Act is framed in terms of biological sex, its purpose was to categorically ban transgender females

from playing on female sports teams. The court next concluded that discrimination based on transgender status triggers heightened scrutiny both because transgender status is itself a quasi-suspect classification and because, under *Bostock v. Clayton County,* it is impossible to discriminate based on transgender status without discriminating based on sex. Finally, the court concluded that the Act likely does not survive heightened scrutiny. While the court concluded that the state has an important interest in furthering women's equality and promoting fairness in female athletic teams, categorically excluding transgender females from female sports teams likely is not substantially related to achieving that objective. The court reasoned that because the evidence does not establish that transgender females taking hormones have a physiological advantage over cisgender females, there likely is not a sufficient justification for excluding them from female teams.

Petitioners argue that the Act does not violate the Equal Protection Clause. Petitioners contend that sex has an objective, biological definition that is controlling for equal protection purposes, so discrimination based on gender identity is not discrimination based on sex. While the Act concededly classifies based on biological sex, petitioners argue that classification is substantially related to the State's interest in limiting participation on female teams to biological females. If biological males were allowed to participate on female teams, petitioners contend, it would put biological females at a physiological disadvantage, a disadvantage that is not erased when transgender females take hormones. Petitioners further contend that the Act does not discriminate based on transgender status because its purpose is to promote fairness to biological females, not to discriminate based on transgender status. In any event, petitioners argue, transgender identity is not a quasi-suspect classification because it is not definitively ascertainable at birth, it is not immutable, and members of the group do not lack political power.

Decision Below:
104 F.4th 1061 (9th Cir. 2024)
Petitioners' Counsel of Record:
Alan M. Hurst, Solicitor General, Idaho Office of the Attorney General
Respondents' Counsel of Record:
Kathleen Hartnett, Cooley LLP

***West Virginia v. B.P.J.,* No. 24-43**

Questions Presented:

1. Whether Title IX prevents a state from consistently designating girls' and boys' sports teams based on biological sex determined at birth.
2. Whether the Equal Protection Clause prevents a state from offering separate boys' and girls' sports teams based on biological sex determined at birth.

Summary:

Title IX prohibits a federal fund recipient from subjecting an individual in one of its programs or activities to "discrimination" "on the basis of sex." The first question presented is whether limiting participation on girls' sports teams to persons who were designated biologically female at birth violates Title IX as applied to transgender girls. The Equal Protection Clause bars the government from discriminating on the basis of sex unless doing so is substantially related to an important government purpose. The second question presented is whether limiting

participation on girls' sports teams to persons who were designated biologically female at birth violates the Equal Protection Clause as applied to transgender females who do not have a biological competitive advantage.

A West Virginia statute provides that athletic teams designated for female students shall not be open to male students. The statute defines "male" as "an individual whose biological sex determined at birth is male." Respondent B.P.J. is a transgender thirteen-year-old girl: her biological sex at birth was determined to be male, but she has identified as female since the third grade. Respondent filed suit, alleging that enforcement of the statute against all transgender females, including those who take puberty blockers before entering puberty, violates Title IX and the Equal Protection Clause. The district court rejected both claims.

The Fourth Circuit reversed, holding that limiting participation on girls' sports teams to persons who were designated biological female at birth discriminates on the basis of sex in violation of Title IX. The court reasoned that a violation of Title IX is established when a statute operates on the basis of sex, treats similarly situated individuals differently, and imposes harm on an individual. The court concluded that the statute operates on the basis of sex in two ways. First, it discriminates based on gender identity because the statute's purpose is to exclude transgender females from female sports teams, and discrimination based on gender identity is discrimination on the basis of sex. Second, it forbids transgender girls, but not transgender boys, from participating on teams consistent with their gender identity. The court concluded that the statute treats similarly situated students differently because it excludes all transgender girls from girls' sports teams regardless of whether they possess a competitive advantage. And the court concluded that the statute imposes a dignitary harm on transgender girls because it forces those who want to participate in sports to do so on a team that is inconsistent with their gender identity.

The court further held that the statute is subject to the Equal Protection Clause's intermediate standard of review for sex classifications for the same two reasons it concluded that the statute operates on the basis of sex within the meaning of Title IX. While the court accepted that eliminating a competitive advantage would be sufficient to justify a sex classification, it concluded that there was a factual dispute that should be resolved by the district court on whether respondent would have a competitive advantage.

The State argues that limiting participation on girls' sports teams to individuals who have been determined to be biologically female at birth does not violate Title IX. The State contends that when Title IX was enacted, the term "sex" referred to an individual's reproductive biology at birth, not gender identity. The State further contends that treating the exclusion of transgender females from female sports teams as a violation of Title IX would undermine the purpose of creating female sports teams in the first place—to provide athletic opportunities for females whose biology places them at a disadvantage when competing against males.

The State also argues that excluding transgender females from female sports teams does not violate the Equal Protection Clause. The State contends that the statute permissibly treats individuals differently on the basis of their birth sex because that classification turns on inherent physical differences between males and females that are substantially related to success in athletics. Once such a substantial fit is shown, the State argues, it is irrelevant that there may be some individuals whose male biology at birth does not give them a competitive advantage. The State further argues that the statute does not discriminate based on transgender status at all because it excludes all individuals determined to be biologically male at birth from female sports teams regardless of whether they are cisgender or transgender.

Decision Below:
98 F.4th 542 (4th Cir. 2024)
Petitioner's Counsel of Record:
Michael R. Williams, Solicitor General, Office of the West Virginia Attorney General
Respondent's Counsel of Record:
Joshua Block, American Civil Liberties Union Foundation

Criminal Law

Habeas Corpus

***Bowe v. United States,* No. 24-5438**

Questions Presented:

1. Whether 28 U.S.C. § 2244(b)(1) applies to a claim presented in a second or successive motion to vacate under 28 U.S.C. § 2255.
2. Whether 28 U.S.C. § 2244(b)(3)(E) deprives this Court of certiorari jurisdiction over the grant or denial of an authorization by a court of appeals to file a second or successive motion to vacate under 28 U.S.C. § 2255.

Summary:

Federal prisoners must seek post-conviction relief through a motion to vacate under 28 U.S.C. § 2255. State prisoners must seek post-conviction relief through a motion to vacate under 28 U.S.C. § 2254. Under 28 U.S.C.§ 2244, a claim presented in a second or successive motion to vacate "under section 2254" that was presented in a prior application must be dismissed. Section 2255(h) provides that a second or successive motion filed under Section 2255 must be certified as provided in Section 2244 by a panel of the appropriate court of appeals. The first question presented is whether Section 2244's directive to dismiss previously presented claims applies to claims previously presented under Section 2255.

Section 2244 provides that a prisoner must seek authorization from a court of appeals before filing a second or successive application under Section 2254 in district court, and that a denial of authorization may not be reviewed by the Supreme Court. As noted above, Section 2255(h) incorporates Section 2244's certification procedure. The second question presented is whether Section 2255(h)'s incorporation of Section 2244's certification procedure deprives the Supreme Court of jurisdiction to review denials of authorization to file a motion to vacate under Section 2255.

Petitioner Michael Bowe pleaded guilty to three federal crimes and was sentenced to prison. After unsuccessfully filing multiple motions to vacate his sentence under Section 2255, petitioner sought court of appeals authorization to file another such motion. In that request, petitioner set forth a claim that was presented in one of his prior applications. Relying on prior circuit precedent, the Eleventh Circuit dismissed, holding that Section 2244's directive to dismiss a claim presented in a previous petition under Section 2254 also applies to a claim presented in a previous petition under Section 2255. The prior precedent reasoned that Section 2255(h)'s incorporation of Section 2244's certification procedure extends Section 2244's directive to dismiss claims previously presented under Section 2254 to claims previously presented under Section 2255.

Petitioner argues that Section 2244's directive to dismiss claims presented in a prior application does not apply to a claim presented under Section 2255. Petitioner contends that the text of Section 2244 expressly limits its scope to motions to vacate under Section 2254. Because of that limitation, petitioner argues, Section 2255(h)'s incorporation of 2244's certification procedure does not incorporate Section 2244's directive to dismiss previously presented claims. Petitioner also contends that Section 2255(h)'s incorporation of Section 2244's certification procedure does not deprive the Supreme Court of jurisdiction to review denials of authorization to file a motion to vacate under Section 2255. Petitioner argues that Section 2244's jurisdiction-stripping language is expressly limited to decisions on Section 2254 applications, and that Section 2255(h) incorporates only Section 2244 certification procedure, not its jurisdictional stripping provision.

Decision Below:
2024 WL 4038107 (11th Cir. June 27, 2024)
Petitioner's Counsel of Record:
Andrew L. Adler, Federal Public Defender's Office
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice
Court-Appointed Amicus in Support of the Judgment:
Kasdin M. Mitchell, Kirkland & Ellis LLP

First Step Act

***Fernandez v. United States,* No. 24-556**

Question Presented:

> Whether a combination of "extraordinary and compelling reasons" that may warrant a discretionary sentence reduction under 18 U.S.C. § 3582(c)(1)(A) can include reasons that may also be alleged as grounds for vacatur of a sentence under 28 U.S.C. § 2255.

Summary:

Under the compassionate release statute, 18 U.S.C. 3582(c)(1)(A), a federal court has discretion to reduce a term of imprisonment for "extraordinary and compelling" reasons. Under the collateral review statute, 28 U.S.C. 2255, a defendant may seek to vacate a sentence that was imposed in violation of the Constitution or laws of the United States. The question presented is whether extraordinary and compelling reasons that may warrant a sentencing reduction under the compassionate release statute can include reasons that may be alleged as grounds for vacating a sentence under the collateral review statute.

Petitioner Joe Fernandez was convicted of conspiracy to commit murder-for-hire resulting in death and sentenced to life imprisonment. After exhausting direct appeal and collateral review, petitioner sought a reduction in his sentence under the compassionate release statute. Petitioner alleged as extraordinary and compelling circumstances his possible innocence and a disparity between the sentence he received and the sentences his co-conspirators received. The district court granted petitioner's motion and reduced his sentence to time served.

The Second Circuit reversed, holding that a reason that may be asserted as a ground for relief under the collateral review statute, such as a defendant's possible innocence, may not be

considered an extraordinary and compelling reason for a sentencing reduction under the compassionate release statute. The court reasoned that, otherwise, a defendant would be able to circumvent the collateral review statute's procedural limitations on obtaining post-conviction relief.

Petitioner argues that extraordinary and compelling reasons that may warrant a sentencing reduction under the compassionate release statute can include reasons that may be alleged as grounds for vacating a sentence under the collateral review statute. Petitioner contends that the text of the compassionate release statute contains no limit on the circumstances a court may consider extraordinary and compelling, except that a defendant's rehabilitation may not serve as the sole basis for relief. Petitioner further contends that there is no reason to add an atextual limitation in order to avoid circumvention of the requirements of the collateral review statute. There is no circumvention issue, petitioner argues, because a compassionate release motion does not attack the legal validity of the sentence, but instead seeks relief based on circumstances that render the continued sentence unjust, even if it is legal.

Decision Below:
104 F.4th 420 (2nd Cir. 2024)
Petitioner's Counsel of Record:
Benjamin Gruenstein, Cravath, Swaine & Moore LLP
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

***Rutherford v. United States,* No. 24-556**
***Carter v. United States,* No. 24-860**

Question Presented:

> Whether a district court may consider disparities created by the First Step Act's prospective changes in sentencing law when deciding if "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

Summary:

Under the compassionate-release statute, 18 U.S.C. § 3582(c)(1)(A)(i), a court may reduce a prisoner's sentence when there are "extraordinary and compelling reasons." The First Step Act prospectively lowered mandatory minimum sentences for certain offenses. The question presented is whether a court may consider the First Step Act's reduction in mandatory minimums as a factor in deciding if extraordinary and compelling reasons warrant a sentencing reduction. The Court granted certiorari on that same issue in *Carter v. United States*, No. 24-860, and the cases have been consolidated for argument.

Petitioner Daniel Rutherford was convicted of committing two armed robberies and sentenced to 42.5 years of imprisonment. If petitioner were sentenced today under the First Step Act, his sentence would be at least 18 years less. After the enactment of the First Step Act, petitioner moved for a sentence reduction under the compassionate-release statute, asserting that the First Step Act's prospective reduction in the mandatory minimums for certain offenses constituted an extraordinary and compelling reason for a reduction in his sentence. The district court denied the motion

The Third Circuit affirmed, holding that the First Step Act's prospective reduction in the statutory minimum for certain offense does not constitute an "extraordinary and compelling reason" to reduce a prisoner's sentence. The court reasoned that treating those changes as a basis for compassionate release would conflict with Congress's determination not to make the changes retroactive. The court concluded that a recent Sentencing Commission Guideline that permits non-retroactive changes to be considered as a basis for compassionate release in certain circumstances is inconsistent with congressional intent and therefore may not be considered in deciding whether a reduction in sentence is warranted.

Petitioner contends that a court may consider the First Step Act's prospective change in statutory minimums when deciding if extraordinary and compelling reasons warrant a reduction in sentence. Petitioner argues that courts have traditionally had broad discretion to decide what evidence to consider when modifying a sentence, and that nothing in the relevant statutes limits the court's discretion to consider the First Step Act's prospective changes. Petitioner further contends that Congress's express decision to bar consideration of rehabilitation as a factor in deciding whether a reduction in sentence is warranted necessarily implies there are no other limitations on the evidence a district court may consider in deciding that issue.

Decision Below:
120 F.4th 360 (3d Cir. 2024)
Petitioner's Counsel of Record:
Justin B. Berg, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

Fugitive-Tolling Doctrine

***Rico v. United States,* No. 24-1056**

Question Presented:

Whether the fugitive-tolling doctrine applies in the context of supervised release.

Summary:

The fugitive-tolling doctrine is a common law rule that suspends the service of a sentence when the defendant is a fugitive, as when the defendant escapes imprisonment. The effect of the doctrine in the prison escapee context is to extend a defendant's original release date by the amount of time the defendant was a fugitive. Under the Sentencing Reform Act, federal courts for the first time could impose a period of supervised release that begins after a custodial sentence ends. The question presented is whether the fugitive-tolling doctrine applies to defendants who abscond from supervised release, extending the term of their supervised release by the amount of time they absconded.

Petitioner Rico was convicted of drug charges and sentenced to imprisonment and a period of supervised release. After serving her custodial sentence, petitioner absconded from supervised release and committed additional crimes. If the fugitive-tolling doctrine applies to supervised release, all of petitioner's additional crimes would be a ground for revoking her supervised release. If the fugitive-tolling doctrine does not apply to supervised release, her term of supervised release would have expired before she committed the most serious of her

additional crimes. Applying the fugitive-tolling doctrine, the district court revoked petitioner's supervised release based on petitioner's commission of the most serious crime and sentenced her to an additional period of imprisonment and an additional period of supervised release.

The Ninth Circuit affirmed, holding, in reliance on prior circuit precedent, that the fugitive-tolling doctrine applies to supervised release. In that precedential opinion, the court reasoned that a failure to apply the fugitive-tolling doctrine to supervised release would reward individuals who abscond and remain as fugitives until the date their original supervised release term expires.

Petitioner contends that the fugitive-tolling doctrine does not apply to supervised release. Petitioner argues the text of the Sentencing Reform Act contains no language that authorizes applying the fugitive tolling doctrine to supervised release. Petitioner further argues that because the Sentencing Reform Act specifically permits tolling of supervision periods under certain circumstances, but is silent on fugitive tolling, the necessary implication is that the fugitive-tolling doctrine does not apply to supervised release. Petitioner finally argues that the common law fugitive-tolling doctrine is inapplicable to supervised release because supervised release is a recent statutory innovation.

Decision Below:
No. 24-2662, 2025 WL 720900 (9th Cir. 2025)
Petitioner's Counsel of Record:
Adam G. Unikowsky, Jenner & Block LLP
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

Election Law

Election Spending

National Republican Senatorial Committee v. Federal Election Commission, No. 24-621

Question Presented:

> Whether the limits on coordinated party expenditures in 52 U.S.C. § 30116 violate the First Amendment, either on their face or as applied to party spending in connection with "party coordinated communications" as defined in 11 C.F.R. § 109.37.

Summary:

The Federal Election Campaign Act (the Act) limits the expenditures political parties can make in coordination with their candidates. In *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*), the Supreme Court upheld the Act's coordinated spending limits against a First Amendment facial challenge. The question presented is whether, under the Court's more recent approach to spending limits, the Act's coordination limits violate the First Amendment, either on their face or as applied to party coordinated communications.

The National Republican Senatorial Committee and others (petitioners) wish to make coordinated campaign advertising expenditures in excess of the Act's limits. They filed suit against the Federal Election Commission (FEC), alleging that the Act's coordinated spending limits violate the First Amendment, both on their face and as applied to coordinated

communications. The district court certified the constitutional question to the Sixth Circuit sitting en banc.

The en banc Sixth Circuit denied petitioners' challenges, holding that the Act's coordinated spending limits are constitutional both facially and as applied to party coordinated communications. The court concluded that *Colorado II* remains controlling, and any tension resulting from subsequent doctrinal developments may be resolved only by the Supreme Court. Even as applied, the court explained, granting relief across the broad category of party coordinated communications would functionally overrule *Colorado II*.

Petitioners argue that, under the Court's current doctrine, the Act's coordinated spending limits violate the First Amendment both facially and as applied to party coordinated communications. They contend that the limits substantially burden speech by impairing the ability of parties to promote their candidates. To justify that burden under current precedent, petitioners argue, the limits must be narrowly tailored to prevent quid pro quo corruption. Petitioners argue that the limits were never intended to prevent quid pro quo corruption but were instead designed to further the impermissible purpose of curbing excess campaign spending. Petitioners further assert that while the limits have been defended as a way to prevent donors from funneling money to candidates through parties, multiple other mechanisms already prevent such circumvention, rendering the limits unnecessary. Finally, petitioners contend that *Colorado II* does not stand in the way of holding the limits unconstitutional because it is irreconcilable with the Court's subsequent decisions. To the extent the Court concludes that *Colorado II* controls, petitioners argue, it should be overruled.

Decision Below:
117 F.4th 389 (6th Cir. 2024)
Petitioner's Counsel of Record:
Noel J. Francisco, Jones Day
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice
Court-Appointed Amicus in Support of the Judgement:
Roman Martinez, Latham & Watkins, LLP
Intervenor's Counsel of Record:
Marc E. Elias, Elias Law Group LLP

Voting Rights Act

***Louisiana v. Callais,* No. 24-109**
***Robinson v. Callais,* No. 24-110**

Questions Presented:

1. Did the majority err in finding that race predominated in the Legislature's enactment of S.B. 8?
2. Did the majority err in finding that S.B. 8 fails strict scrutiny?
3. Did the majority err in subjecting S.B. 8 to the [*Thornburg v.*] *Gingles* preconditions?
4. Is this action non-justiciable?
5. Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution.

Summary:

A state's use of race to draw district lines violates the Equal Protection Clause's prohibition against racial gerrymandering when district lines are predominantly motivated by race and the state fails to show that its use of race is narrowly tailored to further a compelling interest. Section 2 of the Voting Rights Act (Section 2) requires a state to draw a majority-minority district when it is necessary to provide minority voters with an equal opportunity to elect their candidates of choice. The Court has assumed that the use of race in drawing district lines in order to comply with Section 2 is a compelling interest when a state has good reason to believe that failure to draw such a district would violate Section 2. In its most recent redistricting (S.B. 8), Louisiana created a second majority-minority district.

Last term, the principal questions presented by Louisiana were whether race predominated in the drawing of that district, and, if so, whether the district is narrowly tailored to further a compelling interest in complying with Section 2. After briefing and oral argument, the Court ordered reargument and has added the question whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution. *Robinson v. Callais* presents similar questions, and the two cases have been consolidated for argument.

Louisiana adopted a redistricting plan that contained a single majority-minority district. After minority voters challenged the plan, a district court (the *Robinson* court) found that the failure to draw a second majority-minority district likely violated Section 2, and the Fifth Circuit affirmed. Louisiana then created a new plan with a second majority-minority district (District 6). A group of White voters (appellees) challenged District 6 as an unconstitutional racial gerrymander. A different district court ruled for appellees (the *Callais* court).

The *Callais* court first found that race predominated in the drawing of District 6. It pointed to evidence that the district encompasses only the parts of cities inhabited by majority-Black voting populations. The court acknowledged that political considerations played a role in how district lines were drawn but concluded that race played a larger role. The court next held that District 6 could not survive strict scrutiny. The court reasoned that a district may be justified as narrowly tailored to comply with Section 2 only when it is sufficiently compact to satisfy the first *Gingles* precondition for proving a Section 2 violation, and it concluded that the second majority-minority district was not reasonably compact.

In its briefing last term, the State argued that race did not predominate in the drawing of District 6. It contended that the *Robinson* court set the racial baseline for the district and that protecting incumbents was the predominant factor in deciding how to meet that racial baseline. The State argued that, in any event, District 6 satisfies strict scrutiny because the *Robinson* court's decision and the Fifth Circuit's affirmance of it supplied it with good reason to believe that District 6 was necessary to comply with Section 2. To satisfy narrow tailoring, the State contended, a district need not satisfy the *Gingles* compactness requirement. Instead, it was only required to show that the district substantially addressed the violation identified by the *Robinson* court, a showing that it made here.

The Court has now directed the parties to address an argument presented by appellees in their brief. Appellees argued that Section 2 is itself unconstitutional insofar as it requires the use of race in drawing district lines. For that reason, appellees argued, complying with Section 2 cannot serve as a compelling interest for race-based districting.

In their supplemental brief, Louisiana now argues that the drawing of District 6 is unconstitutional. The State contends that the arguments made in their original briefing are irrelevant because the new question presented is a threshold matter. The State argues that the use of racial classifications in redistricting is "uniquely odious" because it harms the voters, the states who must comply with unconstitutional conduct, judges who are forced to pick "winners and losers" based on race, and the Nation. The State further contends that Section 2 does not justify race-based redistricting, both because such conduct violates equal protection and because it fails to satisfy strict scrutiny. While the State does not explicitly argue that Section 2 itself is unconstitutional, it contends that race-based redistricting under Section 2 is unconstitutional.

Petitioner Robinson contends that both Section 2 and race-based redistricting under Section 2 are constitutional. Petitioner Robinson argues that Congress acted within its authority under the Fourteenth and Fifteenth Amendments to pass Section 2 as an appropriate and rational means of enforcing those amendments. Petitioner Robinson further argues that because racial redistricting under Section 2 is only permitted as a remedial measure if it satisfies the *Gingles* preconditions, this self-limiting remedial measure is constitutional and does not require the additional safeguard of an expiration date. As applied to this case, petitioner Robinson argues that the evidence is sufficient to allow remedial racial redistricting under Section 2. Finally, even if S.B. 8 impermissibly relied on race, petitioner Robinson contends that the constitutional issue would be with the specific map that was drawn, and not with Section 2.

Decision Below:
732 F.Supp.3d 574 (W.D. La. 2024)
Petitioner Louisiana's Counsel of Record:
J. Benjamin Aguiñaga, Solicitor General, Louisiana Department of Justice
Petitioner Robinson's Counsel of Record:
Stuart Naifeh, NAACP Legal Defense and Education Fund, LLC
Respondent's Counsel of Record:
Edward D. Greim, Graves Garrett Greim LLC

Standing

Bost v. Illinois State Board of Elections, No. 24-568

Question Presented:

> Whether Petitioners, as federal candidates, have pleaded sufficient factual allegations to show Article III standing to challenge state time, place, and manner regulations concerning their federal elections.

Summary:

Illinois, among other states, has enacted a statutory scheme allowing ballots to be received and counted 14 days after Federal Election Day if they are postmarked or certified on or before Election Day. The question presented is whether petitioners, as federal candidates, have Article III standing to challenge that law.

Petitioner Congressman Bost and two federal electors filed suit, challenging the Illinois law as inconsistent with federal law. Petitioners alleged as Article III injury that candidates have a distinct Article III interest in lawful elections. Bost also claimed that the Illinois law would

cause him to suffer both a competitive disadvantage and an increase in his expenditures to challenge objectionable ballots. The district court dismissed for lack of Article III standing.

The Seventh Circuit affirmed, holding that petitioners, as federal candidates, do not have Article III standing to challenge the Illinois law. The court suggested that the interest in lawful elections is too generalized to satisfy Article III, and it concluded that, in any event, the possibility of an inaccurate tally was too speculative to satisfy Article III. It concluded that Bost's alleged competitive injury was insufficient because he failed to allege that a majority of votes received and counted after Election Day would break against him. And it concluded that Bost's decision to expend additional resources to counter a hypothetical competitive injury was a self-inflicted harm, not one caused by the Illinois law.

Petitioners contend that they have pleaded sufficient factual allegations to demonstrate Article III standing as federal candidates. They argue that because candidates pour enormous resources into their campaigns, they have a distinct (and not a generalized) interest in the rules that govern their elections. Petitioner Bost further argues that he alleged a sufficient competitive injury because there is a substantial risk that extending the deadline for counting ballots past Election Day would adversely affect his electoral prospects. Because it is impossible to know in advance how votes will break, Bost argues, he was not required to allege that the votes would break against him. Finally, Bost argues that he alleged a classic pocketbook injury because the Illinois law compels him to expend significant extra resources following Election Day. That injury is not self-inflicted, Bost argues, because it is a reasonable response to the certainty that Illinois will apply its law to ballots received and counted after Election Day.

Decision Below:
75 F.4th 682 (7th Cir. 2023)
Petitioner's Counsel of Record:
Paul D. Clement, Clement & Murphy PLLC
Respondent's Counsel of Record:
Jane Elinor Notz, Office of the Attorney General, State of Illinois

Federal Courts

Diversity

The Hain Celestial Group v. Palmquist, No. 24-724

Question Presented:

Whether a district court's final judgment as to completely diverse parties must be vacated when an appellate court later determines that it erred by dismissing a non-diverse party at the time of removal.

Summary:

In general, a federal court has diversity jurisdiction only when there is complete diversity between the plaintiffs and all defendants. In *Caterpillar Inc. v. Lewis*, the Supreme Court held that when a district court errs in declining to remand a case to state court for lack of complete diversity at the time of removal, a district court's judgment should not be vacated if the non-diverse party settles the case and complete diversity exists when a final judgment is entered. In

Newman-Green, Inc. v. Alfonzo-Larrain, the Court held that a court of appeals may dismiss a dispensable non-diverse defendant to preserve the final judgment as to the diverse parties. The question presented is whether a district court's final judgment as to diverse parties must be vacated when an appellate court determines that the district court erred in dismissing a non-diverse party at the time of removal.

Respondents Grant and Sarah Palmquist, citizens of Texas, regularly purchased baby food from petitioner Whole Foods, also a citizen of Texas. Petitioner Hain, a citizen of Delaware and New York, manufactured the food. Respondents sued petitioners in state court, alleging that the baby food contained heavy metals that caused their child severe physical and mental impairments. Hain removed the case to federal court, and respondents filed a motion to remand for lack of complete diversity. The district court dismissed Whole Foods as fraudulently joined, declined to remand the case, and ultimately entered judgment in favor of Hain.

The Fifth Circuit found that the district court erred in dismissing Whole Foods and vacated the district court's judgment. The court held that when a district court errs in dismissing a non-diverse party at the time of removal, the district's judgment as to diverse parties must be vacated. The court reasoned that when a non-diverse party is improperly dismissed, the initial lack of complete diversity lingers through to final judgment.

Petitioners contend that when a district court enters a final judgment as to diverse parties, the judgment need not be vacated based on a district court error in dismissing a non-diverse party. Petitioners argue that the reasoning underlying *Caterpillar* and *Newman-Green* is controlling. Petitioners contend that those cases establish that, for the sake of efficiency and finality, an appellate court should preserve a final judgment as to diverse parties even when complete diversity did not exist at the time of removal.

Decision Below:
103 F.4th 294 (5th Cir. 2024)
Petitioner's Counsel of Record:
Sarah E. Harrington, Covington & Burling LLP
Respondent's Counsel of Record:
Russell S. Post, Beck Redden LLP

Federal Rules of Civil Procedure

***Berk v. Choy*, No. 24-440**

Question Presented:

> Whether a state law providing that a complaint must be dismissed unless it is accompanied by an expert affidavit may be applied in federal court.

Summary:

When a state law rule conflicts with the Federal Rules of Civil Procedure (FRCP), the state law rule is inapplicable in federal court. FRCP Rule 8 requires a plaintiff to file a pleading that contains a short and plain statement of the facts showing that the plaintiff is entitled to relief. Rule 9 sets forth a heightened pleading requirement for certain claims. Rule 11 requires an attorney to sign a pleading certifying that any claim in a pleading has merit, but it otherwise specifies that a pleading need not be verified or accompanied by an affidavit. Rule 12 sets forth

the grounds on which a complaint may be dismissed. Delaware law provides that medical negligence complaints must be dismissed unless they are accompanied by an affidavit of merit (AOM) in which an expert certifies the merits of the claim. The question presented is whether this requirement conflicts with FRCP Rules 8, 9, 11, or 12, and is therefore inapplicable in federal court.

Petitioner Harold R. Berk sustained an ankle injury. Respondent Dr. Wilson C. Choy treated the injury at the emergency room of respondent Beebe Medical Center. Petitioner sued respondents for medical malpractice in federal court but did not file an AOM. The district court dismissed the complaint for failure to follow the state law AOM requirement.

The Third Circuit affirmed, holding that an AOM requirement does not conflict with FRCP Rules 8, 9, 11, or 12. The court reasoned that an AOM requirement does not conflict with Rules 8 or 9 because an AOM is not a pleading and does not serve the purpose of stating the factual basis for a claim. It concluded that an AOM requirement does not conflict with Rule 11 because it governs representations by an expert rather than an attorney. And it concluded that the AOM requirement does not conflict with Rule 12 because it does not govern the sufficiency of a complaint.

Petitioner contends that a state law AOM requirement conflicts with FRCP Rules 8, 9, 11, and 12. Petitioner argues that a state law AOM conflicts with Rule 8 and 9 because it imposes a more stringent pleading requirement than those two Rules. Specifically, petitioner argues that Rule 8 identifies only three items a complaint must generally contain, and none includes an affidavit of merit. Similarly, petitioner argues that Rule 9 identifies the special circumstances in which a complaint must satisfy heightened pleading standards but does not mandate that a complaint must be accompanied by an affidavit of merit. Petitioner further contends that a state law AOM requirement conflicts with Rules 11 because Rule 11 states that a pleading needs to be verified or accompanied by an affidavit, whereas a state law AOM rule requires both. Finally, petitioner argues that an AOM requirement conflicts with Rule 12, because Rule 12 sets forth the grounds on which a complaint may be dismissed, and those grounds do not include a failure to attach an affidavit of merit.

Decision Below:
2024 WL 3534482 (3d Cir. 2024)
Petitioner's Counsel of Record:
Andrew T. Tutt, Arnold & Porter Kaye Scholer LLP
Respondent Beebe Medical Center's Counsel of Record:
Sarah E. Harrington, Covington & Burling LLP
Respondent Choy's Counsel of Record:
Frederick R. Yarger, Wheeler Trigg O'Donnell LLP

***Coney Island Auto Parts Unlimited v. Burton*, No. 24-808**

Question Presented:

Whether Federal Rule of Civil Procedure 60(c)(1) imposes any time limit to set aside a void default judgment for lack of personal jurisdiction.

Summary:

Federal Rules of Civil Procedure (FRCP) 60(b)(4) provides that a court may relieve a party from a final judgment if that judgment is void. Rule 60(c)(1) provides that a motion under Rule 60(b) must be made "within a reasonable time." The question presented is whether 60(c)(1) imposes any time limit on the filing of a motion to set aside a judgment on the ground that it is void for lack of personal jurisdiction.

After entering bankruptcy proceedings, Vista-Pro filed an adversary proceeding against petitioner Coney Island Auto Parts to recover unpaid invoices. Petitioner failed to respond, and the bankruptcy court entered a default judgment against it. Years later, petitioner moved to vacate the default judgment, alleging that it had not been properly served and that the judgment was therefore void for lack of personal jurisdiction. The bankruptcy court denied the motion, and the district court affirmed.

The Sixth Circuit affirmed, holding that a motion to set aside a judgment on the ground that it is void for lack of personal jurisdiction must be filed within a reasonable time. The Court reasoned that the text of Rule 60(c)(1) specifies without limitation that a motion filed under Rule 60(b) must be filed within a reasonable time. Because a motion to vacate a judgment as void for lack of personal jurisdiction is filed under Rule 60(b), the court concluded, the text of Rule 60(c)(1) requires that it must be filed within a reasonable time. The Sixth Circuit also found it significant that while the law predating Rule 60(c)(1) set no time limit for filing a motion to vacate void judgments, Rule 60(c)(1) makes no exception to its reasonable time requirement for them.

Petitioner contends that Rule 60(c)(1) does not impose a time limit to set aside a judgment on the ground that it is void for lack of personal jurisdiction. Petitioner argues that under established law that predated FRCP, there was no time limit for filing a motion to vacate a judgment as void for lack of personal jurisdiction because such a judgment was understood to be void for all time. Petitioner further argues that nothing in the FRCP altered that understanding. Instead, the drafters of the Rules and the courts applying FRCP in the wake of their adoption understood that there was no time limit on a motion to vacate a void judgment because a void judgment could not be revived through the passage of time.

Decision Below:
109 F.4th 438 (6th Cir. 2024)
Petitioner's Counsel of Record:
Daniel Ginzburg, The Ginzburg Law Firm, P.C.
Respondent's Counsel of Record:
Lisa S. Blatt, Williams & Connolly LLP

Federal Officer Removal

***Chevron USA Inc. v. Plaquemines Parish, Louisiana*, No. 24-813**

Questions Presented:

1. Whether a causal-nexus or contractual-direction test survives the 2011 amendment [extending it to conduct "relating to" acts under color of federal office] to the federal-officer removal statute.
2. Whether a federal contractor can remove to federal court when sued for oil-production activities undertaken to fulfill a federal oil-refinement contract.

Summary:

The federal-officer removal statute authorizes removal of actions against any person acting under an officer of the United States "for *or relating to* any act under color of such office." The question presented is whether the "related to" requirement is satisfied when a federal contractor engages in challenged oil production activity to fulfill a contract to provide refined oil, or whether the statute requires that the contract direct the contractor to produce the oil itself rather than purchase it on the open market.

Chevron U.S.A. and other oil and gas companies (petitioners) produced crude oil within Louisiana's coastal zone that they then refined to fulfill a federal contract. The contract did not require petitioners to produce the oil themselves; they could instead purchase it on the open market. Respondents Plaquemines Parish and others filed suit in state court alleging that petitioners' production activities violated state law. Petitioners removed the cases to federal district courts under the federal-officer removal statute. The district courts remanded to state court.

The Fifth Circuit affirmed, holding that the "related to" requirement for removal is not satisfied merely because a contractor engages in challenged production activity in order to fulfill a refined oil contract. The court reasoned that the connection was not sufficient because the contract did not require the contractor to produce the oil itself, rather than buy it on the open market. Absent that kind of direct connection, the court concluded, the "related to" requirement would impose no meaningful limit on removal.

Petitioners contend that the "related to" requirement is satisfied when a federal contractor engages in challenged oil production activity in order to fulfill its obligation under a refined oil contract. Petitioners argue that the ordinary meaning of the term "related to" is "associated with" or "connected to," a minimal requirement that is easily satisfied here. Under the ordinary meaning of "related to," petitioners argue, it is irrelevant that petitioners could have fulfilled the contract by purchasing oil on the open market, rather than producing the oil itself. Petitioners further argue that focusing on whether the contract itself required the challenged activity would resurrect the demanding causation standard that Congress abrogated when it amended the federal-officer removal statute to permit removal under the far more lenient "related to" standard.

Decision Below:
103 F.4th 324 (5th Cir. 2024)
Petitioner's Counsel of Record:
Paul D. Clement, Clement & Murphy, PLLC
Respondent's Counsel of Record:
J. Benjamin Aguiñaga, Solicitor General, Louisiana Department of Justice

Sovereign Immunity

***Galette v. New Jersey Transit, Corp.*, No. 24-1021**
***New Jersey Transit, Corp. v. Colt*, No. 24-1113**

Question Presented:

Whether the New Jersey Transit Corporation is an arm of the State of New Jersey for interstate sovereign immunity purposes.

Summary:

Under the Constitution, states are immune from private party suits in the courts of other states. That immunity extends to entities that are arms of the state. The question presented is whether the New Jersey Transit Corporation (NJ Transit) is an arm of New Jersey for interstate sovereign immunity purposes.

Petitioner Cedric Galette sued respondent NJ Transit for negligence in Pennsylvania state court, alleging that he was a passenger in a car hit by a NJ Transit bus and suffered physical injuries. Respondent moved to dismiss, asserting that it is an arm of the State of New Jersey and, therefore, entitled to interstate immunity. The Court of Common Pleas denied the motion, and the Superior Court affirmed.

The Pennsylvania Supreme Court reversed, holding that NJ Transit is an arm of the State of New Jersey for interstate sovereign immunity purposes. The court concluded that three factors support that conclusion. First, the Act creating NJ Transit describes it as an instrumentality of the State exercising core government functions. Second, New Jersey exercises significant control over NJ Transit; in particular, the Governor has authority to appoint the members of its board, and NJ Transit's action are subject to the Governor's veto. Third, NJ Transit performs a core governmental function: providing public transportation.

Petitioner contends that NJ Transit is not an arm of the State of New Jersey, relying on several considerations to support that conclusion. First, the Act creating NJ Transit describes it as independent of any supervision or control of the executive agency in which it is housed. Second, NJ Transit exercises broad powers with only limited state supervision. Third, a judgment against NJ Transit does not run against the State, so it is not collectable from the state treasury. Finally, public transportation is not a traditional state function because private entities can perform the same function. Petitioner argues further that the other factors identified by the Pennsylvania Supreme Court are insufficient to override the more important factors establishing that NJ Transit is not an arm of the State of New Jersey.

Decision Below:
332 A.3d 776 (Pa. 2025)
Petitioner's Counsel of Record:
Michael B. Kimberly, Winston & Strawn LLP
Respondent's Counsel of Record:
Jeremy M. Feigenbaum, Solicitor General, Office of the New Jersey Attorney General

***The GEO Group v. Menocal,* No. 24-758**

Question Presented:

Whether an order denying a government contractor's claim of derivative sovereign immunity is immediately appealable under the collateral-order doctrine.

Summary:

Under the collateral order doctrine, a district court order is appealable when it conclusively resolves an issue, the issue is completely separate from the merits, and the issue is effectively unreviewable on appeal from a final judgment. The Supreme Court has held that a contractor has derivative sovereign immunity for conduct that the government lawfully directed.

The question is whether a district court's denial of a motion to dismiss based on derivative sovereign immunity is immediately appealable under the collateral-order doctrine.

Petitioner The GEO Group has a contract with U.S. Immigration and Customs Enforcement to operate immigration detention centers. Petitioner requires detainees to clean all common areas. It also maintains a voluntary work program for which it pays detainees $1.00 per day. A group of detainees sued petitioner, claiming that its cleaning requirement constitutes forced labor in violation of federal law, and that its voluntary work program creates unjust enrichment under state law. The district court denied petitioner's claim of derivative sovereign immunity.

The Tenth Circuit dismissed, holding that a denial of a claim of derivative sovereign immunity is not immediately appealable under the collateral-order doctrine. The court concluded that derivative immunity fails to satisfy the second condition for a collateral order appeal: it is not completely separate from the merits. The court reasoned that there will generally be factual overlap between the question of whether the government directed the contractor's conduct and the merits inquiry into the lawfulness of a contractor's conduct.

Petitioner contends that a denial of a motion to dismiss based on derivative sovereign immunity is immediately appealable under the collateral-order doctrine. Petitioner first argues that derivative sovereign immunity is an immunity from suit, and the Court's cases establish that any immunity from suit is immediately appealable under the collateral-order doctrine. Petitioner alternatively argues that an order concluding that the conditions for derivative sovereign immunity are not satisfied meets each of the three conditions for a collateral order appeal, including the second requirement. Petitioner contends that while there may be factual overlap between whether the conditions for derivative immunity have been satisfied and the merits, the issue of derivative sovereign immunity remains conceptually distinct, and conceptual distinctness rather than factual overlap determines whether the second condition for a collateral order appeal has been satisfied.

Decision Below:
No. 22-1409, 2024 WL 4544184 (10th Cir. 2024)
Petitioner's Counsel of Record:
Dominic E. Draye, Greenberg Traurig LLP
Respondent's Counsel of Record:
Jennifer D. Bennett, Gupta Wessler LLP

Immigration

***Enbridge Energy, LP v. Nessel*, No. 24-783**

Question Presented:

Whether district courts have the authority to excuse the thirty-day procedural time limit for removal in 28 U.S.C. § 1446(b)(1).

Summary:

Section 1446(b)(1) of Title 28 provides that a notice of removal of a civil action "shall be filed within 30 days" after the defendant receives a copy of the initial pleading. The question

presented is whether district courts have the authority to excuse that thirty-day limit on equitable grounds.

Respondent Attorney General of Michigan filed an action in state court seeking to enjoin the operation of an oil pipeline owned by petitioner Enbridge Energy. Invoking equitable considerations, petitioner removed respondent's case to federal court long after the thirty-day limit had passed. The district court denied respondent's motion to remand the case to state court.

The Sixth Circuit reversed, holding that courts do not have the authority to excuse Section 1446(b)'s thirty-day limit on equitable grounds. The court reasoned that because the statute sets out a default thirty-day limit through the use of the phrase "shall" and then creates explicit exceptions to that default rule, adding a judicially-created exception for equitable considerations would run contrary to the congressional scheme. The court also relied on a presumption that removal statutes should be construed strictly against removal out of respect for state sovereignty.

Petitioner argues that district courts have discretion to excuse Section 1446(b)(1)'s thirty-day limit on removal based on equitable considerations. Petitioner relies on the Court's decision in *Powers v. Chesapeake & O Ry. Co.,* construing Section 1446(b)'s predecessor to permit a court to excuse the deadline for removal on equitable grounds. Petitioner further contends that the provision requiring a district to remand when it lacks subject matter jurisdiction implies that the court has discretion to excuse the thirty-day limit on removal. Finally, petitioner argues there is no general presumption that removal statutes must be construed strictly against removal.

Decision Below:
104 F.4th 958 (6th Cir. 2024)
Petitioner's Counsel of Record:
Alice E. Loughran, Steptoe & Johnson LLP
Respondent's Counsel of Record:
Ann M. Sherman, Solicitor General, Michigan Department of Attorney General

***Urias-Orellana v. Bondi*, No. 24-777**

Question Presented:

Whether a federal court of appeals must defer to the BIA's judgment that a given set of undisputed facts does not demonstrate mistreatment severe enough to constitute "persecution" under 8 U.S.C. § 1101(a)(42).

Summary:

The Immigration and Nationality Act (the Act) authorizes the Attorney General of the United States (AG) to grant asylum to noncitizens who do not wish to return to their country of origin because of "persecution," The AG has delegated authority to make asylum determinations to Immigration Judges (IJs) and the Bureau of Immigration Appeals (BIA). If an IJ concludes that an applicant is ineligible for asylum, the applicant may appeal to the BIA. If the appeal is unsuccessful, the individual may seek review in a court of appeals. Under the Act, a court of appeals must treat administrative findings of fact as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. That form of deference is known as substantial evidence review. The Act does not specify the standard of review for legal questions. The

question presented is whether a court of appeals must apply substantial evidence review to a BIA determination that an individual has not been subjected to persecution.

Petitioner Douglas Urias-Orellana applied for asylum. In support of the application, petitioner submitted evidence that a cartel in El Salvador carried out a vendetta against his extended family and subjected him to a series of death threats and one physical attack. The IJ ruled that the petitioner did not suffer actual harm that was significant enough to constitute persecution, and the BIA affirmed.

The First Circuit denied a petition for review, holding that substantial evidence review applies to an administrative determination that an individual has not been subjected to persecution. The court reasoned that the Act requires de novo review for issues of law and substantial evidence review for findings of fact, and that a determination that an individual has not been subjected to persecution is a finding of fact.

Petitioner contends that appellate courts must review a persecution determination de novo, not deferentially. Petitioner argues that persecution is a mixed question of law and fact, not a question of fact. For that reason, petitioner argues, the INS's requirement of substantial evidence review for findings of fact is inapplicable. Petitioner further argues that because the Act specifies deferential review for four kinds of determinations, but not for persecution determinations, the inescapable inference is that persecution determinations are not subject to deferential review. Petitioner also contends that because a persecution determination is a legal question, subjecting it to deferential review would conflict with *Loper Bright*'s holding that courts should review legal determinations de novo. Finally, petitioner argues that de novo review of persecution determinations is consistent with the background principle that mixed questions should be reviewed de novo when, as here, such review is necessary to ensure uniform application of a statutory standard.

Decision Below:
121 F.4th 327 (1st Cir. 2024)
Petitioner's Counsel of Record:
Nicholas Rosellini, Latham & Watkins LLP
Respondent's Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice

Other Federal Statutes

Copyright Act

Cox Communications v. Sony Music Entertainment, No. 24-171

Questions Presented:

1. Did the Fourth Circuit err in holding that a service provider can be held liable for "materially contributing" to copyright infringement merely because it knew that people were using certain accounts to infringe and did not terminate access, without proof that the service provider affirmatively fostered infringement or otherwise intended to promote it?
2. Did the Fourth Circuit err in holding that mere knowledge of another's direct infringement suffices to find willfulness under 17 U.S.C. § 504(c)?

Summary:

Under the Copyright Act, a business that knowingly and materially contributes to infringing conduct may be held liable for contributory infringement. The first question presented is whether an internet service provider (ISP) may be held contributorily liable for its subscribers' copyright infringement where the ISP continued to provide service to the subscriber after receiving notice of the infringement. The Copyright Act authorizes increased statutory damages when infringing conduct was committed "willfully." The second question presented is whether an ISP's knowledge of its subscribers' infringement is sufficient to establish that the ISP acted willfully.

Petitioner Cox Communications provides internet service to millions of subscribers. Some of the subscribers have used the service to download or distribute copyrighted content. Respondent Sony Music Entertainment, an owner of copyrighted musical works, notified petitioner of numerous instances of subscriber infringement. Petitioner responded to these notices in a variety of ways, ranging from taking no action to issuing email warnings, temporary suspensions, and, in rare cases, terminations. Respondent brought suit alleging contributory copyright infringement and seeking statutory damages. The jury found petitioner contributorily liable. It also found that petitioner's infringement was willful and awarded enhanced statutory damages.

The Fourth Circuit affirmed, holding that an ISP may be held contributorily liable when it continues to provide service to subscribers after receiving notice of their direct infringement. The court acknowledged that failure to take affirmative steps to prevent unlawful infringement is ordinarily insufficient to establish contributory liability. It concluded, however, that supplying services with knowledge that particular recipients will use it to infringe is exactly the kind of culpable conduct that justifies a finding of contributory infringement. The court also affirmed the jury's finding of willfulness. Under an instruction approved in a prior court decision, the jury was allowed to make such a finding based on petitioner's knowledge of its subscribers' infringement.

Petitioner contends that an ISP may not be held contributorily liable for a subscriber's copyright infringement because the ISP continued to provide service after receiving notice of a subscriber's infringement. Petitioner argues that, under controlling Supreme Court precedent, a finding of contributory liability must be based on affirmative culpable conduct, such as encouraging infringing conduct, not merely passively providing service coupled with knowledge of a subscriber's misconduct. Petitioner further argues that an ISP's mere knowledge of its subscribers' infringement is not sufficient to find willfulness. Under the traditional understanding of willfulness in the civil context, petitioner contends, a finding of willfulness requires proof that the defendant knew his own conduct was unlawful, or that the defendant was reckless with respect to whether his own conduct was unlawful; knowledge that someone else's conduct was unlawful is not enough. Petitioner further argues that if knowledge of subscriber infringement alone establishes willfulness, every secondary infringer would automatically be subject to enhanced damages, overriding Congress's two-tier damages scheme.

Decision Below:

94 F.4th 222 (4th Cir. 2024)

Petitioner's Counsel of Record:

E. Joshua Rosenkranz, Orrick, Herrington & Sutcliffe LLP

Respondent's Counsel of Record:
Paul D. Clement, Clement & Murphy, PLLC

Employee Retirement Income Security Act (ERISA)

***M & K Employee Solutions, LLC v. Trustees of the IAM National Pension Fund*, No. 23-1209**

Question Presented:

Whether 29 U.S.C. §1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year.

Summary:

The Multiemployer Pension Plan Amendments Act (the Act) requires an employer withdrawing from a multiemployer pension plan to pay withdrawal liability, the benefits still owed to employees. Under the Act, the amount of benefits the employer owes is calculated as of the last day of the prior year, the measurement date. When determining withdrawal liability, actuaries must make certain assumptions. The question presented is whether the Act's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year.

M & K Employee Solutions and others (petitioners) withdrew from a multiemployer pension fund. In the year preceding withdrawal, the plan actuary used a 7.5% discount rate to value the plan's underfunding. When the actuary calculated petitioners' withdrawal liability, it used a 6.5% discount rate. The effect of using a 6.5% rate rather than 7.5% rate was to significantly increase petitioners' withdrawal liability. Petitioners challenged the actuary's method of calculating their withdrawal liability as a violation of the Act. The district court ruled against petitioners.

The D.C. Circuit affirmed, holding that the Act's instruction to compute withdrawal liability "as of the end of the plan year" does not require the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, provided the assumptions are based on information available as of the end of the year. The court reasoned that its interpretation best reconciles Congress's dual directives that unfunded benefits be determined "as of" the measurement date and that actual assumptions represent the "best estimate" of anticipated experience.

Petitioners contend that the Act requires the plan to base withdrawal liability on the actuarial assumptions most recently adopted before the end of the preceding year. They argue that the language specifying that plans must calculate underfunding "as of the end of the plan year" necessarily refers to the calculations made as of that time. They further argue that the Act's "best estimate" language does not suggest otherwise but instead directs the actuary to use its best estimate as of the measurement date.

Decision Below:

92 F.4th 316 (D.C. 2024)
Petitioner's Counsel of Record:
Michael E. Kenneally, Morgan, Lewis & Bockius LLP
Respondent's Counsel of Record:
John E. Roberts, Proskauer Rose LLP

Federal Tort Claims Act

***Hencely v. Fluor Corporation*, No. 24-924**

Question Presented:

> Should *Boyle* [*v. United Technologies Corp.*] be extended to allow federal interests emanating from the FTCA's combatant-activities exception to preempt state tort claims against a government contractor for conduct that breached its contract and violated military orders?

Summary:

The Federal Tort Claims Act (the Act) authorizes private parties to seek damages against the United States for the wrongful or negligent acts of its employees. The Act includes an exception for claims arising out of combatant activities in the military (the combatant-activities exception). In *Boyle v. United Technologies Corp.,* the Court held that uniquely federal interests emanating from the Act's discretionary function exception preempt state law claims against government contractors in certain circumstances. The question presented is whether uniquely federal interests emanating from the combatant-activities exception preempt state tort claims against a government contractor when the contractor violates its contract and the government's instructions.

A suicide bomber detonated a bomb at a military base in Afghanistan, killing several U.S. Service members and severely injuring numerous others, including petitioner Hencely. The suicide bomber worked for a subcontractor of respondent Fluor Corporation, a military contractor that provided services on the base. Petitioner filed suit against respondent alleging that, in violation of its contract and state law, respondent negligently supervised the bomber, negligently entrusted him with tools, and negligently retained him. The district court ruled that petitioner's claims were preempted by the combatant-activities exception.

The Fourth Circuit affirmed. It held that federal interests emanating from the combatant-activities exception preempt state tort claims against a military contractor even when the contractor violates its contract and the government's instructions. The court reasoned that the purpose of the combatant-activities exception is to foreclose state law claims that could interfere with the military's battlefield decisions, including decisions on how to deter and punish a contractor's wrongful conduct. The court viewed its holding as a logical extension of *Boyle*.

Petitioner contends that federal interests emanating from the Act's combatant-activities exception do not preempt state tort claims against a government contractor when the contractor violates its contract and the government's instructions. Petitioner contends that preemption can occur only when the text of a federal statute displaces state law, and the text of the Act does not preempt state law claims against a government contractor. To the contrary, petitioner argues, the Act expressly governs only the liability of the United States, while specifically excluding government contractors, and the combatant-activities exception expressly limits its scope to the

military, naval forces, and the Coast Guard. Petitioner further argues that the logic of *Boyle* does not support preemption of petitioner's claims because *Boyle* preempts only state law claims that would impose duties that conflict with a duty imposed by a federal contract, whereas petitioner alleges that respondent breached its contract with the military.

Decision Below:
120 F.4th 412 (4th Cir. 2024)
Petitioner's Counsel of Record:
Tyler Green, Consovoy McCarthy PLLC
Respondent's Counsel of Record:
Mark W. Mosier, Covington & Burling LLP

***United States Postal Service v. Konan*, No. 24-351**

Question Presented:

Whether a plaintiff's claim that she and her tenants did not receive mail because Postal Service employees intentionally did not deliver it to a designated address arises out of "the loss" or "miscarriage" of letters or postal matter.

Summary:

The Federal Torts Claims Act (the Act) generally waives the United States' immunity from suit for claims seeking damages for the negligent or wrongful act of a U.S. employee. The Act retains the government's immunity for any claim arising out of the "loss" or "miscarriage" of the mail. The question presented is whether a plaintiff's claim that Postal Service employees intentionally did not deliver mail to her arises out of the "loss" or "miscarriage" of the mail.

Respondent Lebene Konan owns two properties where she rents out rooms. She filed suit against the United States under the Act, alleging that Postal Service employees intentionally refused to deliver mail to her and her tenants because she is a Black person who rents property to white tenants. The district court dismissed the suit based on sovereign immunity.

The Fifth Circuit reversed, holding that a claim that Postal Service employees intentionally failed to deliver mail does not arise out of "the loss" or "miscarriage" of the mail. The court reasoned that an intentional non-delivery is not a "loss" because that term covers only unintentional acts. The court further concluded that an intentional non-delivery is not a "miscarriage" because a carriage must precede a miscarriage, and a carriage occurs only when mail is mistakenly delivered to a third party, not when it is intentionally withheld and not delivered to anyone.

The government contends that a plaintiff's claim that Postal Service employees intentionally failed to deliver mail arises out of the loss and the miscarriage of the mail. The government primarily contends that miscarriage means "failure to deliver properly," and mail is not delivered properly when it is carried from where it is deposited to the local postal office, and then intentionally not delivered to the designated address. The government also argues that while a loss usually results from an unintentional act, it can also result from an intentional act.

Decision Below:
96 F.4th 799 (5th Cir. 2024)
Petitioner's Counsel of Record:

D. John Sauer, Solicitor General, Department of Justice
Respondent's Counsel of Record:
Robert Clary, Robert Clary, PLLC

International Emergency Economic Powers Act

***Trump v. V.O.S. Selections*, No. 25-250**
***Learning Resources, Inc. v. Trump*, No. 24-1287**

Questions Presented:

1. Whether the International Emergency Economic Powers Act (IEEPA) authorizes the tariffs imposed by President Trump pursuant to the national emergencies declared or continued in Proclamation 10,886 and Executive Orders 14,157, 14,193, 14,194, 14,195, and 14,257, as amended.
2. If IEEPA authorizes the tariffs, whether the statute unconstitutionally delegates legislative authority to the President.

Summary:

The International Emergency Economic Powers Act (IEEPA) authorizes the President to take certain actions in response to a national emergency arising from an "unusual and extraordinary threat[ ] ... to the national security, foreign policy, or economy of the United States." In part, IEEPA authorizes the President to "regulate . . . importation." President Donald Trump issued a series of executive orders invoking authority under IEEPA to impose two types of tariffs. First, the President imposed drug trafficking tariffs (Trafficking Tariffs) on almost all goods from Mexico, Canada, and China, on the grounds that those countries contributed to the flow of drugs into the United States. The President imposed Reciprocal Tariffs on nearly every country, stating that this was done to address the negative effects of large and persistent trade deficits. The question presented is whether these tariffs fall within the President's authority under IEEPA.

Respondents, a group of small businesses and eleven states, brought suit against the government in the Court of International Trade (CIT) challenging the President's imposition of the Reciprocal and Trafficking Tariffs, respectively. The CIT granted summary judgement for respondents. The Federal Circuit, sitting en banc, affirmed, holding that the imposed tariffs were not authorized by IEEPA. The court found that where Congress has wished to authorize imposition of tariffs, it has done so explicitly, and IEEPA does not mention tariffs. It also concluded that authority to "regulate" does not imply authority for the President to order the imposed tariffs. And absent a clear delegation of authority, the court concluded, the President's asserted authority runs contrary to the Major Questions Doctrine. In addition, the court held as a threshold matter that the CIT had exclusive jurisdiction over this issue.

The government petitioned the Court for certiorari and requested that it expedite consideration of the petition, and briefing and oral argument if the petition was granted. The Court granted certiorari and put the case on the November argument calendar. At the same time, the Court granted certiorari before judgment in *Learning Resources, Inc. v. Trump*, a case raising a parallel substantive challenge, and has consolidated these cases for briefing and oral argument. In *Learning Resources*, a group of businesses filed suit in district court, which held that it had

jurisdiction to hear the case. The government appealed that decision to the D.C. Circuit and petitioners asked the Court to review the case before the D.C. Circuit could rule.

The government argues that the President has broad authority to impose tariffs to respond to national emergencies under IEEPA. The government contends that the ordinary meaning of "regulate"—to control or to adjust by rule—covers the imposition of tariffs. The government further contends that the statute need not use the word "tariff" to give the President tariff authority. The government also argues that reading IEEPA to authorize the President to exercise tariffs does not run afoul of the Major Questions Doctrine, nor does it raise a nondelegation issue.

Decisions Below:
No. 2025-1812, 2025 WL 2490634
No. CV 25-1248, 2025 WL 1525376
Petitioners' Counsel of Record:
D. John Sauer, Solicitor General, Department of Justice
Pratik A. Shah, Akin Gump Strauss Hauer & Feld LLP (*Learning Resources*)
Respondents' Counsel of Record:
Michael W. McConnell, Wilson Sonsini Goodrich & Rosati, P.C.
Benjamin Noah Gutman, Solicitor General, Oregon Department of Justice

Investment Company Act

***FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd., et al.*, No. 24-345**

Question Presented:

Whether Section 47(b) of the Investment Company Act, 15 U.S.C. § 80a-46(b), creates an implied private right of action.

Summary:

The Investment Company Act (the Act) regulates investment companies. Section 47(b) of the Act provides that a contract that violates the statute is "unenforceable by either party." Section 47(b) further provides that "a court may not deny rescission at the instance of any party" unless it finds that denial would produce a more equitable result. The question presented is whether Section 47(b) creates an implied private right of action.

A number of investment funds (petitioners) adopted a resolution providing that holders of control shares in a corporation acquired in a control share acquisition would generally have no voting rights. Respondent Saba Capital, a hedge fund that owns shares in each of the funds, filed suit against petitioners under Section 47(b), seeking recission of the resolutions. The district court ruled for respondents.

The Second Circuit affirmed. While the court did not address whether Section 47(b) creates a private right of action, prior circuit precedent had already held that it does. The prior decision reasoned that Section 47(b)'s statement that "a court may not deny rescission at the instance of any party" necessarily presupposes that a party may seek rescission in court by filing suit. The court added that the reference to "any party" identified the class of intended beneficiaries who could sue: any party to a contract that violates the Act.

Petitioners contend that Section 47(b) does not create an implied private right of action. In support of that conclusion, petitioners first argue that Section 47(b) contains no rights-creating language. Instead, its language is directed to courts. Second, petitioners argue that Congress's authorization for the Securities and Exchange Commission (SEC) to sue to enforce Section 47(b) indicates that Congress did not intend for any private party to sue under that provision. Third, petitioners contend that Congress's creation of an explicit right of action in a different provision of the Act demonstrates that Section 47(b) was not intended to create a private right of action. Finally, petitioners argue that the language in Section 47(b) providing that a court may not deny rescission at the instance of any party simply means that in a state law breach of contract action, the defendant may seek recission of the contract on the grounds that the contract is unenforceable under the Act.

Decision Below:
2024 WL 3174971 (2d Cir. June 26, 2024)
Petitioner's Counsel of Record:
Shay Dvoretzky, Skadden, Arps, Slate, Meagher & Flom LLP
Respondent's Counsel of Record:
Mark Musico, Susman Godfrey LLP

Religious Land Use and Institutionalized Persons Act of 2000

***Landor v. Louisiana Department of Corrections and Public Safety*, No. 23-1197**

Question Presented:

Whether an individual may sue a government official in his individual capacity for damages for violations of RLUIPA.

Summary:

The Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) provide parallel protection for the free exercise of religion: RFRA applies to the federal government, while RLUIPA applies to states and local governments. In parallel language, they provide that a person may seek "appropriate relief" for a violation against "an official" or "other person acting under color of … law." In *Tanzin v. Tanvir*, the Supreme Court interpreted that language to authorize an individual to sue a government official in his individual capacity for damages for a violation of RFRA. The question presented is whether an individual may sue a government official in his individual capacity for damages for a violation of RLUIPA.

Petitioner Damon Landor is a Rastafarian man who wears his hair in long dreadlocks for religious reasons. While petitioner was incarcerated in a Louisiana prison facility, correctional officials forcibly shaved his head. Petitioner filed suit under RLUIPA against the warden of the facility and the head of the Department of Corrections (respondents), seeking damages against them in their individual capacities. The district court dismissed petitioner's claims.

The Fifth Circuit affirmed, holding that an individual may not sue a government official in his individual capacity for damages for a violation of RLUIPA. The court reasoned that because RLUIPA is Spending Clause legislation that operates as a contract between the federal government and a state as the recipient of federal funds, it cannot be read to impose liability on a

non-party to the contract. The court added that extending liability to non-recipients would exceed Congress's power under the Spending Clause. The court distinguished *Tanzin* on the ground that RFRA was not enacted under Congress's Spending Power.

Petitioner argues that an individual may sue a government official in his individual capacity for damages for a violation of RLUIPA. Petitioner contends that because the text of RLUIPA mirrors the text of RFRA, *Tanzin* requires RLUIPA to be interpreted to allow suits against government officials for damages in their individual capacities. Petitioner further contends that Spending Clause precedent establishes that Congress may constitutionally impose damage liability on parties other than the funding recipient.

Decision Below:
82 F.4th 337 (5th Cir. 2023)
Petitioner's Counsel of Record:
Zachary D. Tripp, Weil, Gotshal & Manges LLP
Respondent's Counsel of Record:
J. Benjamin Aguiñaga, Solicitor General, Louisiana Department of Justice

Section 1983

***Olivier v. City of Brandon, Mississippi,* No. 24-993**

Questions Presented:

1. Whether the decision in *Heck v. Humphrey* bars § 1983 claims seeking purely prospective relief where the plaintiff has been punished before under the law challenged as unconstitutional.
2. Whether *Heck v. Humphrey* bars § 1983 claims by plaintiffs even where they never had access to federal habeas relief.

Summary:

Section 1983 generally gives individuals the right to sue local governments and state officials who violate their constitutional rights. In *Heck v. Humphrey*, the Court held that a person serving a sentence for a state conviction may not bring a Section 1983 claim for damages because that remedy would necessarily imply that the plaintiff's conviction is invalid and habeas corpus is the exclusive remedy for invalidating a conviction or sentence. The first question presented is whether plaintiffs punished under a law may later bring a Section 1983 claim to prevent the law from being applied to them again. The second question is whether *Heck* prevents plaintiffs from bringing a Section 1983 claim if they were never in custody.

Petitioner Olivier evangelized outside a public amphitheater in Brandon, Mississippi. He was fined for violating a city ordinance restricting protests and demonstrations to a designated area during live events. Petitioner subsequently brought a Section 1983 suit against the City, claiming that the ordinance violates the First Amendment. As relief, petitioner sought an injunction preventing the City from applying the ordinance to him in the future. The district court ruled in the City's favor.

The Fifth Circuit affirmed, holding that *Heck* bars claims seeking prospective relief when the plaintiff has previously been punished under the law. The court reasoned that *Heck* bars claims that necessarily imply the invalidity of a conviction, and that an injunction based on a

law's unconstitutionality necessarily implies the invalidity of the conviction. The court further held, relying on prior circuit precedent, that *Heck* bars Section 1983 claims even when a plaintiff is no longer in custody.

Petitioner argues that *Heck* does not bar a Section 1983 claim for prospective relief. Petitioner argues that a grant of prospective relief based on a law's unconstitutionality governs only future applications of the law; it does not invalidate a prior conviction under the law. Petitioner further contends that *Heck* does not bar claims by plaintiffs who were never held in custody. Petitioner relies on the text of the habeas statute, which specifies that a habeas remedy is available only when a person is "in custody." Petitioner argues that if *Heck* were read to bar a Section 1983 claim by a plaintiff who was never in custody, it would leave a person who is deprived of his constitutional rights no remedy, no matter how egregious the violation.

Decision Below:
No. 22-60566, 2023 WL 5500223 (5th Cir. 2023)
Petitioner's Counsel of Record:
Allyson N. Ho, Gibson Dunn
Respondent's Counsel of Record:
G. Todd Butler, Phelps Dunbar LLP

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