TERM HIGHLIGHTS

KEY CASES IN THE SUPREME COURT'S OCTOBER TERM 2026

Supreme Court Institute
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OCTOBER TERM 2026 HIGHLIGHTS

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Supreme Court Institute Term Highlights
Supreme Court October Term 2026

This Term, the Supreme Court Institute is launching a new version of a longstanding publication. Since the October Term 2007, the Institute has published an annual Term Preview Report. That report consisted of a short Highlights section and summaries of every case in which the Court granted certiorari before taking its summer recess. Beginning with OT 26, our fall publication will focus exclusively on several of the most noteworthy cases to be argued in the upcoming term, providing both detailed summary and analysis of the questions presented. We hope our new publication will be a valuable resource for the upcoming Term.

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***Department of Labor v. Sun Valley Orchards, LLC*, No. 25-966**

Administrative Law – Agency Adjudication

Administrative adjudication has been a fixture of the administrative state. Hundreds of statutes authorize agency adjudication. But recently, agency adjudication has come under fire as one component of a broader attack on the administrative state. In *Securities and Exchange Commission v. Jarkesy*, the Court set what some would characterize as new limits on Congress's authority to assign adjudication to administrative agencies, derived from Article III and the Seventh Amendment. This case will be the first post-*Jarkesy* to provide insight into just how much of an impact *Jarkesy* will have. Will it be interpreted to invalidate practically any agency adjudication or to have a far more limited impact? The potential for mass disruption of agency adjudication is what makes this case one of the most important cases of the Term.

The relevant facts are these. The Immigration and Nationality Act H-2A visa program allows employers to bring foreign workers into the country for farm labor. Participating employers must comply with requirements concerning housing quality, food, and transportation. They must also incorporate the requirements into their contracts with H-2A workers and domestic workers who perform the same work. The Department of Labor (DOL) adjudicates violations of the requirements and issues monetary remedies, including penalties and backpay. The question is whether DOL's imposition of monetary remedies violates Article III.

In Jarkesy, the Supreme Court reiterated that Article III prohibits Congress from withdrawing any common law claims from federal courts. Consistent with prior law, the Court also reaffirmed that matters concerning public rights may be assigned to an administrative adjudicator. Applying those principles, the Court held that Congress could not give the Securities and Exchange Commission authority to seek administrative penalties for the fraudulent sale of securities. Such a suit, the Court concluded, was in the nature of a common law suit, both because Congress modeled the claim on common law fraud, and because it provided a type of remedy—civil penalties—available only in courts of law. The Court also rejected the government's theory that a public right is implicated any time Congress assigns a statutory right to the United States.

Jarkesy also reaffirmed that two kinds of suits implicate public rights. It first referred to *Oceanic Steam Navigation Co. v. Stranahan*, describing it as a case in which the Court upheld a monetary penalty on a steamship company that brought aliens into the country who had dangerous contagious diseases. The Court explained *Oceanic Steam's* reasoning as follows: "Congress's power over foreign commerce was so total that no party had a vested right to import anything into the country, and Congress could prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury." The Court also referenced cases involving "public benefits, such as payments to veterans, pensions, and patent rights."

The government invokes both of those lines of authority as justification for the H-2A visa program. In reliance on *Oceanic Steam*, the government argues that the government's sovereign right to control immigration is a public right that justifies the administrative imposition of monetary remedies on employers who violate the conditions for bringing foreign workers into the country. The government also invokes the public benefit exception. It argues that when Congress confers a benefit, it generally may require the recipient, as a condition of obtaining the benefit, to submit to non-Article III adjudication of matters related to the privilege. That principle applies here, the government contends, because bringing foreign laborers into the country is a quintessential privilege.

The government claims that, unlike in *Jarkesy*, DOL administrative adjudications cannot be analogized to any common law action. In particular, the government resists any analogy to a breach of contract action. The difference, the government argues, is that its adjudications enforce the United States' public right to compliance with government-imposed terms and conditions of employment, whereas a contract suit enforces the private right to compliance with the bargained-for terms of a contract. The government alternatively argues that when a case falls within a public rights category, like immigration or public benefits, it makes no difference whether the claim can be analogized in some way to a common law claim. In *Oceanic Steam* itself, the government points out, the Court upheld administrative imposition of a penalty when a claim for a penalty is a quintessential common law claim.

Respondent Sun Valley, for its part, argues that this case involves private rights for the same two reasons that the claim in *Jarkesy* involved private rights. First, the government's claim is in the nature of a common law claim—in this case, breach of contract, rather than fraud. And second, the government is seeking monetary remedies available only in courts of law—in this case, penalties and backpay, rather than just penalties.

Sun Valley contends that the distinctions the government offers between its claim and a common law contract claim are unpersuasive. According to Sun Valley, it is common for contract terms to be legally imposed, and *Jarkesy* establishes that it makes no difference whether a claim is brought by a private party or the United States. Sun Valley further argues that the government cannot avoid the contract analogy when its own regulations authorize the imposition of penalties for violation of the work contract, and when courts have held that the workers themselves can enforce the terms of their employment through a breach of contract action. Sun Valley also invokes the statement from *Jarkesy* that the availability of penalties is "nearly dispositive" on the question of whether an action is in the nature of a common law claim.

Sun Valley contends that the *Oceanic Steam* immigration exception is inapplicable here. The key elements involved in *Oceanic Steam*, Sun Valley argues, were that liability was based on bringing in aliens who were prohibited from entering; the claims turned on factual determinations made at the border; and the penalties were not collected as debts but by withholding permission for the steamship to disembark. By contrast, Sun Valley argues, there is no tradition of administrative adjudication of common law remedies for an employer's breach of its contractual obligations to its foreign and domestic workers inside the country.

Finally, Sun Valley contends that the public rights exception for public benefits is limited to actions to withdraw the benefit. For example, because a patent is a public benefit, the government may revoke the patent through administrative adjudication. But an action for breach of a patent must be resolved by a federal court. By parity of reasoning, Sun Valley argues, an employer that breaches the conditions of the visa program may have its privilege of participating in the program revoked, but it may not be subject to the administrative imposition of penalties.

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There is much to be said for each side in this case. On the one hand, the government is right that immigration and public benefits implicate public rights and that this case involves both. On the other hand, Sun Valley is right that the government's claim looks a lot like a breach of contract claim, and it is generally impermissible to impose penalties outside an Article III court. The case could therefore go either way. If the Court views the immigration and public benefits traditions broadly and the breach of contract tradition narrowly, the government will prevail. Conversely, if it views the immigration and public benefits traditions narrowly and the breach of contract claim tradition broadly, Sun Valley will prevail. If it views all three traditions broadly, *Oceanic Steam* would seem to establish that the government should prevail. After all, there is nothing more indicative of a common law claim than the availability of a penalty. And yet *Oceanic Steam* held that the immigration tradition justified administrative imposition of a penalty.

As is true of history and tradition tests generally, there is no magic formula for deciding the right level of generality or how close an analogy must be. *Jarkesy*, however, appears to reflect a general hostility to administrative adjudications, particularly ones that result in the imposition of penalties. That hostility likely would give way if there were an overwhelming historical tradition favoring administrative adjudication. But for the reasons Sun Valley gives, the traditions on which the government relies do not inescapably apply in this context. Perhaps even more important, it is hard for the government to make the case that it will lose a valuable enforcement tool if it may administratively revoke an employer's participation in the visa program, but it must go to court to collect penalties and backpay against employers who breach its conditions. For those reasons, while the government has a strong fighting chance, it seems more likely that the Court will require the government to seek monetary remedies in an Article III court. If so, the Court will be taking one step further down the road of its long-term project of dismantling the administrative state.

***International Partners for Ethical Care, Inc. v. Ferguson*, No. 25-840**

Article III – Standing

Cases that raise only standing questions rarely rise to the top of the list of the Court's most important cases of the Term. But a standing question can take on far greater importance when its resolution threatens to preclude a challenge to a controversial law that raises serious constitutional questions. That is the situation here. This case concerns at what point parents have standing to challenge a law that allegedly limits their parental role, should any of their children seek gender affirming care.

Washington state law generally requires youth shelters to contact parents within 72 hours of admitting a child. The notification includes informing parents where the child is and what the child's condition is. When there are "compelling reasons" not to provide parental notification, a shelter has no parental notification obligation but must instead notify the State's Family Services Department. Family Services must then make a good faith effort to notify the parents. A good faith effort consists of asking the child for contact information and notifying parents that the child is at a shelter if the information is received.

Until a recent amendment, compelling reasons for failing to notify parents arose only if notification would lead to a child's abuse or neglect. Under the amendment, compelling reasons also exist when a minor seeks gender affirming care. The new amendment also imposes a duty on Family Services to offer gender affirming care to children seeking it.

Parents challenged the amendments as a violation of their constitutional right to direct the care and upbringing of their children. In addition to alleging that their children showed signs of gender incongruity, the parents alleged that they are opposed to their children transitioning, that their children use gender pronouns at school that are not aligned with their birth sex, and that the amendments will induce their children to run away to get gender affirming care, and that this will result in four concrete harms. First, parents will be denied the right to consent or refuse gender transition treatment for their child. Second, notice to parents will be denied or delayed. Third, even if notice were provided, parents will not be told about their child's condition or location. Fourth, the child's return will be significantly delayed.

The district court held that the parents lacked standing, and the court of appeals affirmed. The question is whether plaintiff parents have standing.

The requirements of standing are summarized in the Court' recent decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine.* To establish that a prospective injury satisfies Article III, a plaintiff must show that the harm is likely to occur. The mere possibility of future harm is not sufficient. Ordinarily, satisfying Article III is more difficult when, as here, the future harm depends on the actions of third parties. Typically, that showing can be made only when plaintiffs can establish that the third parties will likely react in "predictable" ways that will, in turn, injure the plaintiffs.

That showing can be satisfied by economic common sense. For example, in *Diamond Alternative Energy v. Environmental Protection Agency*, it was economic common sense that a regulation requiring automakers to produce fewer gas-powered cars would lead to lower gasoline sales by fuel producers. *Diamond* also reaffirmed that when the plaintiff is an object of the regulation, standing can usually be established relatively easily. To fall within that principle, the law need not regulate the plaintiff directly. For example, in *Diamond*, the Court concluded that fuel producers might be viewed as an object of the law because the law's objective was to reduce the use of fuel in automobiles.

More recently, in *Mirabelli v. Bonta*, parents challenged a state law preventing schools from informing them about whether their children were engaged in gender transitioning efforts. The Court concluded that the parents likely had standing because they were the objects of the challenged exclusion policies.

Petitioners argue they have standing under *Diamond* and *Mirabelli*. While the laws they challenge facially govern shelters and Family Services, petitioners say, the amendments were enacted to prevent parents from interfering with their children's access to transition services. Petitioners argue that this makes parents the objects of the amendments and gives parents standing to challenge them. Petitioners further argue that, under *Diamond*, a plaintiff can rely on any kind of common sense, not just economic common sense, to establish that a third party will react in a way that will cause harm to the plaintiff. According to petitioners, it is common sense that children respond to incentives and will seek what they want unless foreclosed from that desire. Because the state offers gender transition services to children who want them, petitioners assert, it is common sense that children wanting the services will seek them.

Washington contends that petitioners lack standing because their claim of harm rests on a long chain of speculative occurrences. For petitioners to be harmed, Washington points out, their children would have to run away to a shelter, seek transition services, not provide contact information, accept a Family Services referral for transition services, and obtain the services. The State asserts that each step in that chain is speculative, dooming petitioners' claim of standing.

Washington dismisses petitioners' reliance on *Diamond*. The State argues that, while it was predictable that requiring automakers to produce fewer fuel-powered vehicles would lead to fewer purchases of gasoline by automakers and therefore lower gasoline sales by fuel producers, the individual choices of individual children with different family circumstances do not follow any predictable pattern. Nor, Washington contends, are parents the object of the regulations they challenge. The amendments regulate shelters and Family Services, Washington says; they do not regulate parents at all. Even if parents were viewed as the objects of the amendments, the State argues, that would not relieve petitioners of the obligation to establish that the independent actions of their children will predictably cause them harm, a showing they failed to make.

The State also argues that *Mirabelli* is distinguishable, because Washington law does not permit Family Services to withhold information from parents. In addition, whereas all the children in *Mirabelli* were in the schools governed by the challenged policy, petitioners do not allege their children have ever been in shelters governed by the challenged policies.

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Petitioners' theory that they automatically have standing to challenge a state law as long as the law incentivizes action that will cause them harm seems like a real stretch from current precedent. Under established Article III precedent, a plaintiff must show a likelihood of harm, not a mere possibility of harm. While a law that incentivizes certain conduct may well make the conduct possible, it does not inevitably make it likely.

Take this case. The fact that a minor suffers from gender confusion and wants to use a pronoun their parents oppose does not make it predictable that the minor would run away to a shelter, then seek transition services, then refuse to give their parents' contact information, and then undergo transition services. It's possible, but to say it is predictable, absent some further evidence to that effect, is dubious. And that remains true even if the law was intended to incentivize minors so inclined to take those steps.

Petitioners' theory that Article III is satisfied because they can be viewed as the object of the amendments seems equally flawed. Whether they are the object of the regulation or not, when Article III injury depends on the independent actions of third parties, as it does here, a plaintiff should have to show that the predictable actions of third parties will cause them harm. That's where petitioners fall short.

On the other hand, it's hard to see why the Court would have granted certiorari in this fact-bound case other than to reverse. The Court's ready acceptance of standing for the parents in *Mirabelli* also portends that the Court will take a generous view of standing when parental rights are asserted. In addition, the Court's view on the merits of a challenge often colors its view of standing. On that score, there is little doubt that the Court will think that Washington went overboard when it reduced the role of parents in the transitioning decisions of their children. So, all things considered, petitioners would have to be considered the favorites to prevail.

***Kian v. Florida*, No. 25-6623**

Sixth Amendment – Trial by Jury

Originalism has often worked to the advantage of criminal defendants. In *Crawford v. Washington,* the Court held that the Confrontation Clause, as originally understood, bars the introduction of out-of-courts statements made by a person not subject to cross-examination. In *Apprendi v. New Jersey,* the Court held that the Sixth Amendment and the Due Process Clause, as originally understood, require any fact that increases the statutory maximum to be proven to a jury beyond a reasonable doubt. And most recently, in *Ramos v Louisiana,* the Court held that the Sixth Amendment, as originally understood, requires a unanimous verdict of guilt. This Term's biggest criminal procedure case asks whether the original understanding of the Sixth Amendment also requires a 12-person jury.

Petitioner Kian was convicted of a crime by a six-person jury. He challenges his conviction, arguing that Florida denied his Sixth Amendment right to a trial by a 12-member jury. In *Williams v. Florida*, the Court held that the Sixth Amendment right to a jury trial permits a six-person jury; it does not require a jury of 12. The question presented in this case is whether *Williams* should be overruled.

The resolution of that issue turns in large part on the soundness of the analysis in *Williams.* Here is a summary of the Court's analysis in that case. First, the common law's preference for a 12-person jury was a historical accident. Second, the historical record does not establish that the Constitution codified that feature of the common law. Third, the relevant constitutional inquiry is therefore whether a 12-person jury is indispensable to advancing the purposes of the jury trial right. Fourth, those purposes are determining a defendant's guilt or innocence by the common sense of laypersons who engage in group deliberation, resisting outside pressure, and reflecting a fair cross-section of the community. Fifth, those goals can be achieved as well with six members as with 12.

There is one other case that is critical in deciding whether *Williams* should be overruled. In *Ramos v. Louisiana*, the Court overturned *Apodaca v. Oregon* in the course of holding that the Sixth Amendment requires a jury to reach a unanimous verdict to convict a defendant of a serious offense. The stare decisis analysis in that case is of critical importance in resolving the question whether the Court should adhere to *Williams* on stare decisis grounds.

Petitioner's lead argument for overruling *Williams* is that the original public meaning of trial by a jury included a trial by 12 jurors. Petitioner argues that every relevant source of meaning confirms that understanding. Those sources include the common law, early state practice, founding era treatises, state court decisions following ratification, and the Court's own precedents.

Petitioner next argues that *Ramos* repudiated the reasoning in *Williams,* effectively overruling it. According to petitioner, *Ramos* held that the scope of the Sixth Amendment jury trial right is to be determined by its original public meaning. Instead of resolving the issue on that basis, petitioner argues, *Williams* focused on whether the functions of the jury could be served with six members rather than 12. Because *Williams* failed to follow the approach that *Ramos* compels, petitioner argues, it has no ongoing vitality.

Petitioner next argues that, in any event, all relevant stare decisis considerations identified in *Ramos* favor overruling *Williams.* His arguments are as follows: first, *Williams* was egregiously wrong because it is inconsistent with the Sixth Amendment's original public meaning and improperly based its decision on functionalist reasoning instead. Second, even if functionalist reasoning were permitted, *Williams* was wrong to conclude that six-person juries function as well as 12-person juries. Research has revealed that smaller juries are less representative and more likely to reach inconsistent outcomes that disadvantage defendants. Indeed, petitioner asserts, *Ballew v. Georgia* relied on some of that research in holding that five-person juries are unconstitutional. Third, for the same reason, *Williams* has caused serious negative real-world consequences. Finally, only a small number of states still retain six-person juries, and only cases still on appeal will need to be retried. The short-term and limited consequence effects of overruling *Williams* cannot justify eliminating a critical constitutional guarantee forever.

Florida responds that *Williams* was correctly decided and therefore should not be overruled. It argues that *Williams* properly concluded that the term "jury trial" in the Sixth Amendment did not codify any common law practice of empaneling 12 jurors. For one thing, 12-person juries were a historical accident. For another, the Constitution did not incorporate every common law feature. A common law jury consisted of male freeholders from the vicinage of the alleged crime, and none of those features were incorporated into the Sixth Amendment. And finally, the Framers rejected Madison's proposal to constitutionalize all "accustomed requisites" of the common-law jury.

Florida next argues that nothing in *Ramos* justifies overruling *Williams*. Florida reads *Ramos* as resting on its understanding that unanimity was a "vital right" protected by the common law, not that every feature of the common law was incorporated into the Constitution. Florida also argues that *Ramos* overruled *Apodaca* in part because it was a fractured decision that was entitled to either reduced or no stare decisis effect. In contrast, *Williams* commanded a solid majority and has been repeatedly reaffirmed.

The State further argues that there was nothing wrong with *Williams* following up its detailed historical analysis with an assessment of the purpose of a jury trial because a constitutional provision's purpose may validly inform its meaning. Nor, Florida says, does subsequent evidence cast doubt on the conclusion in *Williams* that six-person juries serve the function of a jury as well as 12-person juries. In fact, Florida asserts, subsequent evidence shows that six-person juries perform better than larger juries in certain respects: they pay more attention and are more likely to participate in deliberations. And, according to Florida, six-person juries do not disadvantage criminal defendants.

Finally, Florida argues that overruling *Williams* would have sweeping consequences for the six states that have relied on *Williams* in using six-person juries. For example, the State says that if *Williams* were to be overruled, every single conviction still on appeal will have to be retried. In contrast, only two states permitted non-unanimous verdicts, and the *Ramos* decision to overrule *Apodaca* affected only the small set of criminal trials in which the jury was not unanimous.

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The case for overruling *Williams* is not as strong as the case for overruling *Apodaca* in two respects. First, *Apodaca* was uniquely vulnerable because of the fractured nature of the majority. The majority consisted of four Justices who concluded that the Sixth Amendment did not incorporate unanimity, and one Justice who concluded that the Sixth Amendment incorporated unanimity, but the Fourteenth Amendment did not incorporate that aspect of the Sixth Amendment. Both grounds of decision were therefore rejected by a majority of the Court, the first by a vote of 5-4, the second by a vote of 8-1. In contrast, the rationale of *Williams* was supported by a majority of the Justices.

Second, at the time of framing, everyone understood unanimity to be an indispensable feature of the right to a jury trial. By contrast, while 12-person juries had become standard in the common law, the exact number was viewed as a historical accident, rather than an indispensable element of a jury trial.

Still, it is hard to see the Court coming out differently than it did in its recent decision in *Ramos.* The same sources on which *Ramos* relied in holding that the original understanding of the term jury trial incorporated unanimity also show that the original understanding of that term incorporated a 12-person jury. As was true for unanimity, the Court's earliest precedents singled out 12-person juries as an element of the Sixth Amendment jury trial right. Like the plurality in *Apodaca,* the majority in *Williams* placed emphasis on the kind of functional analysis the Court repudiated in *Ramos.* And while there is somewhat more in the way of state reliance on six-person juries than there was state reliance on non-unanimity, the difference is not one that will likely matter to any of the Justices.

***St. Mary Catholic Parish v. Roy*, No. 25-581**

First Amendment – Free Exercise Clause

No issue is more fraught or divisive than whether religious institutions should get an exemption from a legal requirement not to discriminate against gay or transgender individuals. This case squarely presents that issue, which makes it one of the most important this Term.

Colorado funds preschool for all children in the state. To qualify, preschools must give each child an equal opportunity to enroll without regard to race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability. A state regulation permits preschools to establish various preferences, including one for individuals with low income, one for individuals with disabilities, and one catchall preference for, *inter alia,* children whose families belong to a specific community. Catholic school petitioners seek an exception to Colorado's equal opportunity mandate that would permit them to refuse, for religious reasons, to enroll children who have same sex or gender nonconforming parents. The question is whether the Free Exercise Clause requires Colorado to afford that exception.

In *Employment Division v. Smith,* the Supreme Court held that neutral laws of general applicability do not trigger strict scrutiny under the Free Exercise Clause, even when a person's religion prohibits them from complying with the law. Such incidental burdens trigger only rational basis review. There are at least three circumstances in which *Smith* is inapplicable, and a state law triggers strict scrutiny. The first is when a state law disqualifies religious schools from a generally applicable public benefit solely because of their religious character. *Carson v. Makin* is the most recent example of such a case. There, the Court invalidated a state law that offered tuition assistance to attend a private school but excluded from the program private schools offering a religious education.

The second circumstance in which *Smith* is inapplicable is when a state law treats any comparable secular activity more favorably than religious activity, with comparability depending on whether the activity poses the same risk to the state's identified interest in the regulation. *Tandon v. Newsom* is illustrative. In that case, a state law prohibited more than three households from gathering in a home, including for religious purposes. In contrast, it permitted more than three households to gather in retail stores, hairdressers, restaurants, movie theaters, and other venues. The Court held that the law's failure to permit more than three households to gather in a home for religious purposes violated the Free Exercise Clause. It reasoned that the venues in which the state permitted more than three households to gather carried a comparable risk to the state's asserted interest preventing the spread of COVID-19.

The third situation in which *Smith* is inapplicable is when state law provides a mechanism for individualized exemptions. *Fulton v. City of Philadelphia* elucidated that principle. There, Philadelphia refused to refer children to Catholic Social Services (CSS) for foster care services because CSS was unwilling to certify same sex couples as foster parents. Because the City had discretion to make individualized exceptions to its nondiscrimination requirements, the Court held that the law fell outside *Smith*'s protection for neutral and generally applicable laws.

Petitioners make all three arguments for why *Smith* is inapplicable. Their lead argument is based on *Carson.* They contend that while Colorado generally offers preschool funding to the preschool of the parent's choice, it denies that benefit to families who choose Catholic preschools. Those schools are excluded, petitioners argue, solely because of their religious objection to enrolling children of same sex or gender nonconforming parents.

Petitioners next argue that the Colorado law violates the *Tandon* comparability rule. Even though the law, on its face, requires equal opportunity without respect to income level or disability, petitioners argue, regulations permit preferences for persons from low-income families and for individuals who have disabilities. Petitioners argue that those preferences pose the same risk to the statute's equal opportunity mandate as their requested religious accommodation.

Petitioners' final argument is based on *Fulton.* They contend that the regulation's catchall provision allows Colorado to make individualized judgments on when the nondiscrimination requirements can be set aside. Petitioners refer to trial testimony in which respondent Odean testified that the catchall would allow preferences for gender nonconforming children and children of color from historically underserved areas.

Respondents resist each of petitioners' arguments. Respondents argue that *Carson* applies only when a state law denies a school's participation in a public benefit based on its religious character. Here, respondents assert that eligibility turns on compliance with equal opportunity requirements, not on whether a school is religious or secular.

Respondents contend that there is no violation of *Tanden* because the permitted preferences for low-income students and children with disabilities do not disserve the State's interests, whereas petitioners' requested accommodation would. The difference, respondents argue, is that the permitted preferences are not an exception to any nondiscrimination mandate. Instead, respondents contend, these preferences reflect that the mandate itself guarantees equal access for low-income students and students with disabilities, not for high-income students or students without disabilities. Moreover, permitting special efforts to assist low-income students and students with disabilities furthers the statute's equal access goals. By contrast, respondents argue, granting petitioners' requested accommodation would deny equal opportunity to children with same sex or gender nonconforming parents, violating the statute's equal opportunity condition, and would simultaneously disserve the State's equal opportunity goals.

Finally, respondents argue that the catchall provision does not take the statute outside *Smith* because it does not authorize individual exceptions to the nondiscrimination requirements. The cited testimony reflects, at most, a misunderstanding by one person about the scope of those requirements.

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Religious institutions are on a winning streak in the Supreme Court. That success reflects that while the Court is not ready to overrule *Smith,* it is receptive to arguments to confine its scope. At the same time, Colorado is on a losing streak in seeking to apply its nondiscrimination law to religious adherents. It lost *Masterpiece Cake v. Colorado*; it lost *303 Creative v. Elenis*; and last term, it lost *Chiles v. Salazar.*

All that said, petitioners' arguments are not overwhelming. The *Carson* line of cases is about laws that *discriminate* against religious institutions "based on their religion." As *Carson* makes clear, it does not matter whether the discrimination is based on the institution's religious ownership or on their offering a religious, rather than a secular, education. Either way, the state discriminates based on religion. The law at issue here is not of that kind. It treats institutions that do not admit families based on their sexual orientation or gender identity for religious reasons the same way it treats institutions that do not admit such families for secular reasons. Under the statute, the religious source of objection is irrelevant.

Petitioners say that the policy disqualifies Catholic schools based on their religion in the sense that the schools' religion is the reason they do not admit families based on sexual orientation and gender identity. But that is not how the Court has used the term "on the basis of" a protected characteristic. Nor is it the ordinary meaning of that phrase. That phrase refers to the reason that the state has adopted a nondiscrimination policy, not the reason that a regulated party has chosen not to follow a state nondiscrimination policy. Here, the State has chosen to require nondiscrimination to ensure that a child has equal access to every preschool it funds without regard to the child's or their family's sexual orientation or gender identity. The State does not care whether the opposition to access has a religious basis or a non-religious basis.

Petitioners point to *Carson*'s reliance on *Sherbert v. Verner* and *Thomas v. Review Board* as evidence that facially neutral benefit programs trigger strict scrutiny when they incidentally burden free exercise. But while the benefit programs in those two cases were neutral on their face—requiring good cause for refusals to work—state authorities applied the good cause requirement in a discriminatory manner: they treated secular, but not religious, excuses as good cause. As the Court explained in *Fulton,* those two cases establish that when the government creates a system for granting individualized exceptions to facially neutral laws, it may not refuse to extend an exception to cases involving religious exercise absent a compelling justification.

Petitioners worry that unless *Carson* reaches incidental burdens, a state could easily use a neutral factor to disfavor religion. But the use of a neutral factor for the purpose of disfavoring religion would violate *Carson.* That is very different than invalidating a neutral factor that is designed to serve legitimate purposes simply because it imposes an incidental burden on religious exercise. That is the essential insight of *Smith*.

Reading the *Carson* line of cases to presumptively invalidate any incidental burden on religion in a benefit program would convert a nondiscrimination principle into a principle that religion must be favored over comparable secular activity. It would also lead to the counterintuitive conclusion that that states have more authority to compel religious schools to observe nondiscrimination requirements that are contrary to their religion than it has to establish nondiscrimination funding conditions.

That is not to suggest that the Court will necessarily be unwilling to adopt petitioners' *Carson* argument. While the Court has stopped short of overruling *Smith,* it has adopted an ever-increasing list of exceptions to its general rule. *Carson* expanded prior law to effectively require funding of religious instruction. *Tandon* expanded the comparability requirement to require religion to be treated better than the most comparable secular activities. *Mahmoud v. Taylor* expanded *Wisconsin v. Yoder* to give religious objectors a right to dictate what their children will be taught at public schools. It will therefore be no surprise if *Carson* is expanded to require religious accommodations in some, most, or even all benefit programs.

Petitioners' other arguments are no stronger than their *Carson* argument. Petitioners' comparability argument depends largely on their view that the regulations permit exceptions from the statute's equal access mandate that harm the State's equal access interest to the same extent that a religious exception would. But the State says that the statute only prohibits discrimination against low-income children and children with disabilities. When read that way, the regulations do not authorize an exception to the equal access condition. It's hard to see why the Court should second-guess the State's interpretation. There is nothing odd about the State concluding that, whereas low-income and disabled children are in special need of protection against discrimination in admissions, high-income and non-disabled children are not. And there is nothing odd about concluding that special efforts to assist low-income persons and persons with disabilities further rather than undermine affording them equal opportunity.

Nor does the text compel petitioners' reading. After all, the Age Discrimination in Employment Act (ADEA) prohibits discrimination because of age, and yet the Court has interpreted it to prohibit discrimination based on older age, not discrimination based on younger age. Similarly, the Americans with Disabilities Act (ADA) prohibits discrimination against an individual because of disability, which is most naturally read to protect only persons with disabilities, not persons without disabilities. The state's interpretation of its requirements of equal access without regard to disability or income level can similarly be understood to protect only low-income and disabled persons, not rich and non-disabled persons. The state's interpretation makes particular sense in a statute that is focused on Head Start, a program for low-income students, and Individualized Education Plans, a requirement for disabled students.

Once the statute is read as Colorado interprets it, petitioners' comparability argument largely vanishes. Because the State does not forbid discrimination against high-income students or non-disabled students, allowing preferences for low-income children and children with disabilities does not harm the State's interest in funding only schools that comply with its nondiscrimination conditions at all. In contrast, granting petitioners' request to discriminate would undercut the State's interest in funding only schools that afford nondiscriminatory treatment for the children of same sex and gender nonconforming parents.

Petitioners' *Fulton* argument largely depends on its view that the regulations give the State authority to make individualized exceptions to the equal access mandate. Once again, however, that is not how Colorado interprets the authority to create exceptions. That authority, the State says, may not be used to violate the equal-access mandates. If that interpretation is accepted, and it's hard to see why it shouldn't be, petitioners' *Fulton* argument also goes away.

That does not mean there is no chance the Court will adopt petitioners' comparability argument or its *Fulton* argument. The Court is fully capable of rejecting the State's interpretation of its statutes. And if it does so, it can rule for petitioners on either of those grounds.

Ultimately, Colorado's problem is this: On the one hand, the practical effect of the State's law is to exclude Catholic preschools from the State's preschool program, potentially eliminating a desirable option for many parents. On the other hand, it seems very unlikely that any same sex or gender nonconforming parents would want to send their kids to Catholic preschools when what they teach is that marriage is between a man and a woman and there are only two sexes determined by birth. That is particularly true because same sex and gender nonconforming parents will likely have a host of preschool options they would far prefer. While the Court purports not to balance interests, it almost always does. That being so, given the balance of interests, the Court could well find some way to rule for petitioners.

***Suncor Energy Inc. v. County Commissioners of Boulder Cty.*, No. 25-170**

Environmental Law – State-Law Tort Claims

This case involves whether state tort law provides a basis for holding out-of-state fossil fuel producers liable for their contribution to in-state harms caused by global climate change. This suit was brought by the City and County of Boulder, Colorado (Boulder) against Exxon Mobil and Suncor Energy. But numerous state and local governments have filed similar suits, and billions of dollars are at stake. Those stakes make it one of the most important cases the Court will resolve this Term. In addition to the merits, the Court granted certiorari on whether it has jurisdiction to resolve the dispute. This highlight, however, focuses solely on the merits.

The Supreme Court has held that, in the absence of a governing federal statute, federal common law governs certain claims involving interstate pollution. That holding led some plaintiffs to invoke federal common law as the basis for seeking caps on carbon emissions against power plants based on their contribution to global warming. In *American Electric Power Co. v. Connecticut*, however, the Court held that the Clean Air Act's conferral of power on the Environmental Protection Agency (EPA) to regulate carbon emissions from power plants displaced any possible federal common law claim. The Court did not address whether a suit could be based on state law but instead remanded on that issue. It did, however, refer to its decision in *International Paper Co. v. Ouellette.* That case held that the similarly structured Clean Water Act does not preempt a state law claim based on the law of the source state but does preempt a state law claim based on the law of a state affected by pollution from a source state.

Petitioners advance four theories for why they may not be held liable under state law for their contribution to the in-state harms caused by climate change. First, they argue that, under the constitutionally-based equal sovereignty principle, no single state may govern interstate pollution. That constitutional principle, petitioners argue, required the Court to both create federal common law to govern interstate pollution and to preempt state law. Petitioners further argue that while the Clean Air Act displaced federal common law relating to interstate pollution, it did not give states any authority they previously lacked, leaving intact the equal sovereignty bar on the application of state law to interstate pollution.

Petitioners next argue that state law claims to hold them liable for the in-state harms caused by global climate change would violate the non-extraterritoriality principle. Under that principle, petitioners argue, states may not regulate activity beyond their borders. Petitioners acknowledge that a state has some authority to regulate in-state effects based on an out-of-state activity. But they argue that the authority depends on a direct and traceable connection between the out-of-state activity and localized in-state effects. Because greenhouse gases once emitted become mixed into the atmosphere and spread worldwide, petitioners assert, the connection between petitioners' conduct and any in-state harms that Boulder suffers from global warming is indirect, untraceable, and non-localized.

Petitioners next invoke the principle that state laws must give way if they impair the effective exercise of the Nation's foreign policy. That principle is applicable here, petitioners contend, because allowing state law claims to govern international pollution disputes would create an end run around the Unites States' diplomatic approach to global climate change

Finally, petitioners argue that the Clean Air Act preempts Boulder's state law claims. They contend that the Clean Air Act establishes a comprehensive statutory scheme for the regulation of air quality across the US, directing the EPA to set national standards, and leaving no room for multiple different state law judgments.

Boulder resists each of petitioners' preemption theories. Boulder first argues that petitioners' theory that the Constitution precludes application of state law in any area previously governed by federal common law is at odds with both *American Electric Power* and *Ouellette.* It contends that those cases establish that when a federal statute preempts federal common law, the applicability of state law turns on the usual preemption analysis: state law is applicable unless Congress has clearly specified otherwise. Boulder further contends that, in any event, federal common law governs only suits by one state against another to abate a nuisance. It therefore does not govern its claim for deceptive marketing that would allow producers to sell as much fossil fuel as they want, as long as they do so nondeceptively. And, more generally, it does not govern a suit by a non-state against non-emitting private defendants for damages.

Boulder also resists petitioners' extraterritoriality theory, relying on Supreme Court precedent holding that states may regulate out-of-state activity that has harmful consequences within the state. Just as suits may be brought against out of state manufacturers of opioids and asbestos for the in-state harms those products cause, Boulder argues, out-of-state fossil fuel producers may be held liable for the in-state harms they cause. Indeed, Boulder contends that states have applied their law to transboundary environmental nuisance disputes since the early days of the Republic. While state law would require a showing of proximate causation, Boulder argues, there is no constitutional causation rule that preempts that traditional state law tort element.

Boulder next contends that the foreign affairs power does not displace a state's authority to protect its citizens from the harms resulting from international conduct simply because state law may have an incidental effect on foreign affairs. The effects that petitioners have identified, Boulder argues, such as the effect on international diplomacy, are the very kind of indirect effects that do not displace a state's authority to protect its own citizens.

Boulder finally argues that nothing in the Clean Air Act preempts state law tort suits for in-state harms traceable to out-of-state producers. Nothing in the text of the statute, it argues, even remotely suggests that claims against fossil fuel producers are prohibited.

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The idea that tort litigation is the way for the United States to decide on the acceptable level of carbon emissions is likely to appeal to few, if any Justices. That's why it was no surprise when a unanimous Court held that the Clean Air Act, and EPA's authority under it, preempt litigation based on federal common law. It is even less likely that a majority of Justices will view it as optimal for multiple states to make their own judgments about the acceptable level of carbon emissions as a matter of state nuisance law, with the state having the most restrictive view prevailing. Assuming there is no jurisdictional problem, petitioners would therefore seem to be the favorites to prevail.

Still, the case is in some ways a result in search of a legal theory. Petitioners' argument that, absent express congressional authorization, the Constitution preempts state law in any area in which the Court once created federal common law has some intuitive force. It is not, however, anchored in any constitutional text or in any established precedent. Moreover, the Court's authority to establish federal common law is highly undertheorized and in serious tension with the Court's more general view that it interprets the law as opposed to making it. Making the Court's authority to create federal common law the centerpiece of its decision is not something the Court will be eager to do.

The Court's decision in *Hencely v. Fluor Corp.* last term is evidence of the Court's increasing skepticism of constitutional preemption theories that are not linked to any constitutional text and to federal common law preemption theories that require expansion of prior precedent. Significantly, Justice Thomas wrote the opinion and Justice Gorsuch joined it.

It is true that states generally lack authority to regulate out-of-state activity. But, as Boulder argues, states have longstanding authority to regulate out-of-state activity insofar as it has in-state effects. That authority is reflected in the traditional conflicts of law principle that the applicable law depends on the place of the injury. Unless there is some constitutional causation principle that limits that traditional authority, there is at least a risk that the rule against extraterritoriality could be swallowed up by the exception for in-state effects.

There is intuitive force to the notion that unless there is some causation principle that limits that traditional authority, the rule against extraterritoriality could be swallowed up by the exception for in-state effects. But again, there is no constitutional text or established precedent that affirmatively supports such a constitutional causation rule. Plus, the Court may be reluctant to invent a new constitutional causation principle when it will have uncertain effects on an area of traditional state authority.

Petitioners' foreign affairs argument has the feel of a secondary argument that supports its main constitutional argument but is unlikely to serve as an independent ground for ending the lawsuit. A majority of the Court may think international diplomacy is the only approach to global climate change that makes any sense. But missing from petitioners' foreign affairs argument are examples in which state law is preempted when it seeks to address in state-effects of the actions of U.S. companies, and no treaty or executive agreement that has the force of law stands in the way.

That leaves a more conventional argument that the Clean Air Act preempts Boulder's suit. That argument is complicated by the Trump Administration's recent conclusion that the Clean Air Act does not regulate carbon emissions. If that's right, it makes the preemption argument far more difficult. Even assuming the Court were able to put that complication to one side, the statutory preemption argument is not as straightforward as one might think. There is no text suggesting that the Act was intended to protect or regulate fossil fuel producers, and, as the decision in *Virginia Uranium v. Warren* makes clear, the Court, including Justices Thomas and Gorsuch, is increasingly uncomfortable with relying on non-textually based implied preemption.

Beyond that, Boulder has two narrower arguments that are not easily swept aside by Clean Air Act preemption. One is that if Colorado law does not apply, then the Clean Air Act remedy is the application of some other state's law, as it was in *Ouellette,* not a free pass from liability. The other is that Boulder's claim that petitioners have deceptively marketed their product survives because it permits petitioners to market as much fossil fuel as they can sell as long as they do it nondeceptively.

The Court will have a strong instinct to end this lawsuit. Whether that instinct ends up producing a decision in petitioners' favor, and if so, on what ground is not as easy to predict as one might think.

***Viramontes v. Cook County,* No. 25-238**

***Grant v. Higgins,* No. 25-566**

Second Amendment – Possession of AR-15s

These consolidated cases raise a Second Amendment issue the Court has put off resolving for years: the constitutionality of bans on the possession of AR-15s. Since their introduction into the civilian market, AR-15s have been legal to possess throughout much of the country, and millions of law-abiding citizens own them. But they have also been used by mass murderers in some of our Nation's most horrific mass shootings. And at least 10 states now ban them. It is hard to think of a case this Term that is more important or that will be more closely watched.

An AR-15 is a lightweight, semiautomatic rifle. Unlike a machinegun, a single pull of the trigger of an AR-15 fires only one shot. After a shot is fired, however, the AR-15 automatically reloads. That and other design characteristics allow the AR-15 to be fired rapidly. The M-16, to which the AR-15 is sometimes compared, is a military weapon with both automatic and semiautomatic fire options. The AR-15 has characteristics that are similar to an M-16 when it is in semiautomatic mode. But unlike the M-16, the AR-15 does not have an automatic mode.

These consolidated cases involve a Cook County, Illinois Ordinance and a Connecticut statute that prohibit the possession of AR-15s. In both cases, individuals challenged the prohibition as a violation of the Second Amendment. In both cases, the lower courts rejected the challenge. The question presented is whether a prohibition on the possession of an AR-15 violates the Second Amendment.

The key decisions bearing on the resolution of the question are *District of Columbia v. Heller* and *New York State Rifle v. Bruen*. In *Heller,* the Court held that the Second Amendment guarantees an individual right to possess firearms in the home for purposes of self-defense. In

Bruen, the Court held that the Second Amendment guarantees an individual right to carry firearms outside the home for purposes of self-defense.

Bruen also established a two-step inquiry for deciding whether a firearms regulation is constitutional. At the first step, if "the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." At the second step, "the government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." The analogy to a historical regulation need not be "an exact match." At the same time, the modern and historical regulations must impose a comparable burden on the Second Amendment right, and the burden must be comparably justified.

Heller made various other statements on which the parties rely. For example, *Heller* said that "arms" were defined at the time of the framing as "weapons of offence, or armour of defense," and that the term was applied "to weapons that were not specifically designed for military use and were not employed in a military capacity." It also stated that the term "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."

Heller also said that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotgun." Similarly, it stated that the Second Amendment protection is limited to weapons "in common use at the time," a limitation supported "by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." And it said that weapons "that are most useful in military service—M-16 rifles and the like—may be banned."

The parties take different positions on both Step 1 and Step 2 of the *Bruen* inquiry. On *Bruen* Step 1, petitioners argue that the term "arms" has its semantic meaning—any bearable weapon. Because the AR-15 is a bearable weapon, petitioners argue, it falls within the plain text of the Second Amendment. Petitioners resist any further limitation on the meaning of the term "arms." The text provides no basis, petitioners argue, for limiting the term arms to weapons "in common use." Nor does the text furnish any basis for excluding, at *Bruen* Step 1, arms that are "most useful in military service." In both cases, petitioners say, those limitations come in at *Bruen* Step 2 as consistent with the tradition of prohibiting "dangerous and unusual weapons."

Respondents argue that the term “arms” is limited to weapons in common use for self-defense, a limitation that excludes arms that are primarily useful for military purposes. Respondents assert that AR-15s are more similar to military grade weapons, like the M-16, than they are to handguns and other weapons that are useful for self-defense. They therefore argue that AR-15s are not “arms” within the meaning of the Second Amendment.

Petitioners argue at *Bruen* Step 2 that, under *Heller,* a weapon in common use for lawful purposes cannot be banned. Since millions of law-abiding people own AR-15s, petitioners argue, they are in common use for lawful purposes and cannot be banned. Petitioners further argue that AR-15s falls outside the historical tradition that permits banning dangerous and unusual weapons. Under *Heller,* petitioners argue, that tradition requires that a weapon must be both dangerous and unusual, not just dangerous, and a weapon cannot be unusual if it is in common use for lawful purposes. Finally, petitioners argue that the bans on Bowie knives and machineguns, relied on by respondents, are not relevantly similar because those weapons were not in common use for lawful purposes at the time they were restricted.

Respondents argue that the applicable historical tradition allows banning a weapon that is unusually dangerous. Under that tradition, respondents argue, a weapon that is unusually dangerous may be banned even if it is in common use for lawful purposes. Respondents assert that AR-15s fall within the tradition of banning unusually dangerous weapons because of their capacity to spray bullets accurately and rapidly at distance, to harm innocent persons, and to do extreme bodily damage. That is why they have been used by mass murderers, respondents say. At the same time, respondents assert, those features of AR-15s mean they are not useful for self-defense.

Respondents further argue that there is no need to find a close historical parallel to banning AR-15s. Under *Bruen,* respondents argue, such a parallel is unnecessary when a modern legislature confronts a societal problem that did not exist at the time of the framing. That is true here, respondents say, because mass murder was not a societal problem at the time of the framing. In any event, respondents argue, bans on Bowie knives and machineguns provide a sufficient analogue for banning AR-15s because those unusually dangerous weapons were in common use for lawful purposes at the time they were restricted.

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It seems unlikely that a majority of the Court will think that a ban on AR-15s can be justified at *Bruen* Step 1. The best reading of *Heller* is that the term "arms" has its semantic meaning: any weapon of offense or defense that is bearable. The Court might be open to an argument that weapons that are exclusively designed for military use, like grenades or nuclear weapons, are outside the meaning of arms. But AR-15s do not fall in that category. They are widely used by the civilian population for non-military purposes. If a ban on them can be justified, it will have to be because such a ban falls within our historical tradition.

On that score, you can find lines in opinions that refer to the tradition as one permitting restrictions on dangerous *and* unusual weapons (as in *Heller*), and you can find lines in opinions saying the tradition permits restrictions on dangerous *or* unusual weapons (as in *United States v. Rahimi*). The Court will have to decide which of those formulations best captures the historical tradition.

Neither of those formulations, however, seems quite right. Modern handguns are surely dangerous, but we know they cannot be banned. At the same time, it would seem to make no sense to disable a government from restricting a new and unusually dangerous weapon that is widely used by criminals to inflict massive damage simply because the weapon also appeals to a segment of the law-abiding population and is therefore not unusual. Take Tommy guns. Suppose they had become popular with a segment of the law-abiding population before criminal organizations began using them to inflict massive harm on rival criminal organizations, bystanders, and the police. Is it really the case that they could not have been banned?

Similarly, there is much intuitive appeal to the idea that the government should be able to ban a weapon used by unstable mass murderers even if that means that some segment of the law-abiding public will have to do without a firearm they would like to own. After all, it's not like the public does not already have access to handguns, which seem far more suited to self-defense, and to ordinary rifles, which seem far more suited to sports hunting.

This is also a case in which it seems wrong to look to history for a definitive resolution. After all, mass murder was not a problem at the time of the framing. We therefore have no idea what the Framers would have thought about restricting the weapons used by mass murderers even if that meant those weapons could not be used by law-abiding citizens either.

Those points, however, are unlikely to get respondents more than three votes. To get to five, there would have to be a deep concern that, if the Court greenlights AR-15s, they will be seen by the public as responsible to some significant degree for the inevitable succession of mass murders made possible by the wide availability of AR-15s.

The biggest problem for respondents is that a majority of the Court is likely to have an overriding sense that the effort to ban AR-15s comes too late. With millions of AR-15s out there, there will be a sense that the genie is out of the bottle and a ban, at this point, has little more than symbolic value.

Respondents' chances would improve if there was some way for the Court to leave the issue entirely up to the states. But if a state can ban AR-15s, so can Congress. And while that possibility may seem unrealistic today, Congress's power to step in and ban AR-15s is still going to be seen by a majority of the Court as an undesirable consequence of respondents' constitutional position.

If all this suggests that interest balancing still matters to the Court in Second Amendment cases, it should—because it does. While history and tradition is the formal test, a judgment about whether a regulation makes common sense informs the Court's view of what history has to say. That's why *Rahimi* upheld a possession ban on individuals who threaten their domestic partners. As the Court itself said, common sense and history supported the ban.

As for the historical analogies, there is a surprising gap in the record on some key facts. Just how popular were Bowie knives and machine guns before they were banned? How useful for self-defense are AR-15s? And whether you call the tradition one of regulating dangerous and unusual weapons, dangerous or unusual weapons, or unusually dangerous weapons, what kinds of weapons were thought to fall within that tradition? The records in these cases do not clearly resolve any of these questions.

In the end, the grant of certiorari without a conflict, the trend in Second Amendment cases, and the popularity of AR-15s all suggest that petitioners are likely to win. But there is always a chance for a June surprise.

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