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Supreme Court Term October 2022: A Review of Selected Major Rulings

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Supreme Court Term October 2022: A Review of Selected Major Rulings

The Supreme Court issued a number of opinions of interest to Congress in the term that began on October 3, 2022. Over the course of the term, the Court decided cases addressing issues including affirmative action, freedom of speech under the First Amendment, redistricting and the Voting Rights Act, and the environment. The Court also weighed in on the executive branch’s regulatory authority, the authority of states to enact various types of laws, and principles of judicial review such as standing and the standard for review of agency action.

Among the decisions of particular note are: (1) *Sackett v. Environmental Protection Agency*, narrowing the test for when wetlands are considered “waters of the United States” subject to federal jurisdiction under the Clean Water Act; (2) *Biden v. Nebraska*, holding that the Biden Administration lacked authority to implement its student loan cancellation policy; (3) *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, striking down the use of race-based affirmative action in higher education admissions; and (4) *303 Creative LLC v. Elenis*, ruling that the First Amendment’s Free Speech Clause barred a state from enforcing its nondiscrimination law against a website designer who did not want to create websites for same-sex weddings.

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

R47689

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Contents

<i>Sackett v. EPA</i> : Scope of “Waters of the United States”	2
Background	2
Prior Supreme Court Rulings Regarding WOTUS	3
Regulatory History	3
Litigation History	4
The Supreme Court’s Opinion	5
Concurring Opinions	6
Considerations for Congress	8
<i>Biden v. Nebraska</i> : Student Loan Cancellation	10
Background	10
The Supreme Court’s Opinion	12
Dissenting and Concurring Opinions	14
Considerations for Congress	16
Students for Fair Admissions Inc. v. President & Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina: Race-Based Affirmative Action in Higher Education.....	18
Background	19
The Supreme Court’s Opinion	20
A “Color-Blind” Interpretation of the Fourteenth Amendment and <i>Brown v. Board of Education</i>	20
Measurable Objectives, Race as a Disadvantage, and Time Limits.....	21
The Decision and <i>Grutter</i>	23
Concurring and Dissenting Opinions	23
Considerations for Congress	25
<i>303 Creative LLC v. Elenis</i> : Free Speech Exceptions to Nondiscrimination Law	26
Background	26
The Supreme Court’s Opinion	28
Dissenting Opinion.....	30
Considerations for Congress	30

Appendixes

Appendix. List of Cases	34
-------------------------------	----

Contacts

Author Information.....	60
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Over the course of its October 2022 term, the Supreme Court issued 56 merits decisions addressing numerous significant issues, including affirmative action, freedom of speech under the First Amendment, redistricting and the Voting Rights Act, and the environment. The Court also weighed in on the executive branch’s regulatory authority, the authority of states to enact various types of laws, and principles of judicial review such as standing and the standard for judicial review of agency action. In contrast to the October 2021 term, which saw fewer unanimous opinions and more 6-3 opinions than any term in the past decade, nearly half of the October 2022 term’s merits decisions were unanimous, a fraction that more closely aligns with the Court’s decisions over the past decade.¹ Similarly, the Court in the October 2022 term produced fewer 6-3 decisions with Republican-appointed Justices in the majority and Democratic-appointed Justices in dissent than in the previous term.² The 6-3 split between Justices appointed by Republican and Democratic Presidents continued to surface in major cases, however—including all four of the cases discussed in this report.

One notable development³ at the Court this term was the arrival of Justice Ketanji Brown Jackson. The arrival of Justice Jackson, who replaced Justice Stephen Breyer, did not change the balance of Republican and Democratic appointees.⁴ Justice Jackson wrote five majority opinions and six dissents and was noted for her active participation in oral arguments: She spoke more at argument than any other Justice this term, and more than any other first-term Justice in recent memory.⁵

This report focuses on four important decisions from this term. Two of the cases addressed issues of statutory interpretation: *Sackett v. EPA*, a case with significant implications for the scope of

¹ Adam Feldman, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023), <https://empiricalscotus.com/2023/06/30/another-one-bites-2022/>; see also Angie Gou, *As Unanimity Declines, Conservative Majority’s Power Runs Deeper than the Blockbuster Cases*, SCOTUSBLOG (July 3, 2022), <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/>.

² Feldman, *supra* note 1.

³ Among other developments was an increased scrutiny of some Justices’ recusal patterns and financial disclosures. *E.g.*, *Friends of the Court: SCOTUS Justices’ Beneficial Relationships with Billionaire Donors*, PROPUBLICA, <https://www.propublica.org/series/supreme-court-scotus> (last visited Sept. 6, 2023). While the Code of Conduct for United States Judges does not explicitly apply to Supreme Court Justices, some commentators have called for ethical rules that would be binding on the Court. Members have recently introduced legislation that would impose ethics rules on the Justices as well as federal judges. Judicial Ethics and Anti-Corruption Act of 2023, S. 1908 and H.R. 3973 118th Cong. (2023). The Justices themselves have differing opinions about whether such legislation would be valid. *E.g.*, David B. Rivkin Jr. and James Taranto, *Samuel Alito, the Supreme Court’s Plain-Spoken Defender*, WALL STREET JOURNAL (July 28, 2023), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7?st=8kujgeb6f0h7nr7>; Claire Rush, *Justice Kagan Supports Ethics Code but Says Supreme Court Divided on How to Proceed*, ASSOCIATED PRESS, Aug. 3, 2023, <https://apnews.com/article/elena-kagan-supreme-court-oregon-ethics-4b70b05db01eabfee58fd245d75b8cbb>. For additional discussion of judicial conduct and financial disclosure requirements, see CRS Legal Sidebar LSB10255, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations*, by Joanna R. Lampe; and CRS Legal Sidebar LSB10949, *Financial Disclosure and the Supreme Court*, by Whitney K. Novak.

⁴ *E.g.*, *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1167 (2023) (joining opinion of Chief Justice Roberts concurring in part and dissenting in part to argue that a state animal welfare law imposed substantial burdens on interstate commerce in violation of the dormant Commerce Clause); *Pugin v. Garland*, 143 S. Ct. 1833 (2023) (joining majority opinion of Justice Kavanaugh to hold that the government could deport noncitizens for offenses related to obstruction of justice for offenses that do not require a pending investigation or proceeding); *Abitron Austria GmbH v. Hetronic Int’l*, 143 S. Ct. 2522 (2023) (joining majority opinion of Justice Alito holding that the Lanham Act’s prohibitions on trademark infringement generally do not apply when an infringing ‘use in commerce’ occurs outside the United States).

⁵ Adam Feldman, *A New Landscape Unfolds: Supreme Court Oral Arguments in the 2022-2023 Term*, EMPIRICAL SCOTUS (May 8, 2023), <https://empiricalscotus.com/2023/05/08/a-new-landscape-unfolds-supreme-court-oral-arguments-in-the-2022-2023-term/>.

federal jurisdiction under the Clean Water Act; and *Biden v. Nebraska*, involving the Biden Administration’s student loan cancellation policy. The other two decisions focused on constitutional issues: a combined decision in *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, involving the use of race-based affirmative action in higher education admissions; and *303 Creative LLC v. Elenis*, a case regarding the applicability of the First Amendment’s Free Speech Clause to a state nondiscrimination law. The **Appendix** lists all of the Court’s merits decisions this term, summarizes the decisions’ key holdings, and provides references to CRS resources that address selected cases in more detail.

***Sackett v. EPA*: Scope of “Waters of the United States”⁶**

In *Sackett v. EPA*, the Supreme Court addressed the standard for determining when wetlands are considered “waters of the United States” (WOTUS) under the Clean Water Act (CWA) based on their adjacency to other waters.⁷ While the Court unanimously agreed that the lower court applied the wrong standard, it split 5-4 on the appropriate test. This is the fourth case in which the Court has considered the scope of wetlands covered by the CWA. The Court in *Sackett* construed the reach of the CWA more narrowly than previous regulatory and judicial interpretations. It also evinces the Court’s decreasing reliance on deferential modes of statutory construction as well as its increasing insistence on clear congressional authorization for agency action. Following the Court’s decision in *Sackett*, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)—the two agencies tasked with implementing the CWA—have issued a new rule revising the regulatory definition of WOTUS to conform to the Court’s ruling.⁸

Background

The CWA prohibits discharging certain pollutants into navigable waters without a permit.⁹ The statute defines “navigable waters” as “waters of the United States, including the territorial seas,” but it does not further define WOTUS.¹⁰ The definition of WOTUS is important because it determines which waters are subject to federal government regulations and protections, including CWA permitting programs. For decades, Congress, the courts, stakeholders, and the Corps and EPA have debated how to define the term, and how to interpret the scope of waters that are federally regulated.¹¹

⁶ Kate R. Bowers, CRS Legislative Attorney, authored this section of the report.

⁷ 143 S. Ct. 1322 (2023).

⁸ For further analysis, see CRS Legal Sidebar LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act*, by Kate R. Bowers; CRS Report R47408, *Waters of the United States (WOTUS): Frequently Asked Questions About the Scope of the Clean Water Act*, by Kate R. Bowers and Laura Gatz.

⁹ 33 U.S.C. § 1311(a).

¹⁰ *Id.* § 1362.

¹¹ See Bowers and Gatz, *supra* note 8; CRS Report R44585, *Evolution of the Meaning of “Waters of the United States” in the Clean Water Act*, by Stephen P. Mulligan.

Prior Supreme Court Rulings Regarding WOTUS

The Supreme Court has considered the scope of WOTUS in prior cases.¹² Most recently, in 2006, the Court decided *Rapanos v. United States*, a pair of consolidated cases regarding the extent of CWA jurisdiction over wetlands near ditches or man-made drains that emptied into traditional navigable waters.¹³ Some had hoped that *Rapanos* would provide clarity on jurisdictional questions that lingered after previous decisions. Instead, the Court rejected the Corps' assertion of jurisdiction, but issued a fractured 4-1-4 decision with two different standards and no majority opinion providing a rationale indicating how to determine whether a particular waterbody is a water of the United States.

Writing for a four-Justice plurality, Justice Scalia would have applied a bright-line rule holding that WOTUS includes only “relatively permanent, standing or continuously flowing bodies of water,” such as streams, rivers, or lakes; and wetlands that have a “continuous surface connection” to other waters subject to the CWA.¹⁴ Writing separately and concurring in the Court's judgment, Justice Kennedy wrote that the Corps should determine on a case-by-case basis whether wetlands have a “significant nexus” to traditionally navigable waters.¹⁵ Justice Kennedy further wrote that a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.¹⁶ Justice Stevens, joined by three Justices, dissented and would have upheld the Corps and EPA's assertion of jurisdiction.

Following *Rapanos*, lower courts considered which Justice's opinion should apply. Every court of appeals to consider the two standards held either that Justice Kennedy's significant nexus standard was controlling or that jurisdiction may be established under either standard.¹⁷ Some courts declined to identify which opinion was controlling, either because the parties stipulated that the significant nexus standard applied or because both tests had been met.¹⁸ The Ninth Circuit held in 2007 that Justice Kennedy's concurrence was “the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases” and therefore provided the controlling standard for cases within its circuit.¹⁹

Regulatory History

The Corps and EPA have also defined WOTUS through successive regulations. The Obama and Trump Administrations both issued comprehensive regulations to define the term—the Clean

¹² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

¹³ 547 U.S. 715.

¹⁴ *Id.* at 739, 742.

¹⁵ *Id.* at 782 (Kennedy, J., concurring).

¹⁶ *Id.* at 780 (Kennedy, J., concurring).

¹⁷ *See, e.g.*, *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–725 (7th Cir. 2006). *Cf.* *United States v. Cundiff*, 555 F.3d 200, 210–213 (6th Cir. 2009) (declining to decide which *Rapanos* test controls because jurisdiction was proper under both tests). *See also* Brief for the Respondents in Opposition at 14, *Sackett v. EPA*, No. 21-454 (U.S. Nov. 24, 2021) (collecting cases).

¹⁸ *See Wade Foster, Parsing Rapanos*, VA. ENV'T L.J. (2018), syndicated on *Env'tl. L. Rev. Syndicate*, <http://www.velj.org/elrs/parsing-rapanos>.

¹⁹ *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007).

Water Rule in 2015, and the Navigable Waters Protection Rule in 2020.²⁰ The Clean Water Rule was repealed in 2019, and a court vacated the Navigable Waters Protection Rule in 2021.²¹

On January 18, 2023, the Corps and EPA issued a new rule (the 2023 WOTUS Rule) revising the definition of WOTUS.²² Of particular relevance in the context of *Sackett*, the 2023 WOTUS Rule provided that certain wetlands were jurisdictional based on their adjacency to other covered waters and, as in previous regulations, defined *adjacent* as “bordering, contiguous, or neighboring.”²³ Specifically, the rule included wetlands that were adjacent to a traditional navigable water, the territorial seas, or an interstate water, as well as wetlands that were adjacent to jurisdictional impoundments or tributaries and met either the relatively permanent or significant nexus standard.²⁴

Litigation History

The petitioners, Chantell and Michael Sackett, own a parcel of land in Idaho near Priest Lake and across the road from a wetlands complex that drains into an unnamed tributary of a creek that in turn feeds into the lake. In 2007, after they began backfilling the property with sand and gravel, EPA issued a compliance order directing them to restore the site. In 2008, the Corps issued a jurisdictional determination (JD) concluding that the property contained wetlands subject to regulation under the CWA, after which EPA issued an amended compliance order that extended the compliance deadlines. The Sacketts sued EPA, arguing that the compliance order’s underlying jurisdictional basis was flawed.²⁵ The district court granted summary judgment in favor of EPA, ruling that the Sacketts’ property contained jurisdictional wetlands.²⁶

The Ninth Circuit affirmed the district court’s grant of summary judgment in EPA’s favor.²⁷ On the merits, the court held that it was bound by its precedent to apply Justice Kennedy’s concurrence as the controlling opinion.²⁸ Applying Justice Kennedy’s significant nexus test, and looking to the regulations that were in effect when EPA issued the amended compliance order, the court held that the record “plainly supports” EPA’s conclusion that the wetlands on the Sacketts’ property were adjacent to a jurisdictional tributary.²⁹ The court also upheld EPA’s conclusion that those wetlands, together with the similarly situated wetlands complex across the road, had a significant nexus to Priest Lake, a traditional navigable water.³⁰ The court thus concluded that EPA reasonably determined that the Sacketts’ property was subject to federal jurisdiction under the CWA and the relevant regulations.³¹

²⁰ Definition of “Waters of the United States,” 80 Fed. Reg. 37,053 (June 29, 2015); The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (Apr. 21, 2020).

²¹ Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019); Order, *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266 (D. Ariz. Aug. 30, 2021).

²² Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004 (Jan. 18, 2023).

²³ *Id.* at 3143.

²⁴ Fact Sheet, Final Rule: Revised Definition of “Waters of the United States” (Dec. 2022), <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf>.

²⁵ *Id.*

²⁶ Order, *Sackett v. EPA*, No. 2:08-cv-00185 (D. Idaho Mar. 31, 2019).

²⁷ *Sackett*, 8 F.4th 1075.

²⁸ *Id.* at 1089.

²⁹ *Id.* at 1092.

³⁰ *Id.* at 1093.

³¹ *Id.*

The Supreme Court’s Opinion

The Supreme Court granted review to address “whether the Ninth Circuit set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act.”³² On review, the Court unanimously reversed the Ninth Circuit. Although all nine Justices agreed that the lower court applied the wrong standard for identifying WOTUS, the Court was split 5-4 on the appropriate test. Justice Alito wrote the majority opinion and was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett. Under the majority’s test, “waters” are limited to relatively permanent bodies of water connected to traditional navigable waters and to wetlands that are “waters of the United States” in their own right by virtue of a continuous surface connection to other jurisdictional waters so that there is no clear demarcation between the bodies.³³ Wetlands that are neighboring covered waters but are separated by natural or artificial barriers are excluded.³⁴

With respect to what constitutes “waters,” the majority reaffirmed the *Rapanos* plurality’s interpretation, holding that “the CWA’s use of ‘waters’ encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes.”³⁵ The majority acknowledged that the Court’s prior jurisprudence interpreted CWA jurisdiction to extend beyond traditional navigable waters but cautioned that those earlier cases “refused to read ‘navigable’ out of the statute, holding that it at least shows that Congress was focused on its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”³⁶ The majority reasoned that this interpretation was consistent with definitions of waters elsewhere in the CWA and in other statutes.³⁷

The majority acknowledged that some but not all wetlands are covered under the CWA and held that jurisdictional wetlands “must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”³⁸ Quoting the *Rapanos* plurality, the majority held that WOTUS includes “only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States,’ such that it is ‘difficult to determine where the water ends and the wetland begins.’ That occurs when wetlands have ‘a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands.’”³⁹

The majority reasoned that its interpretation harmonized the statutory term *waters of the United States* with Section 404(g)(1) of the CWA, which was added in 1977 and authorizes states to apply to EPA for approval to administer permits for certain kinds of discharges into any WOTUS except for certain traditional navigable waters, “including wetlands adjacent thereto.”⁴⁰ The majority explained that because the adjacent wetlands in Section 404(g)(1) “are ‘includ[ed]’ within ‘waters of the United States,’” the term *navigable waters* could not include WOTUS and adjacent wetlands, but only those adjacent wetlands that qualify as WOTUS “in their own

³² Sackett v. EPA, No. 21-454, 142 S. Ct. 896 (2022) (mem.) (granting petition for writ of certiorari).

³³ Sackett v. EPA, 143 S. Ct. 1322, 1339 (2023).

³⁴ *Id.* at 1341.

³⁵ *Id.* at 1336.

³⁶ *Id.* at 1337.

³⁷ *Id.*

³⁸ *Id.* at 1339.

³⁹ *Id.* at 1340 (quoting *Rapanos v. United States*, 547 U.S. 715, 742, 755 (2006)).

⁴⁰ See 33 U.S.C. § 1344(g)(1).

right.”⁴¹ As a result, the majority concluded that wetlands “that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.”⁴²

In addition to reaffirming the *Rapanos* plurality’s standard, the majority also rejected the significant nexus test.⁴³ The majority stated that Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property” and cautioned that an overly broad interpretation of the CWA’s reach would impinge on the regulation of land and water use, an area at the core of traditional state authority.⁴⁴ The majority also wrote that EPA’s interpretation “gives rise to serious vagueness concerns in light of the CWA’s criminal penalties.”⁴⁵ In particular, the majority emphasized that the boundary between a significant nexus and an insignificant one was “far from clear,” that “similarly situated” waters was also a vague concept, and that application of the significant nexus test required consideration of “a variety of open-ended factors that evolve as scientific understandings change.”⁴⁶ According to the majority, the significant nexus test amounted to a “freewheeling inquiry” that “provides little notice to landowners of their obligations under the CWA.”⁴⁷

The majority also rejected EPA’s interpretation of WOTUS as including wetlands that are “neighboring” to covered waters but separated by dry land.⁴⁸ In particular, the majority disagreed with EPA’s argument that the reference to adjacent wetlands in Section 404(g)(1) indicates that Congress implicitly ratified the Corps’ regulatory definition of *adjacent wetlands* that was in place when Congress added that section of the CWA in 1977.⁴⁹ Contrary to EPA’s argument, the majority found that the definition of *adjacent wetlands* was “[f]ar from [] well settled” as of the 1977 CWA amendments.⁵⁰ The majority also disputed EPA’s policy arguments regarding the environmental consequences of a narrower definition, noting that “the CWA does not define the EPA’s jurisdiction based on ecological importance.”⁵¹

Concurring Opinions

Sackett generated three concurring opinions. Justice Thomas joined the judgment in full and wrote a separate concurring opinion, joined by Justice Gorsuch, to discuss the historical meaning of the terms *navigable* and *of the United States* in the phrases *navigable waters* and *waters of the United States*.⁵² Justice Thomas wrote that, prior to the enactment of the CWA, navigable waters were generally understood to be those waters that were or could be used for interstate or foreign commerce and that wetlands were historically excluded from the term.⁵³ Justice Thomas further wrote that “[i]t would be strange indeed” if, in enacting the CWA, “Congress sought to effect a

⁴¹ *Sackett*, 143 S. Ct. at 1339.

⁴² *Id.* at 1340.

⁴³ *Id.* at 1341.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1342.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1341.

⁴⁹ *Id.* at 1343.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1344 (Thomas, J., concurring).

⁵³ *Id.* at 1349–1352.

fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning.”⁵⁴ Applying this reasoning, Justice Thomas concluded that the wetlands on the Sacketts’ property were not jurisdictional because they lack a surface connection with a traditional navigable water; the nonnavigable tributary across the street from the Sacketts’ property is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce; Priest Lake is purely intrastate and has not been shown to be a highway of interstate or foreign commerce; and EPA did not establish that the Sacketts’ actions would obstruct or otherwise impede navigable capacity or the suitability of a water for interstate commerce.⁵⁵

Consistent with his long-standing views, Justice Thomas criticized federal environmental law’s dependence on an “expansive interpretation” of the Commerce Clause, which deviates from the original meaning of the Constitution.⁵⁶ Justice Thomas characterized EPA’s interpretation as “a federal police power, exercised in the most aggressive possible way,” and argued that it “renders the use of the term ‘navigable’ a nullity and involves an unprecedented and extravagant reading of the well-understood term of art ‘the waters of the United States.’”⁵⁷

Justice Kavanaugh, joined by Justices Kagan, Sotomayor, and Jackson, wrote an opinion concurring in the judgment.⁵⁸ Although he agreed with the majority’s decision not to adopt the significant nexus test and its conclusion that the wetlands on the Sacketts’ property are not covered by the CWA, Justice Kavanaugh disagreed with the holding that only wetlands with a continuous surface connection are jurisdictional.⁵⁹ Instead, Justice Kavanaugh argued that wetlands are jurisdictional if they are bordering, contiguous, or neighboring to covered waters, even if they are separated from those waters by a natural or artificial barrier.⁶⁰ Justice Kavanaugh criticized the majority’s ruling as “depart[ing] from the statutory text, from 45 years of consistent agency practice, and from this Court’s precedents.”⁶¹

Justice Kavanaugh criticized the majority for narrowing the test to cover only “adjoining” wetlands—those contiguous to or bordering a covered water—as opposed to “adjacent” wetlands, which he defined as including both wetlands contiguous to or bordering a covered water and wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.⁶² According to Justice Kavanaugh, *adjacent* and *adjoining* are commonly understood to have distinct meanings, and Congress’s use of the broader *term* adjacent in the 1977 CWA amendments unambiguously means that the statute does not require wetlands to adjoin (or touch) covered waters.⁶³

Addressing the environmental impacts of the majority’s decision, Justice Kavanaugh warned that the majority’s narrowing of coverage to adjoining wetlands would exclude “long-regulated and long-accepted-to-be-regulable wetlands” and would have significant repercussions for water quality and flood control throughout the United States, such as by excluding wetlands separated

⁵⁴ *Id.* at 1353.

⁵⁵ *Id.* at 1357.

⁵⁶ *Id.* at 1358.

⁵⁷ *Id.* at 1354.

⁵⁸ *Id.* at 1362 (Kavanaugh, J., concurring in the judgment).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1366–1367.

by flood control levees from the Mississippi River and wetlands adjacent to but not adjoining Chesapeake Bay and its covered tributaries.⁶⁴ He also identified several areas in which the majority’s decision would generate regulatory uncertainty.⁶⁵

Justice Kagan wrote a concurring opinion in which Justices Sotomayor and Jackson joined.⁶⁶ Justice Kagan expressed agreement with Justice Kavanaugh and argued that there was no ambiguity or vagueness around the meaning of adjacent in the text of the CWA.⁶⁷ Citing her dissent last term in *West Virginia v. EPA*, she asserted that it was therefore inappropriate for the majority to rely on a “judicially manufactured clear-statement rule” not to deal with statutory vagueness or ambiguity but instead to correct the perceived overbreadth of the CWA.⁶⁸ Justice Kagan argued that this approach amounted to “a thumb on the scale for property owners—no matter that the [CWA] ... is all about stopping property owners from polluting.”⁶⁹

Considerations for Congress

The Court’s ruling in *Sackett* narrows the scope of jurisdiction under the CWA as compared to both its longstanding regulatory implementation and the interpretation adopted by lower courts post-*Rapanos*. The majority’s exclusion of wetlands that are separated from covered waters by natural or artificial barriers means that fewer wetlands will be covered than under any regulatory framework developed by the Corps or EPA since the 1970s. Additionally, while the majority recognized that “temporary interruptions in surface connection” such as from low tides or dry spells would not defeat jurisdiction, it is not clear how temporary such an interruption must be in order to preserve a wetland’s jurisdictional status.⁷⁰ Furthermore, with respect to the bodies of water that are considered “waters” under the CWA, the majority’s ruling covers “only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.” The majority opinion does not explicitly address ephemeral waters, which flow only in response to precipitation, or intermittent waters, which flow continuously during certain times of year (such as when snowpack melts). At a minimum, however, the majority’s interpretation would appear to exclude ephemeral waters.

Neither the 2023 WOTUS Rule nor any prior regulation was presented to the Supreme Court for review in *Sackett*, so the Court’s decision did not automatically affect the status of the 2023 WOTUS Rule. The majority opinion nevertheless rejects jurisdictional interpretations that were reflected in the 2023 WOTUS Rule. On September 8, 2023, the Corps and EPA signed a new final rule amending the regulations defining WOTUS to conform to *Sackett*.⁷¹ Invoking the “good cause” exception to the Administrative Procedure Act’s notice and comment requirements for rulemakings, the agencies found that providing notice and an opportunity for comment on a proposed rule was unnecessary because the rule’s sole purpose was to conform the 2023 WOTUS Rule to *Sackett* and did not involve the exercise of the agencies’ discretion.⁷² The amendments

⁶⁴ *Id.* at 1368.

⁶⁵ *Id.* at 1368–1369.

⁶⁶ *Id.* at 1359 (Kagan, J., concurring in the judgment).

⁶⁷ *Id.* at 1361.

⁶⁸ *Id.* at 1360–1361 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2630 (2022) (Kagan, J., dissenting)).

⁶⁹ *Sackett*, 143 S. Ct. at 1361.

⁷⁰ *Id.* at 1341.

⁷¹ Revised Definition of “Waters of the United States,” 88 Fed. Reg. 61,964 (Sept. 8, 2023).

⁷² *Id.* at 61,964–61,965. For more information, see CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

revise the 2023 rule to remove the significant nexus standard as a basis for jurisdiction and define *adjacent* as “having a continuous surface connection.”⁷³ The amendments also remove certain categories of waters, including interstate wetlands, from federal coverage unless they also fall within one or more of the remaining categories of jurisdictional waters.⁷⁴ The amendments do not define “continuous surface connection,” nor do they address other questions Justice Kavanaugh identified as unresolved by *Sackett*, including how to determine whether a wetland is “indistinguishable” from a covered water; how the test applies to wetlands with temporary interruptions in surface connection due to seasonal variations or to wetlands in areas where storms, floods, and erosion frequently shift or breach natural barriers; and whether ditches, swales, pipes, or culverts can establish a continuous surface connection.⁷⁵

The 2023 WOTUS Rule has been challenged in five lawsuits across three federal district courts. Some courts have issued either preliminary injunctions or injunctions pending appeal that bar implementation of the 2023 WOTUS Rule while litigation is pending.⁷⁶ As of the date of this report, a total of 27 states and six industry associations and their members are covered by the preliminary injunctions and injunction pending appeal.⁷⁷ The Corps and EPA have stated that they will interpret WOTUS “consistent with the pre-2015 regulatory regime and the *Sackett decision*” as to those states and plaintiffs.⁷⁸ Further litigation regarding the recent amendments to the 2023 WOTUS Rule is likely.

The *Sackett* majority’s emphasis on clear statement rules is also indicative of a shift in how the Supreme Court views the relationship between Congress and agencies’ regulatory authority. This is the second consecutive term in which the Supreme Court has curtailed EPA’s regulatory authority by holding that Congress was required to provide clear authorization to EPA and had failed to do so in the relevant statutory text. In *West Virginia v. EPA*, the Court applied the major questions doctrine to hold that, because regulation of greenhouse gas emissions from power plants presented a question of vast economic or political significance and there was not clear evidence of congressional intent to task EPA with balancing the nationwide energy mix, the Clean Air Act did not authorize EPA to issue emission guidelines that were based in part on shifting electricity generation from higher-emitting sources to lower-emitting ones.⁷⁹ Similarly, in *Sackett*, the majority reasoned that because broadening the scope of WOTUS would “alter the balance between federal and state power and the power of the Government over private property,” the Court would require “exceedingly clear language” from Congress in support of EPA’s interpretation.⁸⁰

Congress could address the uncertainty remaining after *Sackett* by providing more specific instruction to the agencies and regulated parties as to the interpretation of the CWA or by proposing legislation to provide a definition of WOTUS. The Supreme Court’s increasing

⁷³ Revised Definition of “Waters of the United States,” 88 Fed. Reg. at 61,966, 61,969.

⁷⁴ *Id.* at 61,966.

⁷⁵ *Sackett v. EPA*, 143 S. Ct. 1322, 1368–1369 (2023) (Kavanaugh, J., concurring).

⁷⁶ Memorandum Opinion and Order Granting Preliminary Injunction, *Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex. Mar. 19, 2023), ECF No. 60; Order Granting Plaintiffs’ Motion for Preliminary Injunction, *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Apr. 12, 2023), ECF No. 131; Order, *Kentucky v. EPA*, No. 23-5343 (6th Cir. May 10, 2023), ECF No. 24.

⁷⁷ EPA, Definition of “Waters of the United States”: Rule Status and Litigation Update (last updated Aug. 29, 2023), <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

⁷⁸ *Id.*

⁷⁹ 142 S. Ct. 2587 (2022).

⁸⁰ *Sackett*, 143 S. Ct. at 1341. The Court also invoked the major questions doctrine in striking down President Biden’s student loan forgiveness program. *See infra* “Biden v. Nebraska: Student Loan Cancellation.”

insistence on clear congressional intent to delegate regulatory authority, and its decreasing reliance on or reference to more deferential modes of judicial review, suggest that any regulatory actions taken pursuant to such legislation would be subject to close judicial scrutiny.

***Biden v. Nebraska*: Student Loan Cancellation**⁸¹

On the last day of the term, the Supreme Court handed down a second significant decision interpreting an agency’s authority under a federal statute. *Biden v. Nebraska*⁸² determined the fate of a policy designed to pursue a Biden Administration policy priority, federal student loan cancellation. The Court first ruled that the State of Missouri had Article III standing to challenge Secretary of Education Miguel Cardona’s planned use of the Higher Education Relief Opportunities for Students (HEROES) Act of 2003 to cancel all or part of the federal student loan balances of up to 40 million borrowers.⁸³ Then, turning to the merits of Missouri’s claims, the Court ruled that this cancellation policy exceeded Secretary Cardona’s HEROES Act authority.⁸⁴

Beyond forestalling loan cancellation under the HEROES Act, *Nebraska* could shape the Department of Education’s (ED’s) future management of the \$1.64 trillion federal student loan portfolio.⁸⁵ The Biden Administration is exploring whether to cancel loans balances under different statutory authority. *Nebraska* could bear on the scope of that other authority, as well as the ability of third parties to show injury sufficient to challenge a new cancellation rule. *Nebraska* could also shape ED’s use of the HEROES Act in future national emergencies. The decision also provides another example of an issue of major political and economic significance that is subject to the major questions doctrine, a rule of statutory interpretation that the Court named for the first time in its previous term.

Background

In August 2022, Secretary Cardona announced two related actions affecting federal student loans.⁸⁶ The Secretary first stated that on December 31, 2022, the pause on monthly loan payments, interest accrual, and involuntary collections would end.⁸⁷ This payment pause had been in place since March 2020, and after September 2020 was effectuated through successive uses of the HEROES Act.⁸⁸ The statute authorizes the Secretary to pursue certain objectives by waiving or modifying “any statutory or regulatory provision applicable to” federal student loan programs

⁸¹ Sean M. Stiff, CRS Legislative Attorney, authored this section of the report.

⁸² 143 S. Ct. 2355 (2023).

⁸³ *Id.* at 2368. On the same day, the Court ruled that two borrowers lacked Article III standing to set aside the cancellation policy on certain procedural grounds. *See Dep’t of Educ. v. Brown*, 143 S. Ct. 2343, 2355 (2023). For discussion of the arguments presented in both cases, see CRS Report R47505, *Student Loan Cancellation Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff.

⁸⁴ *Nebraska*, 143 S. Ct. at 2371, 2375–76.

⁸⁵ U.S. Dep’t of Educ., *Federal Student Aid Portfolio Summary*, Fed. Student Aid, <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls> (last accessed Sept. 11, 2023).

⁸⁶ Memorandum from Miguel Cardona, Jr., Secretary of Education, to Richard Cordray, Chief Operating Officer of Federal Student Aid 1 (Aug. 24, 2022) [hereinafter Cardona Memo] (filed as Exhibit B to Decl. of James Richard Kvaal, *Nebraska v. Biden*, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

⁸⁷ *See* Cardona Memo, *supra* note 86, at 1.

⁸⁸ *See id.* Between March 27, 2020 and September 30, 2020, the Coronavirus Aid, Relief, and Economic Security Act instituted a payment pause. *See* Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404 (2020).

under the Higher Education Act of 1965 (HEA) as necessary “in connection with a war or other military operation or national emergency.”⁸⁹

This first action would thus return borrowers to repayment. ED found that a subset of borrowers could fall into delinquency or default, at rates higher than before the pandemic.⁹⁰ To avoid this consequence of a return to repayment, Secretary Cardona also announced the cancellation policy, an initiative to cancel certain federal student loan balances.⁹¹ If all borrowers eligible under the policy applied, ED estimated that up to 43 million would have received cancellation.⁹² Up to 20 million of those would have no balances remaining after cancellation.⁹³ The policy could have canceled up to \$430 billion in loan balances.⁹⁴

The Secretary announced two primary eligibility rules for the policy,⁹⁵ which were later detailed in an October 2022 *Federal Register* notice.⁹⁶ First, borrowers with an adjusted gross income (AGI) in tax years 2020 or 2021 of less than \$125,000 (for those filing individually) or less than \$250,000 (for those filing in other statuses) would be eligible.⁹⁷ Second, cancellation would apply only to certain federal student loans, chiefly those made under the Federal Direct Loan Program, if disbursed before June 30, 2022.⁹⁸ ED would then use a third criterion to determine the cancellation benefit for those eligible. All eligible borrowers would have received up to \$10,000 in cancellation.⁹⁹ Prior federal Pell Grant recipients would have received up to \$20,000 in cancellation.¹⁰⁰

Along with five other states, Missouri sued in September 2022, claiming that the cancellation policy exceeded the Secretary’s HEROES Act authority.¹⁰¹ Among other theories, Missouri argued it had Article III standing based on a theory of loan servicer injury.¹⁰² ED contracts with several loan servicers to administer the millions of borrower accounts associated the federal

⁸⁹ 20 U.S.C. § 1098bb(a)(1).

⁹⁰ Cardona Memo, *supra* note 86, at 1.

⁹¹ *Id.*

⁹² Attachment 1 to Memorandum from James Richard Kvaal, Under Secretary of Education, to Miguel A. Cardona, Secretary of Education, on the Rationale for Pandemic-Connected Loan Cancellation Program 5 (Aug. 24, 2022) [hereinafter Supporting Analysis] (filed as Exhibit A to Decl. of James Richard Kvaal, *Nebraska v. Biden*, No. 4:22-cv-01040 (E.D. Mo. filed Oct. 7, 2022)).

⁹³ *Id.*

⁹⁴ Letter from Phillip L. Swagel, Director, Congressional Budget Office, to Richard Burr, Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, and Virginia Foxx, Ranking Member, Committee on Education and Labor, U.S. House of Representatives at 3 (Sept. 26, 2022), <https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf> (last visited Sept. 11, 2023).

⁹⁵ Cardona Memo, *supra* note 86, at 1.

⁹⁶ Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512 (Oct. 12, 2022).

⁹⁷ *Id.* at 61,514. The \$250,000 threshold would have applied to those filing a joint return, as Head of Household, or as a qualifying widow(er). *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Compl., *Nebraska v. Biden*, No. 4:22-cv-01040 (E.D. Mo. Sept. 29, 2022).

¹⁰² Br. of Resp’ts at 16–20, *Biden v. Nebraska*, No. 22-506 (U.S. Jan. 27, 2023) [hereinafter State Pls.’ Br.].

student loans that it holds.¹⁰³ ED pays its servicers based on, among other factors, the accounts allocated to a servicer.¹⁰⁴

Missouri contended that if all eligible borrowers applied for cancellation, the Higher Education Loan Authority of the State of Missouri (MOHELA), an ED loan servicer, could lose “at least half of” the accounts allocated to it. MOHELA’s total operating revenue could then decline by “nearly 40 percent.”¹⁰⁵ MOHELA is a public corporation, chartered by the Missouri General Assembly.¹⁰⁶ Though MOHELA did not join the state in suing, the state argued that, as a legal matter, harms that MOHELA suffered were shared by the state and thus the state could sue because of those injuries.¹⁰⁷

After a federal district court dismissed Missouri’s complaint for lack of standing in October 2022,¹⁰⁸ the U.S. Court of Appeals for the Eighth Circuit enjoined the cancellation policy pending the states’ appeal of that decision.¹⁰⁹ In December 2022, the Supreme Court granted certiorari before judgment to consider the Article III standing and merits questions raised by the suit.¹¹⁰

The Supreme Court’s Opinion

In a 6-3 decision, the Supreme Court vacated the district court’s judgment of dismissal, holding that Missouri had standing and that the HEROES Act did not authorize the cancellation policy.¹¹¹

Chief Justice Roberts’s majority opinion began by considering whether Missouri had standing to challenge the cancellation policy.¹¹² Chief Justice Roberts first identified the financial harm that MOHELA would suffer under the policy: lost servicer revenue resulting from borrower account closures.¹¹³ Next, the Chief Justice concluded that MOHELA’s threatened financial loss would harm Missouri as well.¹¹⁴ The state created MOHELA to further the public function of helping state residents finance a postsecondary education.¹¹⁵ The state also exercises control over MOHELA by, for example, appointing or removing board members.¹¹⁶ While MOHELA is a corporation separate from the state and can sue in its own name, the Court explained that the same had been true in a prior case where it allowed a state to sue on behalf of a public

¹⁰³ See, e.g., 20 U.S.C. § 1087f(b)(2) (authorizing the Secretary to enter into contracts for “the servicing and collection of loans made or purchased under” the FDLP program).

¹⁰⁴ See, e.g., U.S. Dep’t of Educ., Contract No. ED-FSA-11-D-0012 with MOHELA 15 (2011) (describing account allocation) (filed as Exh. B to Decl. of Michael E. Talent, *Nebraska v. Biden*, No. 4:22-cv-01040 (E.D. Mo. filed Sept. 29, 2022)).

¹⁰⁵ State Pls.’ Br., *supra* note 102, at 16.

¹⁰⁶ See, e.g., MO. REV. STAT. § 173.360.

¹⁰⁷ See State Pls.’ Br., *supra* note 102, at 16–20.

¹⁰⁸ *Nebraska v. Biden*, No. 4:22-cv-1040, 2022 WL 11728905, at *7 (E.D. Mo. Oct. 20, 2022).

¹⁰⁹ *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022).

¹¹⁰ Dkt. Entry, *Biden v. Nebraska*, No. 22-506 (U.S. Dec. 1, 2022). Certiorari before judgment is a rarely-used process that allows the Supreme Court to hear a case before a court of appeals has issued a final judgment. 28 U.S.C. § 2101(e).

¹¹¹ *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023).

¹¹² *Id.* at 2365.

¹¹³ *Id.* at 2365–2366.

¹¹⁴ *Id.* at 2366.

¹¹⁵ *Id.* (explaining that MOHELA’s “profits help fund education in Missouri: MOHELA has provided \$230 million for development projects at Missouri colleges and universities and almost \$300 million in grants and scholarships for Missouri students”).

¹¹⁶ *Id.*

corporation.¹¹⁷ As the Court summarized its conclusion, when “a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself.”¹¹⁸

The Court then turned to the merits.¹¹⁹ The HEROES Act authorizes the Secretary to “waive or modify” statutory or regulatory provisions applicable to HEA student loan programs to assist “affected individuals,” a category that includes those who reside or are employed in a declared disaster area in connection with a national emergency.¹²⁰ All states, permanently inhabited territories, and the District of Columbia had major-disaster declarations stemming from COVID-19, which President Trump also designated a national emergency.¹²¹ For affected individuals, the Secretary may waive or modify statutory or regulatory provisions to ensure they “are not placed in a worse position financially in relation to” their federal student loans “because of their status as affected individuals.”¹²² The October 2022 *Federal Register* notice described the cancellation policy as a “modifi[cation]” of existing HEA provisions and regulations dealing with loan discharges upon a borrower’s death or disability, upon an institution of higher education’s (IHE’s) closure, or in connection with certain false certifications by an IHE.¹²³

The Court explained that the “authority to ‘modify’ statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.”¹²⁴ The Secretary’s action, though, would not reflect such “modest adjustments” to existing discharge provisions.¹²⁵ By purporting to modify “narrowly delineated” existing discharge provisions, the Court wrote, the Secretary had extended cancellation to “nearly every borrower in the country.”¹²⁶ Because the policy was not properly a “modification” of existing statutory or regulatory provisions, it could not be justified under the HEROES Act on that basis.¹²⁷

The Court also held that the policy could not be justified as a “waive[r]” of statutory or regulatory provisions.¹²⁸ A waiver in the HEROES Act sense, the Court explained, makes “compliance” with “a particular legal requirement” “no longer necessary.”¹²⁹ The cancellation policy could not have been crafted through waivers alone, though, because no “specific provision” in the HEA “establishes an obligation on the part of student borrowers to pay back the Government.”¹³⁰ As compared to the existing discharge authorities cited in the *Federal Register* notice, the policy included new features—“particular sums to be forgiven and income-based eligibility

¹¹⁷ *Id.* at 2366–67 (discussing *Arkansas v. Texas*, 346 U.S. 368 (1953)).

¹¹⁸ *Id.* at 2368.

¹¹⁹ *Id.*

¹²⁰ 20 U.S.C. §§ 1098bb(a)(2)(A), 1098ee(2)(C).

¹²¹ *See* Liu and Stiff, *supra* note 83, at 42–43.

¹²² 20 U.S.C. § 1098bb(a)(2)(A).

¹²³ Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (citing purportedly modified statutory and regulatory provisions).

¹²⁴ *Nebraska v. Biden*, 143 S. Ct. 2355, 2369 (2023).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 2369–2370.

¹²⁸ *Id.* at 2370.

¹²⁹ *Id.*

¹³⁰ *Id.*

requirements”—that could not “be said to be a ‘waiver’” of the existing requirements “in any meaningful sense.”¹³¹

Even “when examined using the ordinary tools of statutory interpretation,” the Court wrote, the policy could not be justified under the HEROES Act.¹³² In addition, though, the Court determined that the policy warranted scrutiny under the Court’s *major questions doctrine*.¹³³

Under the major questions doctrine, the Court has explained that for an agency to regulate on an issue of major significance, it must have “clear” congressional authorization for its action.¹³⁴ The cancellation policy, in the Court’s view, would resolve an issue with “staggering” economic and political significance, and the Secretary had not “previously claimed powers of this magnitude under the HEROES Act.”¹³⁵ Given the policy’s stakes, the Court reasoned that Congress would likely have reserved “for itself” the decision of whether to establish a “mass debt cancellation program,” not delegated that decision to the Secretary.¹³⁶ Because the major questions doctrine applied, the Secretary had to “point to ‘clear congressional authorization’” for the cancellation policy.¹³⁷ The HEROES Act did not provide sufficiently clear authority, the Court concluded, pointing to its interpretation of the statute’s key verbs earlier in the decision.¹³⁸

Dissenting and Concurring Opinions

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented, disagreeing with the majority’s standing and merits analysis.¹³⁹ Justice Kagan did not dispute that the policy likely would cause MOHELA to lose revenue, but she wrote that this harm could not be the basis of a suit by the state.¹⁴⁰ MOHELA is separate from the state, Justice Kagan noted, with the ability to sue in its own name.¹⁴¹ Justice Kagan thus would have held that Missouri could not rely on the legal rights of MOHELA, a third party, to bring suit.¹⁴²

On the merits, Justice Kagan viewed the HEROES Act’s phrase “waive or modify” as allowing the Secretary to “amend, all the way up to discarding, those provisions” pertaining to existing loan discharge programs “and fill the holes that action creates with new terms designed to counteract an emergency’s effects on borrowers.”¹⁴³ Justice Kagan disagreed with the majority’s reliance on the major questions doctrine. She contended that the majority’s approach “prevents Congress from doing its policy-making job in the way that it thinks best,” which may be through

¹³¹ *Id.*

¹³² *Id.* at 2375.

¹³³ *Id.* at 2372.

¹³⁴ See CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers.

¹³⁵ *Nebraska*, 143 S. Ct. at 2372-73 (internal quotation marks omitted).

¹³⁶ *Id.* at 2375 (internal quotation marks omitted).

¹³⁷ *Id.* (quoting *W. Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)).

¹³⁸ *Id.* (“[A]s we have already shown, the HEROES Act provides no authorization for the Secretary’s plan even when examined using the ordinary tools of statutory interpretation—let alone clear congressional authorization for such a program.” (internal quotation marks omitted)).

¹³⁹ *Id.* at 2384 (Kagan, J., dissenting).

¹⁴⁰ *Cf. id.* at 2386 (explaining that Missouri’s standing theory “points to MOHELA as the proper plaintiff”).

¹⁴¹ *Id.* at 2387 (describing structural and financial structure separation between Missouri and MOHELA).

¹⁴² *Id.* at 2388.

¹⁴³ *Id.* at 2392–2393 (Kagan, J., dissenting).

broadly worded delegations.¹⁴⁴ Justice Kagan also argued that on its own terms, the major questions doctrine did not apply to the Secretary’s actions because those actions lacked the hallmarks of actions reviewed under the doctrine in prior cases.¹⁴⁵

Justice Kagan has previously described the major questions doctrine as inconsistent with textualism.¹⁴⁶ She reiterated this critique in her *Nebraska* dissent.¹⁴⁷ Justice Barrett, in turn, wrote a separate concurrence to respond to this critique.¹⁴⁸ Textualists argue that “courts should read” words “statutory text as any ordinary Member of Congress would have read them,” within the context of a broader body of law.¹⁴⁹

According to Justice Barrett, some view the major questions doctrine as “inconsistent with textualism” because it may yield results that seem inconsistent with a textual analysis.¹⁵⁰ According to these critics, traditional tools of statutory interpretation might yield two plausible readings of a statute, one “better” than the other.¹⁵¹ When the major questions doctrine is then applied, the critics say, the “better” reading under a textual analysis “will not necessarily prevail” if it leads to a “disfavored result.”¹⁵² The “disfavored result[s]” that the major questions doctrine seeks to avoid include reading a statute to contain a “significant” delegation of rule-making authority absent “unequivocal[.]” language supporting the delegation.¹⁵³

For Justice Barrett, though, this view misunderstands the Court’s cases.¹⁵⁴ Rather than disfavor broad delegations to agencies, Justice Barrett wrote, the Court’s major questions doctrine “situates” statutory “text in context, which is how textualists” approach interpretation.¹⁵⁵ The relevant context that the doctrine emphasizes is the “Constitution’s structure.”¹⁵⁶ Under that structure, “all legislative Powers” are vested in Congress.¹⁵⁷ A “reasonable interpreter” would therefore expect Congress “to make the big-time policy calls itself, rather than pawning them off to another branch.”¹⁵⁸ When the Court applies the major questions doctrine as means of

¹⁴⁴ *Id.* at 2397 (contending that the doctrine requires Congress to “delegate in highly specific terms”). In prior cases, Justice Kagan made similar arguments about the major questions doctrine’s effects on lawmaking. *See* *W. Virginia v. EPA*, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting) (arguing that “Congress knows about how government works in ways courts don’t” and that in some cases Congress determines that the making of “good policy” necessitates broad delegations to agencies).

¹⁴⁵ *See Nebraska*, 143 S. Ct. at 2398–2399 (arguing that the Secretary’s action made use of a “recently enacted,” rather than “long extant,” statute, did not stray outside the ED’s “particular domain,” and had been preceded by the payment pause, itself a broad use of HEROES Act authority (internal quotation marks omitted)).

¹⁴⁶ *W. Virginia*, 142 S. Ct. at 2641 (“The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”) (Kagan, J., dissenting).

¹⁴⁷ *Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) (“The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation.”).

¹⁴⁸ *Id.* at 2376 (Barrett, J., concurring). Though she wrote a separate concurrence, Justice Barrett joined the majority opinion “in full.” *Id.*

¹⁴⁹ CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, at 14 (internal quotation marks omitted).

¹⁵⁰ *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

¹⁵¹ *See id.* at 2377.

¹⁵² *Id.*

¹⁵³ *Id.* at 2378.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2380.

¹⁵⁷ *Id.* (quoting U.S. CONST. art. I, § 1).

¹⁵⁸ *Id.*

incorporating this context into statutory interpretation, Justice Barrett argued that the Court does not choose an “inferior-but-tenable” reading of a statute to protect a “judicially specified value” and avoid a disfavored result.¹⁵⁹ Rather, the Court adopts the reading of the statute that is “most plausible,” considering context (i.e., constitutional structure) “that would be important to a reasonable observer.”¹⁶⁰

Considerations for Congress

Though ED announced the cancellation policy in August 2022, lower court orders prevented ED from cancelling any federal student loan balances while the *Nebraska* litigation proceeded.¹⁶¹ The Court’s subsequent decision in *Nebraska* ensured that no balances would be canceled under the policy.¹⁶² ED is no longer pursuing cancellation under the HEROES Act.

Hours after the Court’s decision, President Biden announced a “new approach” to providing “student debt relief to as many borrowers as possible as quickly as possible.”¹⁶³ This new approach will be “ground[ed]” in provisions of the Higher Education Act of 1965 (HEA) rather than in the HEROES Act.¹⁶⁴ Section 432 of the HEA states that, with respect to Federal Family Education Loan Program loans,¹⁶⁵ the Secretary may “enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.”¹⁶⁶

ED is exploring a new cancellation effort through *negotiated rulemaking*, which governs “all regulations pertaining to” Title IV of the HEA, the authority for the primary federal student loan programs.¹⁶⁷ ED has completed the first steps in that process, soliciting written comment and holding a virtual public hearing to “obtain public involvement in the development of proposed regulations.”¹⁶⁸ ED has solicited nominations for *negotiators* “who represent the communities of interest that would be significantly affected by the proposed regulations.”¹⁶⁹ ED plans to select negotiated rulemaking committee members from these nominations and work with them to

¹⁵⁹ *Id.* at 2381, 2383.

¹⁶⁰ *Id.* at 2383.

¹⁶¹ Liu and Stiff, *supra* note 83, at 16–19.

¹⁶² *Nebraska*, 143 S. Ct. at 2375.

¹⁶³ President Joseph R. Biden, Remarks on the United States Supreme Court Decision on the Federal Student Loan Debt Relief Program and an Exchange With Reporters, DCPD202300589, at 2–3.

¹⁶⁴ *Id.*

¹⁶⁵ Liu and Stiff, *supra* note 83, at 3–5 (describing the Federal Family Education Loan Program). The large majority of the federal government’s student loan portfolio, measured in terms of balances owing, originated under the Federal Direct Loan Program (FDLP). *See id.* at 5. Loans made under the FDLP generally have the “same terms, conditions, and benefits” as Federal Family Education Loan Program (FFELP) loans. 20 U.S.C. § 1087e(a)(1). In other litigation, the federal government has argued that the Secretary’s Section 432 authority is “naturally construed” as either a loan term or condition of a loan, and thus available for FDLP as well as FFELP loans. *See Fed. Resp’ts’ Oppo. to the Appl. to Stay the J. Entered by the U.S. Dist. Ct. for the N. Dist. of Cal. at 29, Everglades College, Inc. v. Cardona*, No. 22A867 (U.S. Apr. 12, 2023).

¹⁶⁶ 20 U.S.C. § 1082(a)(6).

¹⁶⁷ *Id.* § 1098a(b)(2); *see also* CRS Report R46756, *Negotiated Rulemaking: In Brief*, by Maeve P. Carey.

¹⁶⁸ 20 U.S.C. § 1098a(a)(1); *see also* Negotiated Rulemaking Committee; Public Hearing, 88 Fed. Reg. 43,069, 43,069 (2023).

¹⁶⁹ 88 Fed. Reg. at 43,069; *see also* Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings, 88 Fed. Reg. 60,163 (2023).

propose regulations.¹⁷⁰ Proposed regulations could then be submitted for notice-and-comment rulemaking under the Administrative Procedure Act.¹⁷¹

The Court's decision in *Nebraska* could bear on whether a party could establish standing to challenge a new cancellation rule adopted under Section 432. If a new rule could result in enough borrower accounts closing to impose a revenue loss on a servicer, that threatened financial injury could support standing as it did in *Nebraska*.

Nebraska may also shed light on whether, as a substantive matter, Section 432 would authorize a new cancellation rule. The majority described its analysis as primarily an application of “the ordinary tools of statutory interpretation” to the HEROES Act’s operative verbs and their objects.¹⁷² For example, the Secretary could not cancel loan balances using a HEROES Act waiver alone because such waivers operate as to “statutory or regulatory requirements,”¹⁷³ and no “specific provision” of the HEA created “an obligation on the part of student borrowers to pay back the Government.”¹⁷⁴ Section 432, by contrast, uses different relevant verbs and objects. Section 432 permits waiver (or compromise or release) of “right[s]” the United States has acquired under certain federal student loans.¹⁷⁵ A textual analysis of Section 432 could thus lead to a different result than the Court’s analysis of the HEROES Act.

The Court’s opinion also shows a broad-based loan cancellation rule could be subject to major questions scrutiny. Such a new rule could address an issue, federal student loan cancellation, that the Court has already identified to have political significance.¹⁷⁶ A new rule could also have economic significance on the order of prior agency actions scrutinized under the doctrine.¹⁷⁷ In deciding to apply the major questions doctrine, the Court in *Nebraska* also compared past uses of the HEROES Act to the cancellation policy, concluding that the Secretary “never previously claimed powers of this magnitude” under the statute.¹⁷⁸ Unlike the Secretary’s prior HEROES Act uses, ED claims that in recent years it has used Section 432 to provide group-based discharges, some of which discharged (or will discharge) substantial aggregate amounts.¹⁷⁹

Outside the Section 432 context, the Court’s decision will likely guide future uses of HEROES Act authority. Under the Court’s interpretation, ED may, in connection with a war or other military operation or national emergency, use the HEROES Act to excuse (i.e., “waive”) compliance with particular legal requirements that apply to Title IV programs to pursue authorized ends.¹⁸⁰ ED may also modestly adjust (i.e., “modify”) such Title IV-relevant

¹⁷⁰ 88 Fed. Reg. at 43,069; *see also* 88 Fed. Reg. at 60,164 (scheduling committee sessions starting in October 2023).

¹⁷¹ *See* 5 U.S.C. § 553.

¹⁷² *Nebraska v. Biden*, 143 S. Ct. 2355, 2375 (2023).

¹⁷³ 20 U.S.C. § 1098bb(a)(1).

¹⁷⁴ *Nebraska*, 143 S. Ct. at 2370.

¹⁷⁵ 20 U.S.C. § 1082(a)(6).

¹⁷⁶ *Nebraska*, 143 S. Ct. at 2373 (“Congress is not unaware of the challenges facing student borrowers.”).

¹⁷⁷ *See id.* at 2373 (noting that prior to *Nebraska* the Court had applied major questions scrutiny to agency actions with economic significance one-tenth as much as the cancellation policy).

¹⁷⁸ *Id.* at 2372.

¹⁷⁹ *See* Liu and Stiff, *supra* note 83, at 35 (describing prior claimed uses of Section 432 authority). The largest of these group-based discharges, the product of a settlement agreement in the case captioned *Sweet v. Cardona*, is ongoing. *See* U.S. DEP’T OF EDUC., FIRST QUARTERLY REPORT UNDER SETTLEMENT AGREEMENT IN SWEET ET AL. V. CARDONA (2023) (reflecting settlement administration as of May 30, 2023).

¹⁸⁰ *Nebraska*, 143 S. Ct. at 2370.

provisions.¹⁸¹ Broader authority than that—such as the authority that Justice Kagan’s opinion would have found¹⁸²—would require statutory amendment.

Finally, the Court’s decision underscores the continued relevance of the major questions doctrine for Congress and agencies alike. The federal government urged a relatively limited application of the doctrine. It argued that the doctrine had applied before only to “assertions of regulatory authority” and not also to exercises of authority “over a government benefit program to provide additional relief to beneficiaries.”¹⁸³ The Court rejected this distinction, endorsing a relatively broader scope. Chief Justice Roberts wrote that it “would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations.”¹⁸⁴ Thus, if Congress intends to broadly delegate decisionmaking authority to an agency on an issue with major economic and political significance—including for a benefits program—Congress might wish to factor potential major questions scrutiny into the terms of its delegation.

Students for Fair Admissions Inc. v. President & Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina: Race-Based Affirmative Action in Higher Education¹⁸⁵

In addition to deciding questions of statutory interpretation in *Sackett* and *Nebraska*, the Supreme Court’s term also featured important questions of constitutional law. Among those constitutional issues, the Court’s consideration of race-based affirmative action is particularly notable.

On June 29, 2023, the Court issued a decision¹⁸⁶ upending precedent¹⁸⁷ that had previously permitted limited consideration of race in higher education admissions. In an opinion deciding a pair of cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*¹⁸⁸ and *Students for Fair Admissions, Inc. v. University of North Carolina*,¹⁸⁹ the Court held that the schools’ use of race in admissions violated the Constitution’s equal protection principles.¹⁹⁰ Many commentators had been expecting this outcome.¹⁹¹ The case will constrain race-based affirmative action in higher education admissions at private and public colleges and universities.

¹⁸¹ *Id.* at 2369.

¹⁸² See *supra* note 143 and accompanying text.

¹⁸³ Br. of Pet’rs at 48, *Biden v. Nebraska*, No. 22-506, and Dep’t of Educ. v. Brown, No. 22-535 (U.S. Jan. 4, 2023) (internal quotation marks omitted).

¹⁸⁴ *Nebraska*, 143 S. Ct. at 2375 (referring to *King v. Burwell*, 576 U.S. 473 (2015), as an example of the Court applying the major-questions-type considerations to a statute that “involved government benefits”).

¹⁸⁵ April J. Anderson, CRS Legislative Attorney, authored this section of the report.

¹⁸⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

¹⁸⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁸⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *rev’d*, 143 S. Ct. 2141 (2023).

¹⁸⁹ *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022), *and rev’d* 142 S. Ct. 896 (2022).

¹⁹⁰ *Students for Fair Admissions*, 143 S. Ct. at 2141.

¹⁹¹ See Mark J. Drozdowski, *Supreme Court Separates Harvard, UNC-Chapel Hill Affirmative Action Cases*, BEST (continued...)

Background

The two *Students for Fair Admissions* cases build on a long history of affirmative action cases. After failing to identify a precedential rule in its splintered 1978 decision in *University of California Regents v. Bakke*,¹⁹² the Supreme Court in the 2003 case of *Grutter v. Bollinger* held that the Fourteenth Amendment’s Equal Protection Clause allows limited consideration of race in higher education admissions.¹⁹³ In general, equal protection requires that government entities—including state-run universities—avoid distributing benefits or burdens based on race, unless those classifications meet a high bar.¹⁹⁴ To justify race-based action, the government must identify a compelling government interest and show that its policy is narrowly tailored to pursue that interest.¹⁹⁵ This test is known as “strict scrutiny.”¹⁹⁶ Judges and commentators regularly observe that government classifications using race most often fail strict scrutiny and are held unconstitutional.¹⁹⁷

In *Grutter*, the Court held that colleges and universities can have a compelling interest in building student body diversity, justifying some use of race in higher-education admissions, at least as a plus factor in a holistic consideration of applicants.¹⁹⁸ To justify the use of race, however, a university must first establish its interest in diversity and, second, show its policies consider race no more than needed.¹⁹⁹

The *Grutter* Court allowed schools to seek “the educational benefits that flow from a diverse student body” and to “enroll a ‘critical mass’ of [underrepresented] minority students” so that those students felt “encourage[d] ... to participate in the classroom.”²⁰⁰

The Court in *Grutter* also held that a school’s race-based admissions preference can be narrowly tailored when it does not use numerical targets or a quota system.²⁰¹ Rather, the Court required schools to use an admissions plan “flexible enough to ensure that each applicant is evaluated as an individual.”²⁰² In a companion case, *Gratz v. Bollinger*, the Court rejected a state university admissions program that “automatically” awarded admissions points to minority applicants.²⁰³

COLLEGES (Aug. 1, 2022), <https://www.bestcolleges.com/news/analysis/supreme-court-separates-harvard-unc-affirmative-action-cases/>; Michael Burke, *Supreme Court Conservative Majority Signals Opposition to Affirmative Action*, EDSOURCE (Oct. 31, 2022), <https://edsources.org/2022/supreme-court-conservative-majority-signals-opposition-to-affirmative-action/680730>.

¹⁹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁹³ *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

¹⁹⁴ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹⁹⁵ *Grutter*, 539 U.S. at 326.

¹⁹⁶ U.S. CONST. amend. 14 § 1.8.4.2.

¹⁹⁷ See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Margaret A. Sewell, Note, *Adarand Constructors, Inc. v. Peña: The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611, 620 (1997). In the *Students for Fair Admissions* cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157, (1st Cir. 2020); *Students for Fair Admissions, Inc. v. University of North Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021) and in the Court’s prior affirmative action precedent, *Grutter*, 539 U.S. at 306, the parties did not dispute that they engaged in race-based decisionmaking. This report therefore does not address the legal meaning of race or when a classification is based on race.

¹⁹⁸ *Id.* at 340–34.

¹⁹⁹ CRS Report R45481, “Affirmative Action” and Equal Protection in Higher Education, by Christine J. Back, at 32; *Grutter*, 539 U.S. at 334.

²⁰⁰ *Grutter*, 539 U.S. at 318, 328–29 (cleaned up).

²⁰¹ *Id.* at 330.

²⁰² *Id.* at 337.

²⁰³ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

The Court also assumed that schools would continue to pursue race-neutral options and contemplated that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²⁰⁴ The Court never extended the diversity justification to other contexts, such as employment or secondary school zoning.²⁰⁵

The Supreme Court later returned to the issue of affirmative action in higher education and addressed these standards further, in two cases both named *Fisher v. University of Texas*.²⁰⁶ In *Fisher I*, decided in 2013, the Court required universities to describe concretely the diversity-related educational goals their policies serve.²⁰⁷ In *Fisher II*, decided in 2016, the Court upheld the University of Texas’s race-conscious admissions policy against the challenger’s arguments that the university must instead, as a race-neutral alternative, expand its policy of admitting the top ten percent of students from the state’s high schools.²⁰⁸ The Court stated that the ten-percent plan did not meet the university’s diversity goal and would require the university to give up other admissions criteria.²⁰⁹

While *Grutter* and the *Fisher* cases considered constitutional constraints on public institutions, the same rules apply to private schools (like Harvard) that accept federal funds, as they are bound by the antidiscrimination requirements of Title VI of the Civil Rights Act of 1964.²¹⁰ Thus far, the Court has held that Title VI and the Constitution’s equal protection guarantees impose the same standards.²¹¹

The Supreme Court’s Opinion

Students for Fair Admissions (SFFA), petitioner in both cases decided this term, includes university applicants who allege that they were denied admission to the University of North Carolina (UNC) or Harvard because of their race.²¹² The Court issued one majority opinion in both cases.²¹³ Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, concluded that the two schools’ affirmative action admissions policies, in seeking student-body diversity, “lack sufficiently focused and measurable objectives warranting the use of race,” among other things.²¹⁴ Citing *Grutter*’s requirement that race-based decisions must “end” at “some point,” the Court held that the admissions policies violated equal protection.²¹⁵

A “Color-Blind” Interpretation of the Fourteenth Amendment and *Brown v. Board of Education*

Although the Court majority in the *Students for Fair Admissions* cases acknowledged that strict scrutiny affords the government a narrow pathway to make race-based decisions, it held that

²⁰⁴ *Grutter*, 539 U.S. at 343.

²⁰⁵ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007).

²⁰⁶ *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013); *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365 (2016).

²⁰⁷ *Fisher I*, 570 U.S. at 310.

²⁰⁸ *Fisher II*, 579 U.S. at 365.

²⁰⁹ *Id.* at 385.

²¹⁰ *Grutter*, 539 U.S. at 306; *Fisher I*, 570 U.S. at 297; *Fisher II*, 579 U.S. at 365; 42 U.S.C. 2000d.

²¹¹ *Grutter*, 539 U.S. at 343.

²¹² *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023).

²¹³ *Id.* at 2154.

²¹⁴ *Id.* at 2175.

²¹⁵ *Id.* at 2165.

pathway must comport with a “color-blind” approach to equal protection jurisprudence.²¹⁶ In other words, the majority reasoned that the Constitution required it to apply the same level of scrutiny to classifications that purport to benefit racial minorities as it applies to classifications seeking to harm them—all racial classifications are equally suspect. The Court pointed to lawmakers’ statements from around the time of passage of the Fourteenth Amendment describing “absolute equality of all citizens” and the law’s application “without regard to color.”²¹⁷ The Court also cited the United States’ brief in *Brown v. Board of Education*, the case ending public school segregation, which argued that the Constitution “should not permit any distinctions of law based on race or color.”²¹⁸ In the Court’s view, *Brown* requires that public education “be made available to all on equal terms,” and the Fourteenth Amendment means that a state cannot “use race as a factor in affording educational opportunities among its citizens.”²¹⁹ “Eliminating racial discrimination,” the Court stated, “means eliminating all of it.”²²⁰

Measurable Objectives, Race as a Disadvantage, and Time Limits

The Court observed that *Grutter* “expressed marked discomfort with the use of race in college admissions,” characterizing racial classifications as “dangerous.”²²¹ As a result, the *Grutter* Court deemed permissible race-based government action “subject to continuing oversight.”²²² In *Students for Fair Admissions*, the Court concluded that the schools’ admissions programs utilizing race did not survive that oversight for three primary reasons: the schools’ plans (1) lacked measurable objectives; (2) used race to disadvantage and to stereotype students; and (3) had no end date or other goal to mark a stopping point.²²³

To begin with, the Court stated that it could not “license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.”²²⁴ The Court found Harvard’s and UNC’s diversity goals lacking—too “amorphous” and not “sufficiently measurable” to allow meaningful judicial review.²²⁵ The schools argued that they aimed to promote diverse viewpoints, prepare productive citizens and leaders, and foster cross-racial understanding.²²⁶ The Court concluded that courts cannot measure these “elusive” and “standardless,” if “worthy,” goals.²²⁷ In the Supreme Court’s view, even if courts could quantify these objectives, they could not declare them accomplished with sufficient certainty to know when affirmative action should end.²²⁸ Student-body racial diversity is hard to measure even in demographic terms, the majority concluded, because the schools omit some categories (such as Middle Easterners) and lump others together (including South Asians and East

²¹⁶ *Students for Fair Admissions*, 143 S. Ct. at 2161, 2175 (internal quotation marks omitted).

²¹⁷ *Id.* at 2159.

²¹⁸ *Id.* (quoting Supplemental Brief for the United States on Reargument at 41, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), 1953 WL 78291, at *41).

²¹⁹ *Id.* at 2147, 2160 (cleaned up).

²²⁰ *Id.* at 2161.

²²¹ *Id.* at 2165 (quoting *Grutter*, 539 U.S. at 342).

²²² *Id.*

²²³ *Id.* at 2175.

²²⁴ *Id.* at 2168.

²²⁵ *Id.* at 2166.

²²⁶ *Id.* at 2166–67.

²²⁷ *Id.* at 2167.

²²⁸ *Id.* at 2141.

Asians and all Hispanics).²²⁹ In contrast, the majority observed that other interests the Court has recognized as justifying race-based action can be reliably assessed: courts can evaluate whether the potential for racial violence so threatens prison security as to justify inmate segregation and can gauge when race-based remedies have alleviated the effects of de jure segregation.²³⁰

In addition, the Supreme Court majority determined that the schools' use of race disadvantaged some students.²³¹ While *Grutter* and *Bakke* allowed race be used as a "plus" factor for specific applicants, the Court in the *Students for Fair Admissions* cases determined that the schools' admissions programs reduced Asian and white admissions rates.²³² The Court observed that since admissions are "zero-sum," providing a benefit "to some applicants but not to others necessarily advantages the former group at the expense of the latter."²³³

The Court also held that the schools' admissions programs violated equal protection principles barring racial stereotyping by establishing an "inherent benefit" in "race for race's sake."²³⁴ Quoting *Grutter*, the Court said that "universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"²³⁵ In the Court's view, the schools' admissions programs based on fostering diversity evinced such a belief, assuming students "of a particular race, because of their race, think alike."²³⁶

Finally, the Court emphasized *Grutter*'s requirement that race-based admissions programs be temporary.²³⁷ "This requirement was critical," the majority stated, "and *Grutter* emphasized it repeatedly."²³⁸ A time limit was "the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection," in the Court's view.²³⁹ Yet with respect to Harvard's and UNC's admissions plans, the Court pointed out that some twenty years after *Grutter*, the schools admitted they had no timeline in mind for ending consideration of race.²⁴⁰ In addition to avoiding any specific timeline, the Court concluded, the institutions offered no demographic "benchmark" or goal that could, if achieved, mark the end of the schools' need for affirmative action.²⁴¹ The Court condemned what it termed the plans' "numerical commitment" to diversity, evidenced in consistent rates of minority admissions year-to-year.²⁴² The results, the Court said, resembled the "racial balancing" forbidden by precedent and portended that consideration of race would continue.²⁴³ The parties' intent to employ affirmative

²²⁹ *Id.* at 2167–68.

²³⁰ *Id.*

²³¹ *Id.* at 2166.

²³² *Id.* at 2164 (quoting *Bakke*, 438 U.S. at 317).

²³³ *Id.* at 2169.

²³⁴ *Id.* at 2170.

²³⁵ *Id.* at 2169 (quoting *Grutter*, 539 U.S. at 333).

²³⁶ *Id.* at 2170 (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)).

²³⁷ *Id.* at 2169 (quoting *Grutter*, 539 U.S. at 333).

²³⁸ *Id.* at 2165.

²³⁹ *Id.*

²⁴⁰ *Id.* at 2172.

²⁴¹ *Id.* at 2170.

²⁴² *Id.* at 2171.

²⁴³ *Id.* at 2172 (quoting *Fisher I*, 570 U.S. 297, 311 (2013)).

action until racial “stereotypes have broken down” also promised no identifiable end point, in the Court’s view.²⁴⁴

The Decision and *Grutter*

Although the Supreme Court in the *Students for Fair Admissions* cases invalidated Harvard’s and UNC’s affirmative action admissions programs, it did not explicitly overrule *Grutter*.²⁴⁵ The Court held that the schools’ programs were unconstitutional because they did not use measurable objectives, used race to disadvantage some students, relied on stereotyping, and lacked “meaningful end points.”²⁴⁶ The Court viewed these characteristics as contravening the boundaries of race-based decisionmaking in the Court’s equal protection jurisprudence.²⁴⁷ In so holding, the Court based its ruling, at least in part, on a conclusion that the schools’ policies did not comply with *Grutter*.

Nevertheless, *Students for Fair Admissions* leaves in doubt whether any form of race-based admissions program—even the program actually at issue in *Grutter*—could satisfy equal protection principles. The majority in the case emphasized *Grutter*’s requirement that race-based action be temporary, observing that the Court did not “bless[] such programs indefinitely.”²⁴⁸ While the Court in *Students for Fair Admissions* did not explicitly address *Grutter*’s application to other institutions’ plans, it stated that “universities may not” use “the regime we hold unlawful today.”²⁴⁹

The Court expressly avoided addressing one area where *Grutter* may still apply: military service academies. Explaining that the government had argued that race-based admissions programs further compelling government interests in diversity at the nation’s military academies, the Court stated that these institutions were not parties and that its opinion did “not address the issue, in light of the potentially distinct interests that military academies may present.”²⁵⁰

Concurring and Dissenting Opinions

In both cases, Justices Thomas, Gorsuch, and Kavanaugh wrote concurring opinions.²⁵¹ Justice Thomas argued that the Fourteenth Amendment bans legal distinctions based on race.²⁵² It is not designed, Thomas wrote, to thwart subordination of blacks by forbidding “only laws that hurt, but not help, blacks.”²⁵³ It is, in his opinion, “colorblind.”²⁵⁴ “History has repeatedly shown that

²⁴⁴ *Id.*

²⁴⁵ Robert Barnes, *Supreme Court Rejects Race-Based Affirmative Action in College Admissions*, WASH. POST. (June 29, 2023, 8:24 PM), <https://www.washingtonpost.com/politics/2023/06/29/affirmative-action-supreme-court-ruling/>.

²⁴⁶ *Students for Fair Admissions*, 143 S. Ct. at 2175.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2174.

²⁴⁹ *Id.* at 2176.

²⁵⁰ *Id.* at 2166 n.4.

²⁵¹ *Id.* at 2176 (Thomas, J., concurring), 2208 (Gorsuch, J., with Thomas, J., concurring), 2221 (Gorsuch, J., concurring).

²⁵² *Id.* at 2177, 2180 (Thomas, J., concurring). Justice Thomas acknowledged that strict scrutiny permits narrow measures that compensate victims of past governmental discrimination. *Id.* at 2192.

²⁵³ *Id.* at 2185.

²⁵⁴ *Id.*

purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct,” he reasoned.²⁵⁵

Justice Thomas also concluded that affirmative action may harm minority students by stigmatizing them and placing some in educational environments where they are less prepared than fellow students.²⁵⁶ In addition, he noted, race-based policies stoke resentment and “burden millions of applicants who are not responsible for the racial discrimination that sullied our Nation’s past.”²⁵⁷ Addressing the dissenters’ arguments that affirmative action promotes social equality, Justice Thomas reasoned that “any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant.”²⁵⁸

In his concurring opinion, joined by Justice Thomas, Justice Gorsuch focused on the antidiscrimination requirements of Title VI, concluding that “a recipient of federal funds may never discriminate based on race, color, or national origin—period.”²⁵⁹ Justice Kavanaugh also concurred, emphasizing *Grutter*’s requirement that affirmative action have a 25-year time limit.²⁶⁰

Justice Sotomayor (joined by Justices Kagan and Jackson²⁶¹) filed a dissenting opinion, stating that the majority decision “rolls back decades of precedent and momentous progress.”²⁶² In the dissenters’ view, the “expansive,” race-neutral language of the Fourteenth Amendment does not bar race-based decision making in all cases, and the schools’ use of race would pass strict scrutiny.²⁶³ Black people were the intended beneficiaries of the Fourteenth Amendment and other acts of the Reconstruction Congress, they stated.²⁶⁴ The dissenters claimed that educational opportunity is a prerequisite for the racial equality that the Fourteenth Amendment and decisions like *Brown* aimed to promote. From their perspective, *Brown*’s goal “was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness.”²⁶⁵ The dissenters predicted a “devastating impact” and “a sharp decline” in minority student enrollment in the nation’s colleges and universities, and stated that the majority decision “further entrenches racial inequality by making these pipelines to leadership roles less diverse.”²⁶⁶

Justice Jackson also authored a dissent, which Justices Sotomayor and Kagan joined, in the case against UNC.²⁶⁷ Justice Jackson recounted the nation’s history with slavery, reconstruction, and segregation, stating that “[t]he race-based gaps that first developed centuries ago are echoes from the past that still exist today.”²⁶⁸ She characterized the majority’s “colorblindness” approach as

²⁵⁵ *Id.* at 2191.

²⁵⁶ *Id.* at 2198.

²⁵⁷ *Id.* at 2200, 2201.

²⁵⁸ *Id.* at 2202.

²⁵⁹ *Id.* at 2209 (Gorsuch, J., with Thomas, J., concurring).

²⁶⁰ *Id.* at 2224 (Kavanaugh, J., concurring).

²⁶¹ Justice Jackson joined only in the case against UNC. She was recused in the case against Harvard.

²⁶² *Id.* at 2225–26 (Sotomayor, J., with Kagan, J., and Jackson, J., dissenting), 2263 (Jackson, J., with Sotomayor, J., and Kagan, J., dissenting).

²⁶³ *Id.* at 2228, 2242 (Sotomayor, J., with Kagan, J., and Jackson, J., dissenting).

²⁶⁴ *Id.* at 2227–29.

²⁶⁵ *Id.* at 2231.

²⁶⁶ *Id.* at 2260, 2262, 2263.

²⁶⁷ *Id.* at 2263 (Jackson, J., with Sotomayor, J., and Kagan, J., dissenting).

²⁶⁸ *Id.* at 2268–69.

“let-them-eat-cake obliviousness.”²⁶⁹ Citing disparities in wealth, education, employment, homeownership, health, and other metrics, Jackson concluded that the school’s race-based preferences amounted “to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth.”²⁷⁰ “[R]equiring colleges to ignore the initial race-linked opportunity gap between applicants,” Justice Jackson wrote, “will inevitably widen that gap.”²⁷¹

Considerations for Congress

While the Supreme Court struck down Harvard’s and UNC’s race-based admissions preferences, it did not bar all use or mention of race in higher education admissions. For one thing, the Court acknowledged that nothing barred schools from “considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” in written submissions such as admissions essays. The majority cautioned, however, that schools could “not simply establish through application essays or other means the regime we hold unlawful today.” Rather, consideration would have to be based on each applicant’s “experiences as an individual—not on the basis of race.”

Additionally, other Supreme Court precedent recognizes that remedying educational institutions’ past discrimination is a compelling government interest that is distinct from an interest in fostering student-body diversity. Remedying general, societal discrimination, however, is not a sufficient compelling government interest. In the *Students for Fair Admissions* cases, the schools did not claim to be remedying past discrimination.

The Court’s ruling in the *Students for Fair Admissions* cases will require changes in college and university affirmative action programs that rely on race. Private institutions that accept federal funds are subject to federal antidiscrimination requirements under Title VI, and will also be expected to comply with the Court’s ruling. Nationwide, a minority of institutions—mostly highly selective institutions—use such programs. Some states have banned affirmative action in their institutions.

More broadly, the Court has recognized achieving diversity as a compelling government interest only in higher education admissions. While the decision in the *Students for Fair Admissions* cases shows the Court’s reluctance to approve race-based action, it does not control other areas such as employment, grants, or contracts—areas in which the constitutionality of affirmative action programs is already more restricted.

Congress cannot change the Supreme Court’s interpretation of the Equal Protection Clause. Congress could, however, amend Title VI²⁷² so that it is no longer interpreted congruently with that provision.

Congress could expressly encourage or require diversity-enhancing measures under Title VI.²⁷³ Congress could not require unconstitutional action, such as mandating racial quotas or the kinds of admissions programs struck down by the Court in *Students for Fair Admissions*.²⁷⁴ It could require or encourage schools to take other measures, such as tracking minority recruiting,

²⁶⁹ *Id.* at 2277.

²⁷⁰ *Id.* at 2273.

²⁷¹ *Id.* at 2274.

²⁷² 42 U.S.C. § 2000d.

²⁷³ *Id.*

²⁷⁴ *Students for Fair Admissions*, 143 S. Ct. at 2141.

admission, and retention; developing plans to enhance minority recruiting or retention; or appointment of diversity coordinators, Title VI coordinators, or advisory committees. Congress could also consider encouraging or requiring colleges to employ non-racial admissions criteria that may enhance diversity, although it is not clear how the Court might rule on such measures.

303 Creative LLC v. Elenis: Free Speech Exceptions to Nondiscrimination Law²⁷⁵

In *303 Creative LLC v. Elenis*, the Supreme Court ruled that the First Amendment’s Free Speech Clause barred a state from enforcing its nondiscrimination law against a website designer who did not want to create websites for same-sex weddings.²⁷⁶ In recent years, the Supreme Court has been presented with a number of appeals involving religious objections to complying with nondiscrimination laws.²⁷⁷ The Court’s rulings on these prior appeals addressed protections for religious exercise. Although the plaintiff’s objections in *303 Creative* were religiously motivated, the case focused on the scope of Free Speech Clause protections for her speech. Accordingly, while the case is relevant for those with religious objections to federal laws, it also has broader free speech implications.

Background

The plaintiff in *303 Creative* was a graphic artist and website designer who challenged Colorado’s nondiscrimination law on behalf of herself and her company.²⁷⁸ Her business, 303 Creative, creates custom websites for clients—but according to the petitioner, she will not create any content that contradicts her religious beliefs, including her belief that marriage is “solely the union of one man and one woman.”²⁷⁹ At the time she filed her lawsuit, she did not offer wedding-related design services but alleged that she wanted to expand her business.²⁸⁰ If she did offer services to weddings, she would not create websites or offer other services for same-sex weddings.²⁸¹

Colorado law prohibits “public accommodations” (essentially, businesses offering goods or services to the public) from refusing service on the basis of certain protected characteristics, including race, sex, or sexual orientation.²⁸² The petitioner was concerned her refusal to serve same-sex weddings would violate that law.²⁸³ She brought a pre-enforcement challenge arguing that if Colorado enforced this law in a way that forced her to provide services to same-sex

²⁷⁵ Valerie C. Brannon, CRS Legislative Attorney, authored this section of the report.

²⁷⁶ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321–22 (2023).

²⁷⁷ See, e.g., CRS Legal Sidebar LSB10833, *Religious Objections to Nondiscrimination Laws: Supreme Court October Term 2022*, by Valerie C. Brannon; CRS Legal Sidebar LSB10311, *Supreme Court Vacates Another Opinion Applying Antidiscrimination Laws to Religious Objectors*, by Valerie C. Brannon.

²⁷⁸ *303 Creative LLC*, 143 S. Ct. at 2308.

²⁷⁹ Brief for the Petitioners at 5, *303 Creative LLC*, 143 S. Ct. 2298 (2023) (No. 21-476).

²⁸⁰ *Id.* at 6–7.

²⁸¹ *Id.*

²⁸² COLO. REV. STAT. § 24-34-601. Title II of the federal Civil Rights Act of 1964 also prohibits discrimination in “public accommodations,” but more narrowly includes only four categories of business establishments. 42 U.S.C. § 2000a(b); see generally CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

²⁸³ Brief for the Petitioners at 8–9, *303 Creative LLC*, 143 S. Ct. 2298 (2023) (No. 21-476).

weddings, the state would violate the federal Constitution’s protections for speech and religion.²⁸⁴ As relevant to the Supreme Court decision, she argued that forcing her to design websites for same-sex weddings would impermissibly compel her to speak in violation of the First Amendment’s Free Speech Clause.²⁸⁵

The Free Speech Clause of the First Amendment prevents the government from “abridging the freedom of speech.”²⁸⁶ It protects “both the right to speak freely and the right to refrain from speaking at all.”²⁸⁷ The Supreme Court has applied a variety of different frameworks to assess whether a government action compelling speech violates the First Amendment.²⁸⁸ For instance, in a 2018 case considering disclosure requirements imposed on pregnancy centers, the Supreme Court suggested that when the government compels a person “to speak a particular message,” it will usually trigger strict scrutiny, requiring the government to prove a law is narrowly tailored to a compelling interest.²⁸⁹ As in the context of the Equal Protection Clause doctrine that was at issue in *Students for Fair Admissions* discussed earlier, this is a standard the government will usually fail.²⁹⁰ However, the Court has applied lower levels of constitutional scrutiny in a variety of contexts.²⁹¹

One disputed issue in *303 Creative* was whether the state would be targeting speech or conduct. In general, a law that targets conduct is more likely to survive First Amendment review. The First Amendment is not implicated if the government regulates only conduct that is not inherently expressive.²⁹² In some cases, the Court has said that even if the government is regulating expression, if the law is primarily directed at conduct and only incidentally burdens speech, courts should apply a lower constitutional standard known as intermediate scrutiny.²⁹³ This intermediate scrutiny standard requires the government to show the statute “furthers an important or substantial governmental interest ... unrelated to the suppression of free expression” and “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”²⁹⁴ The Court had previously suggested this doctrine might be relevant to nondiscrimination laws in a compelled speech case.²⁹⁵ In dicta, the Court said that a nondiscrimination law will generally only regulate speech “incidental” to the law’s “regulation of conduct,” so that it is unlikely to violate the First Amendment.²⁹⁶ For example, because Congress

²⁸⁴ *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (10th Cir. 2021), *rev’d*, 143 S. Ct. 2298 (2023).

²⁸⁵ *303 Creative LLC*, 143 S. Ct. at 2308. While her petition for certiorari raised arguments under both the Free Speech and Free Exercise Clauses of the First Amendment, the Supreme Court granted certiorari only on the free speech issue.

²⁸⁶ U.S. CONST. amend. I.

²⁸⁷ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

²⁸⁸ See CRS In Focus IF12388, *First Amendment Limitations on Disclosure Requirements*, by Valerie C. Brannon et al.

²⁸⁹ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

²⁹⁰ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (saying that a content-based law subject to strict scrutiny is “presumptively unconstitutional”).

²⁹¹ See, e.g., CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (holding that a state could constitutionally require a shopping center to provide access to third parties circulating petitions).

²⁹² *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

²⁹³ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010) (outlining when this standard applies, but concluding strict scrutiny applied in the case before the court, where the application of the statute depended on the content of a message communicated by the plaintiffs).

²⁹⁴ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

²⁹⁵ *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. at 62.

²⁹⁶ *Id.*

can prohibit the conduct of racial discrimination in employment, it could also prohibit the associated speech of “a sign reading ‘White Applicants Only.’”²⁹⁷

In contrast, in a 1995 case, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Supreme Court held that a state could not use its laws prohibiting discrimination in public accommodations to force a parade organizer to include a gay and lesbian group in a parade.²⁹⁸ A state court had concluded that any infringement on the organizer’s First Amendment rights was justified as “incidental” to the law’s regulation of conduct.²⁹⁹ In ruling to the contrary, the Supreme Court ruled first that parades—and the selection of parade participants—qualify as expressive conduct.³⁰⁰ The marchers were “making some sort of collective point, not just to each other but to bystanders along the way.”³⁰¹ The Court said this application of the state law “had the effect of declaring the [parade] sponsors’ speech itself to be the public accommodation” and violated “the fundamental rule ... that a speaker has the autonomy to choose the content of his own message.”³⁰² The *Hurley* opinion did not expressly clarify whether intermediate or strict scrutiny applied to the state’s action or address the idea of incidental regulation of speech, but merely said that, as a general rule, the government “may not compel affirmance of a belief with which the speaker disagrees.”³⁰³

In *303 Creative*, the federal appeals court agreed that forcing the plaintiff to create websites would implicate the First Amendment’s protections against compelled speech, and it applied strict scrutiny.³⁰⁴ It also ruled, however, that the state satisfied this rigorous standard, saying the state’s interest in ensuring equal access to publicly available services could justify applying its nondiscrimination law.³⁰⁵

The Supreme Court’s Opinion

In a 6-3 opinion authored by Justice Gorsuch, the Supreme Court sided with the graphic designer. The Court first addressed the procedural posture of the case. Colorado had not sought to compel

²⁹⁷ *Id.* The Supreme Court cited a doctrine holding that speech integral to criminal conduct is generally considered to be unprotected by the First Amendment, perhaps suggesting that *no* constitutional scrutiny should apply. *Id.* (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). See generally CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion. However, as previously noted, other cases have applied intermediate scrutiny to incidental regulations of speech, and this is the standard the state argued should apply if the law incidentally regulated speech. Brief on the Merits for Respondents at 25, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (No. 21-476).

²⁹⁸ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572–73 (1995). See also, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (rejecting the application of intermediate scrutiny where a state’s “public accommodations law directly and immediately affects associational rights,” and saying instead that the state’s interests “do not justify such a severe intrusion on the ... freedom of expressive association”).

²⁹⁹ *Hurley*, 515 U.S. at 563.

³⁰⁰ *Id.* at 572–73.

³⁰¹ *Id.* at 568.

³⁰² *Id.* at 573.

³⁰³ *Id.* For this proposition, the Court cited *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), a case in which the Court ruled a school could not force an unwilling student to recite the Pledge of Allegiance. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006), in contrast, the Court said it would “trivialize[] the freedom protected in *Barnette*” to pretend that the conduct at issue in that case (conditioning federal funds on a school’s willingness to host military recruiters) was “the same.”

³⁰⁴ *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177–78 (10th Cir. 2021), *rev’d*, 143 S. Ct. 2298 (2023).

³⁰⁵ *Id.* at 1182.

the designer to make any websites for marriages,³⁰⁶ and in its briefs, argued that the case was not ripe for resolution.³⁰⁷ The Supreme Court, however, noted generally that the parties did not dispute the appeals court’s conclusion that the designer established a “credible threat” of state enforcement if she refused to create same-sex wedding sites.³⁰⁸

The Court then concluded that the custom wedding websites qualified as “pure speech,” emphasizing the parties’ stipulation that the designer would “create these websites to communicate ideas—namely, to ‘celebrate and promote the couple’s wedding and unique love story’” as well as the designer’s ideas of “a true marriage.”³⁰⁹ The Court further held that the websites would be “her speech.”³¹⁰ Although the designer would be sharing a couple’s story and acting at their direction, combining her speech with the couple’s, the First Amendment protected her own speech, including her words and original artwork.³¹¹ Further, given that each website would be custom-designed, the Court said the designer’s services could not merely be viewed as akin to selling “an ordinary commercial product” off the shelves to all customers.³¹² Accordingly, the Court ruled that Colorado sought to compel the designer to speak, celebrating marriages she did not wish to celebrate and creating “an impermissible abridgment of the First Amendment’s right to speak freely.”³¹³ More broadly, the Court disclaimed a principle that would “allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe.”³¹⁴ The majority indicated, for example, that the government could not force “‘an unwilling Muslim movie director to make a film with a Zionist message,’ or ‘an atheist muralist to accept a commission celebrating Evangelical zeal.’”³¹⁵

The majority opinion in *303 Creative* did not expressly state what level of constitutional scrutiny it used to evaluate this application of the Colorado nondiscrimination law, although it seemed to implicitly reject the application of the intermediate scrutiny standard. The Court rejected Colorado’s argument that the burden on the designer’s speech was incidental to the regulation of commercial activity, distinguishing prior cases where it had upheld requirements to disclose factual or “logistical” information.³¹⁶ The Court said Colorado was forcing a person to speak an undesired message “about a question of political and religious significance,” which is “something the First Amendment does not tolerate.”³¹⁷ The Court said more generally that “[w]hen a state public accommodations law and the Constitution collide, there can be no question which must

³⁰⁶ At the time of the decision, some media outlets reported that the web designer had never received any actual requests to create a website for a same-sex marriage. Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC (June 29, 2023), <https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court>. The Court did not weigh in on this issue.

³⁰⁷ Brief on the Merits for Respondents at 23, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (No. 21-476).

³⁰⁸ *303 Creative LLC*, 143 S. Ct. at 2310.

³⁰⁹ *Id.* at 2312 (quoting Petition for a Writ of Certiorari app. at 187a, *303 Creative LLC*, 143 S. Ct. 2298 (2023) (No. 21-476)).

³¹⁰ *Id.* at 2313.

³¹¹ *Id.*

³¹² *Id.* at 2316.

³¹³ *Id.* at 2313.

³¹⁴ *Id.* at 2313–14.

³¹⁵ *Id.* at 2314 (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting)).

³¹⁶ *Id.* at 2316–18.

³¹⁷ *Id.* at 2318.

prevail.”³¹⁸ As in *Hurley*, the Court did not conduct a strict scrutiny analysis, saying only that requiring this speech would be “an impermissible abridgment” of the First Amendment.³¹⁹

Dissenting Opinion

Justice Sotomayor wrote the dissent, joined by Justices Kagan and Jackson. She argued that Colorado’s law “targets conduct, not speech, for regulation, and the act of discrimination has never constituted protected expression under the First Amendment.”³²⁰ The dissent opened by discussing the history and purposes of public accommodations laws: ensuring equal access and equal dignity in the public market, and preventing businesses open to the public from engaging in “unjust discrimination.”³²¹ Justice Sotomayor asserted that the majority opinion “conflates denial of service and protected expression,” and characterized Colorado’s law as a “valid regulation[] of conduct.”³²² In her view, the law did not dictate the content of the designer’s speech or prohibit her from speaking her own message; for example, the law would allow the designer to “offer only wedding websites with biblical quotations describing marriage as between one man and one woman,” so long as she offered those websites “without regard to customers’ protected characteristics.”³²³ Justice Sotomayor claimed that allowing a public business “to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws,” allowing a department store, for example, to “sell ‘passport photos for white people,’” since portrait photography services “are customized and expressive.”³²⁴

The dissent would have applied an intermediate level of scrutiny to the law’s “neutral regulation of commercial conduct.”³²⁵ Justice Sotomayor would have held that Colorado could satisfy that level of scrutiny, noting the state’s compelling interest in eliminating discrimination and the law’s tailoring to that goal.³²⁶ Justice Sotomayor acknowledged that this application of Colorado’s law “would require the company to create and sell speech.”³²⁷ However, the critical factor, in her view, was that Colorado was only applying the law “to the refusal to provide same-sex couples the full and equal enjoyment of the company’s publicly available services,” and consequently was only compelling speech incidental to the content-neutral regulation of conduct.³²⁸

Considerations for Congress

The past decade or so has seen a significant number of claims for religious exemptions from nondiscrimination policies, and the Supreme Court ruled in two earlier cases that state and local governments violated constitutional protections for *religious exercise* when Colorado ordered a baker to make a wedding cake for a same-sex wedding and when Philadelphia attempted to apply

³¹⁸ *Id.* at 2315.

³¹⁹ *Id.* at 2313.

³²⁰ *Id.* at 2322 (Sotomayor, J., dissenting).

³²¹ *Id.* at 2322–25.

³²² *Id.* at 2333, 2336.

³²³ *Id.* at 2336.

³²⁴ *Id.* at 2337, 2339.

³²⁵ *Id.* at 2337.

³²⁶ *Id.*

³²⁷ *Id.* at 2338.

³²⁸ *Id.*

nondiscrimination policies to a Catholic foster-care contractor.³²⁹ In recent years, however, the Supreme Court had largely avoided the *speech* claims it confronted in *303 Creative*.³³⁰

303 Creative prevents a state from applying its nondiscrimination law in certain circumstances. The decision only specifically applies to this particular plaintiff, but it could more generally prevent Colorado and other states from enforcing their nondiscrimination laws in ways that require other businesses to create speech.³³¹

The ruling also could have implications for the application of federal law. Many of the major federal statutes prohibiting discrimination do not expressly include sexual orientation as a protected class.³³² However, a number of agencies have regulations expressly prohibiting such discrimination in federal programs.³³³ In addition, in 2020, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, to also prohibit discrimination based on sexual orientation or gender identity.³³⁴ This interpretation raised the question whether other federal laws prohibiting sex discrimination encompass similar protections,³³⁵ and the Department of Health and Human Services (HHS) and the Department of Education have proposed rules that would interpret the Affordable Care Act and Title IX to prohibit discrimination on the basis of sexual orientation and gender identity.³³⁶ Litigation is ongoing regarding the proper interpretation of these other federal laws.³³⁷

Some of these federal laws have limited exceptions for religious entities.³³⁸ Beyond these exceptions, some regulated entities have cited the Religious Freedom Restoration Act (RFRA) to seek broader religious exemptions from federal nondiscrimination requirements.³³⁹ One high-profile example came when HHS granted a waiver from nondiscrimination regulations for religious foster care agencies in South Carolina in 2019—then rescinded the exemption in

³²⁹ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

³³⁰ *E.g.*, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723.

³³¹ *Cf.*, *e.g.*, Chris Geidner, *303 Creative: What Happens When an Arguably Narrow SCOTUS Decision Meets 2023*, LAW DORK (July 13, 2023), <https://www.lawdork.com/p/303-creative-what-about-the-fallout> (discussing the effects of *303 Creative* and predicting business owners may cite the decision as justification for violating nondiscrimination laws even if they are not engaged in expression protected under that decision).

³³² See generally CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

³³³ See, *e.g.*, 29 C.F.R. § 29.7(j) (requiring an equal opportunity statement in apprenticeship agreements); 31 C.F.R. § 700.13 (prohibiting discrimination in Federal Law Enforcement Training Centers); 41 C.F.R. § 60-1.4 (requiring equal opportunity clauses in government contracts).

³³⁴ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

³³⁵ See CRS Report R46832, *Potential Application of Bostock v. Clayton County to Other Civil Rights Statutes*, by Christine J. Back and Jared P. Cole.

³³⁶ Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022).

³³⁷ See, *e.g.*, CRS Legal Sidebar LSB10953, *Transgender Students and School Bathroom Policies: Title IX Challenges Divide Appellate Courts*, by Jared P. Cole and Madeline W. Donley.

³³⁸ For example, Title VII, governing employment discrimination, contains exemptions allowing certain religious organizations to hire and employ individuals of a particular religion in certain circumstances. 42 U.S.C. §§ 2000e-1–2; see also CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back. Title IX of the Education Amendments of 1972 also contains a religious exemption. See CRS Report R47613, *Title IX’s Religious Exemption: Agency Practice and Judicial Application*, by Jared P. Cole and Christine J. Back.

³³⁹ For more information on RFRA, see CRS In Focus IF11490, *The Religious Freedom Restoration Act: A Primer*, by Whitney K. Novak.

2021.³⁴⁰ Ten days before the ruling in *303 Creative*, a federal appeals court granted a RFRA exemption from Title VII to an employer claiming a sincere religious objection.³⁴¹

303 Creative illuminates another potential avenue to seek an exemption from nondiscrimination laws, especially in non-religious contexts where RFRA does not apply. The availability of a RFRA claim turns (in part) on whether the federal government has burdened a person’s religious exercise.³⁴² In comparison, the protections of the Free Speech Clause extend beyond religious speech, though the Clause requires a plaintiff to show they were engaged in speech or inherently expressive activity—that is, activity that communicates something to third parties.³⁴³

If plaintiffs can show they are engaged in protected expression, the Free Speech Clause would not be limited to religiously motivated expression about same-sex marriage. In the future, a web designer might hypothetically object to designing a site that would “celebrate and promote”³⁴⁴ an interracial marriage, a gay pride parade, or a religious charity. As Justice Sotomayor’s dissent highlighted, in the past, business owners have raised First Amendment objections to prohibitions on race and sex discrimination.³⁴⁵ At least with respect to race discrimination, some have suggested that applying nondiscrimination laws to First Amendment-protected activity may be able to satisfy even strict constitutional scrutiny.³⁴⁶ However, the majority opinion in *303 Creative* did not specify the level of scrutiny it applied and could be read as taking an unqualified approach to these compelled speech claims: nondiscrimination laws cannot be applied to compel speech, regardless of how strong the government’s interest might be or how well-tailored the law is to that interest.³⁴⁷

The Court’s decision in *303 Creative* leaves significant issues for future litigation. Courts will have to determine whether, for example, wedding venues or bakers are engaged in speech or inherently expressive conduct.³⁴⁸ The majority opinion acknowledged that determining which

³⁴⁰ See Letter from Steven Wagner, Principal Deputy Assistant Sec’y, Administration for Children and Families, to Gov. Henry McMaster (Jan. 23, 2019), <https://governor.sc.gov/sites/governor/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf>; Letter from Joo Yeun Chang, Principal Deputy Assistant Sec’y, Administration for Children and Families, to Gov. Henry McMaster (Nov. 18, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/withdrawal-of-exception-from-part-75.300-south-carolina-11-18-2021.pdf>.

³⁴¹ *Braidwood Mgmt., Inc. v. Equal Emp. Opp. Comm’n*, 70 F.4th 914, 937 (5th Cir. 2023).

³⁴² 42 U.S.C. § 2000bb-1.

³⁴³ *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). See also, e.g., *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

³⁴⁴ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023).

³⁴⁵ *Id.* at 2331 (Sotomayor, J., dissenting).

³⁴⁶ Cf., e.g., Louise Melling, *The New Faith-Based Discrimination*, BOSTON REVIEW (Dec. 14, 2022), <https://www.bostonreview.net/articles/the-new-faith-based-discrimination/> (citing cases rejecting religious exercise arguments in the context of racial discrimination); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) (holding that the government’s interest “in eradicating racial discrimination in education” was so compelling that it outweighed any burden imposed on schools’ religious exercise by denying them a tax benefit based on the schools’ racial discrimination).

³⁴⁷ See *303 Creative LLC*, 143 S. Ct. at 2318 (majority opinion) (saying “the First Amendment does not tolerate” compelled speech absent any analysis of the government’s interest or the necessity of the law).

³⁴⁸ See, e.g., *Wedding Venues Are Turning away Same-Sex Couples: A Look at Current Laws and Changing Attitudes*, AMERICAN MARRIAGE MINISTRIES (Apr. 17, 2021), <https://theamm.org/articles/703-wedding-venues-are-turning-away-same-sex-couples-a-look-at-current-laws-and-chan>; *Klein v. Or Bureau of Labor & Indus.*, 143 S. Ct. 2686 (2023) (mem.) (vacating and remanding a case involving a baker’s free speech challenge to a state law prohibiting sexual-orientation discrimination, in light of *303 Creative*).

businesses are expressive could “raise difficult questions” in the future.³⁴⁹ Future courts may also have to decide what level of constitutional scrutiny should govern future free expression objections to nondiscrimination laws in such circumstances—or whether they should now take an unqualified approach to claims that “force an individual” to make a statement “about a question of political and religious significance.”³⁵⁰

These issues may also surface, for example, in disputes over federal or state efforts to regulate social media platforms. Social media platforms, like the anticipated wedding websites in this case, “contain ‘images, words, symbols, and other modes of expression.’”³⁵¹ The Supreme Court has already been asked to consider free speech challenges to Florida and Texas laws limiting websites’ ability to take down or restrict user content.³⁵² These lawsuits allege that these state laws would unlawfully compel the sites to convey speech with which they disagree.³⁵³ *303 Creative* casts doubt on states’ ability to compel websites to communicate messages they do not wish to endorse: the Supreme Court stated that the government may not “coopt an individual’s voice for its own purposes” by forcing a business to provide an “outlet for speech.”³⁵⁴ It may be open to question whether websites that would not be producing custom-designed products for customers are engaged in equivalent expressive activity to the website designer in *303 Creative*.³⁵⁵ Social media platforms may not be considered to “speak[] for pay”³⁵⁶ in the same way as the website designer. However, the Supreme Court has recognized in other contexts that private businesses may exercise constitutionally protected “editorial discretion” over speech in forums they host.³⁵⁷ Apart from forcing websites to host unwanted speech, *303 Creative* could also raise questions about the constitutionality of imposing disclosure requirements on websites to the extent they would force the sites to make undesired statements “about a question of political and religious significance.”³⁵⁸ The Court’s opinion could be read to suggest prior cases upholding factual disclosure requirements in the commercial context might not apply under these circumstances.³⁵⁹

If Congress were to disagree with the Court’s ruling in this case, its options to respond would be somewhat limited. Congress cannot alter the protections of the First Amendment absent a constitutional amendment, so the Free Speech Clause will continue to provide exceptions to certain applications of federal laws. Future litigation in this area may inform congressional consideration of issues like the application of federal nondiscrimination laws or other provisions that could compel businesses to speak.

³⁴⁹ *303 Creative LLC*, 143 S. Ct. at 2319.

³⁵⁰ *See id.*

³⁵¹ *Id.* at 2312 (quoting Petition for a Writ of Certiorari app. at 181a, *303 Creative LLC*, 143 S. Ct. 2298 (2023) (No. 21-476)).

³⁵² *NetChoice, LLC v. Att’y Gen.*, 34 F.4th 1196 (11th Cir. 2022), *cert. petitions filed*, No. 22-277 (U.S. Sept. 21, 2022) & No. 22-393 (U.S. Oct. 24, 2022); *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *cert. petition filed*, No. 22-555 (U.S. Jan. 18, 2023).

³⁵³ *See* CRS Legal Sidebar LSB10748, *Free Speech Challenges to Florida and Texas Social Media Laws*, by Valerie C. Brannon.

³⁵⁴ *303 Creative LLC*, 143 S. Ct. at 2315.

³⁵⁵ *See id.* at 2316.

³⁵⁶ *Id.* at 2313.

³⁵⁷ *E.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

³⁵⁸ *303 Creative LLC*, 143 S. Ct. at 2318.

³⁵⁹ *See id.*

Appendix. List of Cases³⁶⁰

This table includes cases listed on the Supreme Court’s “granted and noted” list for its October 2022 Term,³⁶¹ with the following exceptions: (1) cases in which the Court granted certiorari but subsequently dismissed or remanded the case without a merits opinion; and (2) cases in which the Court granted a writ of certiorari and set an argument date but subsequently removed that argument from its calendar. The questions presented are adapted from the Supreme Court’s statement of the questions presented, which itself often restates the question as framed by the petitioner in the case. The holdings are adapted in some cases from the syllabus published by the Supreme Court’s Reporter of Decisions.

Arellano v. McDonough

Argued: 10/4/2022
Decided: 1/23/2023
Topics: Civil Procedure

Question Presented: In claims against the government related to veterans’ disability compensation under 38 U.S.C. § 5110(b), is the applicable statute of limitations subject to a rebuttable presumption that equitable tolling is available?

Holding: Section 5110(b) is not subject to equitable tolling because the statutory scheme indicates that Congress did not want equitable tolling to apply.

Opinion: Justice Barrett (for the Court)

Bartenwerfer v. Buckley

Argued: 12/6/2022
Decided: 2/22/2023
Topics: Bankruptcy Law

Question Presented: May an individual be liable for the fraud of another by imputation, without any act, omission, intent or knowledge of her own, and therefore be barred from discharge of a debt in bankruptcy under 11 U.S.C. § 523(a)(2)(A)?

Holding: Section 523(a)(2)(A) prevents a debtor from discharging in bankruptcy a debt obtained by fraud, regardless of the debtor’s own culpability.

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

³⁶⁰ David Gunter, CRS Section Research Manager, prepared this section of the report.

³⁶¹ See *Granted & Noted List*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/orders/22grantednotedlist.pdf>.

Cruz v. Arizona

Argued: 11/1/2022
Decided: 2/22/2023
Topics: Criminal Law

Question Presented: Was the Arizona Supreme Court’s holding that state rules of criminal procedure precluded post-conviction relief an adequate state-law ground for the judgment, therefore precluding review of petitioners’ federal-law claim?

Holding: The Arizona Supreme Court holding was an exceptional case in which the state-court judgment rests on such a novel and unforeseeable interpretation of a state-court procedural rule that it is not adequate to foreclose review of the federal claim.

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

Helix Energy Solutions Group v. Hewitt

Argued: 10/12/2022
Decided: 2/22/2023
Topics: Labor and Employment

Question Presented: When determining whether highly compensated supervisors are exempt from the overtime-pay requirements of the Fair Labor Standards Act, does the standalone regulatory exemption set forth in 29 C.F.R. § 541.601 remain subject to the detailed requirements of 29 C.F.R. § 541.604?

Holding: Daily-rate workers, regardless of their income level, qualify as paid on a salary basis only if the conditions set out in 29 C.F.R. § 541.604(b) are met.

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

Bittner v. United States

Argued: 11/2/2022
Decided: 2/28/2023
Topics: Tax Law

Question Presented: The Bank Secrecy Act and its implementing regulations require the filing of an annual report for anyone with an aggregate balance of over \$10,000 in foreign accounts. Is a “violation” under the Act the failure to file the annual report (no matter the number of foreign accounts), or is there a separate violation for each individual account that was not properly reported?

Holding: The statute’s maximum penalty for the non-willful failure to file a compliant report accrues on a per-report, not a per-account, basis.

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

CRS Resources: CRS Legal Sidebar LSB10774, *Supreme Court To Address Foreign Account Reporting Penalties*, by Alexander H. Pepper; CRS Legal Sidebar LSB10938, *Supreme Court Rules Against IRS on Foreign Account Reporting Penalties*, by Alexander H. Pepper

Delaware v. Pennsylvania³⁶²

Argued: 10/3/2022

Decided: 2/28/2023

Topics: Commercial Law and Arbitration

Question Presented: Is a MoneyGram Official Check “a money order, traveler’s check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable,” pursuant to the Federal Disposition Act, 12 U.S.C. § 2503?

Holding: The disputed instruments are sufficiently similar to a “money order” to fall within the Federal Disposition Act.

Opinion: Justice Jackson (for the Court)

Perez v. Sturgis Public Schools

Argued: 1/18/2023

Decided: 3/21/2023

Topics: Civil Procedure; Civil Rights

Questions Presented: (1) In what circumstances is exhaustion of administrative remedies futile under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(l), and should courts excuse the exhaustion requirement in those circumstances? (2) Does Section 1415(l) require exhaustion of a non-IDEA claim seeking money damages that are not available under the IDEA?

Holding: When a plaintiff brings claims under the Americans with Disabilities Act or other federal laws seeking remedies, such as compensatory damages, that are not available under the IDEA, exhaustion of administrative remedies under the IDEA is not required, even when the underlying conduct that is the basis of the plaintiff’s claim was or could have been the subject of an IDEA administrative claim.

³⁶² *Delaware v. Pennsylvania* was consolidated with another case, *Arkansas v. Delaware*, for briefing, argument, and decision.

Opinion: Justice Gorsuch (for the Court)

CRS Resources: CRS Legal Sidebar LSB10907, *Perez v. Sturgis Public Schools: the Supreme Court Considers a Futility Exception to IDEA Administrative Exhaustion*, by Abigail A. Graber

Wilkins v. United States

Argued: 11/30/2022
Decided: 3/28/2023
Topics: Civil Procedure

Question Presented: Is the Quiet Title Act's statute of limitations a jurisdictional requirement or a claims-processing rule?

Holding: The Quiet Title Act's statute of limitations is a non-jurisdictional claims-processing rule.

Opinions: Justice Sotomayor (for the Court); Justice Thomas (dissenting)

Axon Enterprises v. Federal Trade Commission³⁶³

Argued: 11/7/2022
Decided: 4/14/2023
Topics: Civil Procedure; Statutory Interpretation

Question Presented: When Congress provided for court of appeals jurisdiction to review cease-and-desist orders of the Federal Trade Commission (FTC), did it impliedly strip district courts of jurisdiction over constitutional challenges to the Commission's structure, procedures, and existence?

Holding: The statutory review schemes set out in the Securities Exchange Act and Federal Trade Commission Act do not displace a district court's federal-question jurisdiction over claims challenging as unconstitutional the structure or existence of the Securities and Exchange Commission or the FTC.

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

New York v. New Jersey

³⁶³ *Axon Enterprises v. FTC* was consolidated with another case, *Securities and Exchange Commission v. Cochran*, for briefing, argument, and decision.

Argued: 2/27/2023
Decided: 4/18/2023
Topics: Constitutional Law

Question Presented: Should the Supreme Court enjoin New Jersey from withdrawing from its Waterfront Commission Compact with New York, which grants the Waterfront Commission of New York broad regulatory and law enforcement powers over all operations at the Port of New York and New Jersey?

Holding: New Jersey can unilaterally withdraw from the Waterfront Commission Compact despite New York's opposition.

Opinion: Justice Kavanaugh (for the Court)

Reed v. Goertz

Argued: 10/11/2022
Decided: 4/19/2023
Topics: Civil Rights; Criminal Law

Question Presented: When a prisoner seeks DNA testing of crime-scene evidence in a civil rights action under 42 U.S.C. § 1983, does the statute of limitations begin to run at the end of the state-court litigation denying DNA testing, including any appeals, or at the moment the state court denies DNA testing, regardless of any subsequent appeal?

Holding: When a prisoner pursues post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a Section 1983 claim begins to run when the state litigation ends.

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

MOAC Mall Holdings LLC v. Transform Holdco LLC

Argued: 12/5/2022
Decided: 4/19/2023
Topics: Bankruptcy Law

Question Presented: Does Bankruptcy Code § 363(m) limit the appellate courts' jurisdiction over any sale order or order deemed "integral" to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale?

Holding: Section 363(m) is not a jurisdictional provision.

Opinion: Justice Jackson (for the Court)

CRS Resources: CRS Legal Sidebar LSB10979, *Unanimous Supreme Court Rules Bankruptcy Sale Statute Is Not Jurisdictional*, by Michael D. Contino; CRS Legal Sidebar LSB10870, *Supreme Court Ponders Bankruptcy Code's Good-Faith Purchaser Exception*, by Michael D. Contino; CRS Report WPD00036, *Supreme Court Considers Limits on Appellate Review of Asset Sale Order in Sears Bankruptcy*, by Michael D. Contino and Sanchitha Jayaram (podcast)

Turkiye Halk Bankasi S.A. v. United States

Argued: 1/17/2023
Decided: 4/19/2023
Topics: Criminal Law

Question Presented: May U.S. district courts exercise subject matter jurisdiction over criminal prosecutions against foreign sovereigns and their instrumentalities under 18 U.S.C. § 3231 and in light of the Foreign Sovereign Immunities Act (FSIA)?

Holding: The FSIA's comprehensive scheme governing claims of immunity in civil actions against foreign states and their instrumentalities does not cover criminal cases.

Opinions: Justice Kavanaugh (for the Court); Justice Gorsuch (concurring in part and dissenting in part)

CRS Resources: CRS Legal Sidebar LSB10967, *The Foreign Sovereign Immunities Act: Prosecuting Foreign States After the Supreme Court's Decision in Halkbank*, by Stephen P. Mulligan; CRS Legal Sidebar LSB10927, *Supreme Court Considers Whether the United States Can Prosecute a Foreign-State-Owned Bank*, by Stephen P. Mulligan

National Pork Producers Council v. Ross

Argued: 10/11/2022
Decided: 5/11/2023
Topics: Civil Procedure; Constitutional Law

Question Presented: Did the plaintiffs adequately plead a claim under the Constitution's dormant Commerce Clause in their challenge to California's Proposition 12, which bans the sale of pork in the state unless the sow from which it was derived was housed with particular space allowances?

Holding: The dormant Commerce Clause of the Constitution does not prohibit Proposition 12, given that petitioners do not allege that Proposition 12 purposefully discriminates against out-of-state economic interests.

Opinions: Justice Gorsuch (for the Court); Justice Sotomayor (concurring in part); Justice Barrett (concurring in part); Chief Justice Roberts (concurring in part and dissenting in part); Justice Kavanaugh (concurring in part and dissenting in part)

CRS Resources: CRS Legal Sidebar LSB11031, *Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law*, by Kate R. Bowers

Ciminelli v. United States

Argued: 11/28/2022
Decided: 5/11/2023
Topics: Criminal Law

Question Presented: Is the Second Circuit’s “right to control” theory of fraud, which treats the deprivation of complete and accurate information bearing on a person’s economic decision as a species of property fraud, a valid basis for liability under the federal wire fraud statute, 18 U.S.C. § 1343?

Holding: Because the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest, the Second Circuit’s “right to control” theory cannot form the basis for a conviction under the federal fraud statutes.

Opinion: Justice Thomas (for the Court)

CRS Resources: CRS Legal Sidebar LSB11025, *Public Corruption and the Limits of Federal Fraud Statutes*, by Peter G. Berris and Michael A. Foster

Percoco v. United States

Argued: 11/28/2022
Decided: 5/11/2023
Topics: Criminal Law

Question Presented: Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

Holding: Although a person who is not a formal government employee may, under limited circumstances, become an agent of the government and thus owe a fiduciary duty to the government and the public, the Second Circuit’s jury instructions were erroneous to the extent they implied that the public may have a right to a private person’s honest services whenever that person’s influence exceeds a particular threshold.

Opinions: Justice Alito (for the Court); Justice Gorsuch (concurring in the judgment)

CRS Resources: CRS Legal Sidebar LSB11025, *Public Corruption and the Limits of Federal Fraud Statutes*, by Peter G. Berris and Michael A. Foster

Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.

Argued: 1/11/2023

Decided: 5/11/2023

Topics: Civil Procedure; Statutory Interpretation

Question Presented: Does 48 U.S.C. § 2126(a), granting jurisdiction to the federal courts over claims against the Financial Oversight and Management Board for Puerto Rico and claims otherwise arising under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), abrogate the Board’s sovereign immunity with respect to all federal and territorial claims?

Holding: Nothing in PROMESA categorically abrogates any sovereign immunity the Board enjoys from legal claims.

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

CRS Resources: CRS Legal Sidebar LSB10965, *SCOTUS Rules That PROMESA Does Not Abrogate Puerto Rico Oversight Board’s Sovereign Immunity—If It Has Any*, by Mainon A. Schwartz

Santos-Zacaria v. Garland

Argued: 1/17/2023

Decided: 5/11/2023

Topics: Immigration Law

Questions Presented: Prior to seeking judicial review of a removal order under 8 U.S.C. § 1252, an alien is required to exhaust “all administrative remedies available to the alien as of right.” (1) Is Section 1252(d)(1)’s exhaustion requirement jurisdictional, or is it a mandatory claims-processing rule that can be waived or forfeited? (2) To “exhaust all administrative remedies available to the alien as of right,” must the petition file a motion to reconsider with the Board of Immigration Appeals to first ask the Board to exercise its discretion to correct its own error?

Holding: Section 1252(d)(1)’s exhaustion requirement is not jurisdictional, and it does not require an alien to request discretionary forms of review, like reconsideration of an unfavorable Board of Immigration Appeals determination.

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

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

Argued: 10/12/2022

Decided: 5/18/2023

Topics: Intellectual Property

Question Presented: For purposes of considering whether the use of a work is a “fair use” under 17 U.S.C. § 107, is a work of art “transformative” when it conveys a different message or meaning from its source material, or is a court forbidden from considering the meaning of the accused work where it “recognizably derives from” its source material?

Holding: Although a new expression, meaning, or message may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not alone dispositive of whether a work is “transformative” for purposes of a fair use analysis.

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

Ohio Adjutant General’s Department v. Federal Labor Relations Authority

Argued: 1/9/2023

Decided: 5/18/2023

Topics: Labor and Employment

Question Presented: Does the Civil Service Reform Act authorize the Federal Labor Relations Authority to regulate the labor practices of state militias?

Holding: The Federal Labor Relations Authority may regulate a State National Guard when it hires and supervises dual-status technicians serving in their civilian role, because under those circumstances the State National Guard acts as a federal agency for purposes of the Federal Service Labor-Management Relations Statute.

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

CRS Resources: CRS Legal Sidebar LSB11005, *Supreme Court Holds That Federal Labor Relations Authority Has Jurisdiction to Regulate State National Guards*, by Jimmy Balsler

Twitter, Inc. v. Taamneh

Argued: 2/22/2023

Decided: 5/18/2023

Topics: Statutory Interpretation; Telecommunications Law

Questions Presented: (1) Does a defendant that provides generic, widely available services to its numerous users, and which regularly works to detect and prevent terrorists from using those services, knowingly provide substantial assistance to terrorists under 18 U.S.C. § 2333 merely because it allegedly could have taken more meaningful or aggressive action to prevent such use? (2) May a defendant be liable under Section 2333 if its generic, widely available services were not used in connection with a specific “act of international terrorism” that injured the plaintiff?

Holding: Plaintiffs’ allegations that the defendant social media companies aided and abetted terrorists in an attack on a nightclub in Turkey fail to state a claim under Section 2333(d)(2), which requires conscious, voluntary, and culpable participation in another’s wrongdoing.

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

CRS Resources: CRS Legal Sidebar LSB11033, *The Supreme Court’s Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, by Dave S. Sidhu

Gonzalez v. Google LLC

Argued: 2/21/2023

Decided: 5/18/2023

Topics: Statutory Interpretation; Telecommunications Law

Question Presented: Does Section 230(c)(1) of the Communications Decency Act immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or does Section 230(c)(1) only limit the liability of interactive computer services when they engage in traditional editorial functions with regard to such information?

Holding: In light of the Court’s decision in *Twitter v. Taamneh*, the plaintiffs’ complaint states little if any claim to relief, independent of the possible application of Section 230(c)(1).

Opinion: Per Curiam

Amgen Inc. v. Sanofi

Argued: 3/27/2023

Decided: 5/18/2023

Topics: Intellectual Property

Questions Presented: Section 112 of the Patent Act, 35 U.S.C. § 112(a), includes the so-called “enablement” requirement for the description of an invention in a patent. (1) Is enablement a question of fact to be determined by a jury? (2) Did the court of appeals apply the correct standard in determining the scope of the enablement requirement?

Holding: In this case, the lower courts were correct to decide as a matter of law that Amgen’s patents failed to satisfy the “enablement” requirement, because the patent claims swept more broadly than the patent itself enabled.

Opinion: Justice Gorsuch (for the Court)

CRS Resources: CRS Legal Sidebar LSB10971, *Amgen v. Sanofi: Supreme Court Holds Patents Claiming Antibody Genus Invalid as Not Enabled*, by Kevin J. Hickey

Polselli v. Internal Revenue Service

Argued: 3/29/2023

Decided: 5/18/2023

Topics: Tax Law

Question Presented: When the IRS summons the bank account records of a third party associated with a delinquent taxpayer, is that third party entitled to notice and an opportunity to bring an action to quash the summons, or does the notice exception of 26 U.S.C. § 7609(c)(2)(D) apply?

Holding: The notice exception in Section 7609(c)(2)(D)(i) may apply, and thus accounts or records of a third party could be summoned without notice to that party, even when the delinquent taxpayer does not have a legal interest in those accounts or records.

Opinions: Chief Justice Roberts (for the Court); Justice Jackson (concurring)

CRS Resources: CRS Legal Sidebar LSB10998, *Polselli v. IRS: Supreme Court Clarifies Notice Requirements for a Third-Party IRS Summons*, by Justin C. Chung

Calcutt v. Federal Deposit Insurance Corporation

Argued: N/A

Decided: 5/22/2023

Topics: Administrative Law

Question Presented: When a reviewing court identifies an error in an agency’s adjudication of a case, may the court conduct its own review of the record and conclude that substantial evidence supported the agency’s decision?

Holding: Under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), reviewing courts may uphold an agency’s order only on the same basis articulated by the agency itself. If that basis is erroneous, the court must remand to the agency for further consideration.

Opinion: Per Curiam

Sackett v. Environmental Protection Agency

Argued: 10/3/2022

Decided: 5/25/2023

Topics: Environmental Law

Question Presented: Did the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U.S.C. § 1362(7)?

Holding: The statutory term “waters” is limited to only those relatively permanent, standing or continuously flowing bodies of water that are described in ordinary parlance as streams, rivers, oceans, and lakes. “Adjacent wetlands” may be considered “waters of the United States” if they have a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.

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

CRS Resources: CRS Legal Sidebar LSB10981, *Supreme Court Narrows Federal Jurisdiction Under Clean Water Act*, by Kate R. Bowers; CRS Legal Sidebar LSB10707, *Supreme Court Revisits Scope of “Waters of the United States” (WOTUS) Under the Clean Water Act*, by Kate R. Bowers; CRS Video WVB00503, *The Supreme Court’s October 2022 Term: A Preview of Select Cases*, by April J. Anderson et al.

Tyler v. Hennepin County

Argued: 4/26/2023

Decided: 5/25/2023

Topics: Constitutional Law

Question Presented: Does it violate the Takings Clause of the Fifth Amendment for the government to take and sell a home to satisfy a debt to the government, keeping the surplus as a windfall?

Holding: Allegations that the government took from the taxpayer more than the taxpayer owes state a plausible claim for a violation of the Takings Clause.

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

Dupree v. Younger

Argued: 4/24/2023
Decided: 5/25/2023
Topics: Civil Procedure

Question Presented: When an issue is purely legal and rejected at summary judgment, must a party reassert that issue in a post-trial motion in order to preserve it for appellate review?

Holding: A post-trial motion is not required to preserve for appellate review a purely legal issue resolved at summary judgment.

Opinion: Justice Barrett (for the Court)

Glacier Northwest, Inc. v. International Brotherhood of Teamsters

Argued: 1/10/2023
Decided: 6/1/2023
Topics: Labor and Employment

Question Presented: Does the National Labor Relations Act (NLRA) impliedly preempt a state tort claim against a union for intentionally destroying an employer's property in the course of a labor dispute?

Holding: The NLRA does not preempt an employer's tort claim alleging that a union intentionally destroyed the company's property during a labor dispute.

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

Slack Technologies, LLC v. Pirani

Argued: 4/17/2023
Decided: 6/1/2023
Topics: Securities Law; Statutory Interpretation

Question Presented: Do Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought securities registered under the registration statement that they claim is misleading, or may a claim be based on the purchase of a security that was not registered under the allegedly misleading statement?

Holding: Section 11 of the Securities Act requires plaintiffs to plead and prove that they purchased securities registered under a materially misleading registration statement.

Opinion: Justice Gorsuch (for the Court)

United States *ex rel.* Schutte v. SuperValu, Inc.³⁶⁴

Argued: 4/18/2023

Decided: 6/1/2023

Topics: Statutory Interpretation

Question Presented: Under what circumstances, if any, is a defendant’s contemporaneous subjective understanding or beliefs about the lawfulness of its conduct relevant to whether it “knowingly” violated the False Claims Act (FCA), 31 U.S.C. § 3728(a)?

Holding: The scienter element of the FCA refers to a defendant’s knowledge and subjective beliefs, not to what an objectively reasonable person may have known or believed.

Opinion: Justice Thomas (for the Court)

CRS Resources: CRS Legal Sidebar LSB10978, *Supreme Court Addresses Scope of False Claims Act’s Knowledge Requirement*, by Victoria L. Killion

Allen v. Milligan³⁶⁵

Argued: 10/4/2022

Decided: 6/8/2023

Topics: Constitutional Law; Elections Law

Question Presented: Does the state of Alabama’s 2021 redistricting plan for its seven seats in the U.S. House of Representatives violate Section 2 of the Voting Rights Act?

Holding: The plaintiffs have demonstrated a reasonable likelihood of success on their claim that Alabama’s redistricting plan violates Section 2. The Voting Rights Act does not require a race-neutral benchmark for redistricting, nor is Section 2 as applied to redistricting unconstitutional under the Fifteenth Amendment.

Opinions: Chief Justice Roberts (for the Court); Justice Kavanaugh (concurring in part); Justice Thomas (dissenting); Justice Alito (dissenting)

³⁶⁴ *United States ex rel. Schutte v. SuperValu, Inc.* was consolidated with another case, *United States ex rel. Proctor v. Safeway, Inc.* for briefing, argument, and decision.

³⁶⁵ *Allen v. Milligan* was consolidated with another case, *Merrill v. Caster*, for briefing, argument, and decision. (Due to a substitution of parties, the case was originally considered under the caption *Merrill v. Milligan*.)

CRS Resources: CRS Legal Sidebar LSB11002, *Allen v. Milligan: Supreme Court Holds That Alabama Redistricting Map Likely Violated Section 2 of the Voting Rights Act*, by L. Paige Whitaker; CRS Legal Sidebar LSB10699, *Supreme Court Agrees to Hear Voting Rights Act Challenge to Congressional Redistricting Map and Stays Lower Court Ruling: Implications for Congress*, by L. Paige Whitaker

Health and Hospital Corp. of Marion County v. Talevski

Argued: 11/8/2022
Decided: 6/8/2023
Topics: Civil Rights

Questions Presented: (1) Should the Court reexamine its holding that legislation under the Spending Clause gives rise to privately enforceable rights under 42 U.S.C. § 1983? (2) If Spending Clause legislation does give rise to such rights, do transfer and medication rules under the Federal Nursing Home Reform Act of 1987 (FNHRA) do so?

Holding: The FNHRA provisions at issue unambiguously create Section 1983-enforceable rights; there is no incompatibility between private enforcement under Section 1983 and the remedial scheme that Congress provided.

Opinions: Justice Jackson (for the Court); Justice Gorsuch (concurring); Justice Barrett (concurring); Justice Thomas (dissenting); Justice Alito (dissenting)

CRS Resources: CRS Legal Sidebar LSB10853, *Health & Hospital Corporation of Marion County v. Talevski: Determining When A Statute Creates a Federal Right Actionable Under 42 U.S.C. § 1983*, by Whitney K. Novak; CRS Video WVB00503, *The Supreme Court's October 2022 Term: A Preview of Select Cases*, by April J. Anderson et al.

Dubin v. United States

Argued: 2/27/2023
Decided: 6/8/2023
Topics: Criminal Law

Question Presented: The federal aggravated identity theft statute, 18 U.S.C. § 1028A(a)(1), applies when, during the commission of a felony predicate offense, a person “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” Does a person commit aggravated identity theft when he mentions or otherwise recites another person’s name while committing a predicate offense?

Holding: Under Section 1028A(a)(1), a defendant “uses” another person’s means of identification “in relation to” a predicate offense when the use is at the crux of what makes the conduct criminal.

Opinions: Justice Sotomayor (for the Court); Justice Gorsuch (concurring in the judgment)

CRS Resources: CRS Legal Sidebar LSB10877, *What Is Aggravated Identity Theft?*, by Charles Doyle; CRS Legal Sidebar LSB11033, *The Supreme Court’s Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, by Dave S. Sidhu.

Jack Daniel’s Properties, Inc. v. VIP Products LLC

Argued: 3/22/2023

Decided: 6/8/23

Topics: Intellectual Property

Questions Presented: (1) Is the humorous use of another’s trademark as one’s own on a commercial product subject to the Lanham Act’s traditional likelihood-of-confusion analysis, or does it instead receive heightened First Amendment protection from trademark-infringement claims? (2) Is such a humorous use considered “noncommercial” under 15 U.S.C. § 1125(c)(3)(C), thus barring a claim of dilution by tarnishment under the Trademark Dilution Revision Act?

Holdings: (1) Precedents invoking the First Amendment are not applicable when an alleged infringer uses another’s trademark as a designation of source for the infringer’s own goods, the situation in which likelihood-of-confusion concerns are most likely to arise. (2) The Lanham Act’s exception for “noncommercial” use does not shield parody, criticism, or commentary when the alleged diluter uses a mark as a designation of source for its own goods.

Opinions: Justice Kagan (for the Court); Justice Sotomayor (concurring); Justice Gorsuch (concurring)

Haaland v. Brackeen³⁶⁶

Argued: 11/9/2022

Decided: 6/15/2023

Topics: Constitutional Law; Indian Law

Question Presented: Do various provisions of the Indian Child Welfare Act (ICWA) or its implementing regulations violate the anticommandeering doctrine of the Tenth

³⁶⁶ *Haaland v. Brackeen* was consolidated with three other cases for briefing, argument, and decision: *Cherokee Nation v. Brackeen*, *Texas v. Haaland*, and *Brackeen v. Haaland*.

Amendment, the Equal Protection Clause of the Constitution, or the nondelegation doctrine, and do individual plaintiffs have standing to raise such claims?

Holdings: ICWA is consistent with Congress’s Article I authority to legislate with respect to Indian tribes, and it does not violate the anticommandeering doctrine. The plaintiffs do not have standing to raise their claims under the Equal Protection Clause or the nondelegation doctrine.

Opinions: Justice Barrett (for the Court); Justice Gorsuch (concurring); Justice Kavanaugh (concurring); Justice Thomas (dissenting); Justice Alito (dissenting)

CRS Resources: CRS Legal Sidebar LSB10245, *Is the Indian Child Welfare Act Constitutional?*, by Mainon A. Schwartz; CRS Video WVB00503, *The Supreme Court’s October 2022 Term: A Preview of Select Cases*, by April J. Anderson et al.

Smith v. United States

Argued: 3/28/2023
Decided: 6/15/2023
Topics: Constitutional Law; Criminal Law

Question Presented: Where the government fails to prove venue, is the proper remedy an acquittal barring re-prosecution of the offense, or may the government re-try the defendant in a different venue?

Holding: The Double Jeopardy Clause of the Constitution permits the retrial of a defendant following a trial in an improper venue before a jury drawn from the wrong district.

Opinion: Justice Alito (for the Court)

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin

Argued: 4/24/2023
Decided: 6/15/2023
Topics: Bankruptcy Law; Indian Law

Question Presented: Does the Bankruptcy Code unambiguously express Congress’s intent to abrogate the sovereign immunity of Indian tribes?

Holding: The Bankruptcy Code unambiguously abrogates the sovereign immunity of all governments, including federally recognized Indian tribes.

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

CRS Resources: CRS Legal Sidebar LSB11017, *Supreme Court Rules Bankruptcy Code Abrogates Tribal Sovereign Immunity*, by Michael D. Contino and Mainon A. Schwartz

United States *ex rel.* Polansky v. Executive Health Resources

Argued: 12/6/2022
Decided: 6/16/2023
Topics: Civil Procedure

Question Presented: Does the government have authority to dismiss a suit under the False Claims Act (FCA) after initially declining to proceed with the action, and if so, what standard applies?

Holdings: The government may move to dismiss an FCA action whenever it has intervened. In assessing a motion to dismiss, the court should apply Federal Rule of Civil Procedure 41(a), which generally governs the voluntary dismissal of suits in ordinary civil litigation.

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

Lora v. United States

Argued: 3/28/2023
Decided: 6/16/2023
Topics: Criminal Law

Question Presented: Does 18 U.S.C. § 924(c)(1)(D)(ii), which provides that district courts must impose consecutive rather than concurrent terms of imprisonment for certain offenses, apply when a defenant is convicted and sentenced under 18 U.S.C. § 924(j)?

Holding: Section 924(c)(1)(D)(ii) does not govern a sentence for a conviction under Section 924(j). A Section 924(j) sentence therefore may run either concurrently with or consecutively to another sentence.

Opinion: Justice Jackson (for the Court)

Jones v. Hendrix

Argued: 11/1/2022
Decided: 6/22/2023
Topics: Criminal Law

Question Presented: When, based on established circuit precedent, federal inmates do not challenge their convictions on the ground that the statute of conviction fails to criminalize their activity, may those inmates apply for habeas relief under 28 U.S.C. § 2241 after the Supreme Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction?

Holding: A prisoner may not assert an intervening change in the interpretation of a criminal statute to file a Section 2241 habeas petition, thus circumventing the Antiterrorism and Effective Death Penalty Act’s restrictions on second or successive motions under 28 U.S.C. § 2255.

Opinions: Justice Thomas (for the Court); Justices Sotomayor and Kagan (dissenting); Justice Jackson (dissenting)

CRS Resources: CRS Legal Sidebar LSB10862, *Saving Habeas: Section 2255’s Safety Valve*, by Michael D. Contino; CRS Legal Sidebar LSB11007, *Supreme Court Narrows Access to Habeas Corpus Relief for Federal Inmates*, by Michael D. Contino

Department of the Interior v. Navajo Nation³⁶⁷

Argued: 3/20/2023

Decided: 6/22/2023

Topics: Environmental Law; Indian Law

Questions Presented: (1) In allowing the Navajo Nation to proceed with a claim to enjoin the Secretary to develop a plan to meet the Nation’s water needs, did the Ninth Circuit infringe on the Supreme Court’s exclusive jurisdiction over the allocation of water from the Lower Basin of the Colorado River? (2) Does the federal government owe the Nation an affirmative, judicially enforceable fiduciary duty to assess and address the Nation’s need for water from particular sources, allowing the Nation to state a cognizable claim for breach of trust?

Holding: Although the 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purposes of the reservation, it did not require the United States to take affirmative steps to secure water for the tribe.

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

CRS Resources: CRS Legal Sidebar LSB11001, “Reserved” but Not “Secured”: *Supreme Court Sinks Navajo Nation’s Attempt to Compel Federal Action on Tribal Water Rights*, by Mainon A. Schwartz and Kristen Hite

³⁶⁷ *Department of the Interior v. Navajo Nation* was consolidated with another case, *Arizona v. Navajo Nation*, for briefing, argument, and decision.

Pugin v. Garland³⁶⁸

Argued: 4/17/2023
Decided: 6/22/2023
Topics: Criminal Law; Immigration Law

Question Presented: For purposes of determining whether a predicate offense constitutes obstruction of justice and thus an “aggravated felony” for purposes of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S), must that predicate offense have a nexus with a pending or ongoing investigation or judicial proceeding?

Holding: An offense may “relate to the obstruction of justice” under Section 1101(a)(43)(S) even if the offense does not require that an investigation or proceeding be pending.

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

CRS Resources: CRS Legal Sidebar LSB10994, *Supreme Court Considers Meaning of “An Offense Relating to Obstruction of Justice” for Immigration Enforcement Purposes*, by Hillel R. Smith

Yegiazaryan v. Smagin³⁶⁹

Argued: 4/25/2023
Decided: 6/22/2023
Topics: Civil Procedure

Question Presented: Does a foreign plaintiff state a cognizable civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) when it suffers an injury to intangible property, and if so, under what circumstances?

Holding: A plaintiff alleges a domestic injury for purposes of RICO, 18 U.S.C. § 1964(c), when the circumstances surrounding the injury indicate that it arose in the United States.

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

United States v. Texas

Argued: 11/29/2022
Decided: 6/23/2023

³⁶⁸ *Pugin v. Garland* was consolidated with another case, *Santos-Zacaria v. Garland*, for briefing, argument, and decision.

³⁶⁹ *Yegiazaryan v. Smagin* was consolidated with another case, *Monaco v. Smagin*, for briefing, argument, and decision.

Topics: Constitutional Law; Immigration Law

Questions Presented: (1) Do the state plaintiffs have Article III standing to challenge the Department of Homeland Security’s Guidelines for the Enforcement of Civil Immigration Law? (2) Are the Guidelines contrary to 8 U.S.C. § 1226(c), 8 U.S.C. § 1231(a), or the Administrative Procedure Act? (3) Does 8 U.S.C. § 1252(f)(1) prevent the entry of an order to “hold unlawful and set aside” the Guidelines under 5 U.S.C. § 706(2)?

Holding: The state plaintiffs do not have Article III standing to challenge the Guidelines, because a dispute about the Executive’s exercise of its discretion to arrest and prosecute is not traditionally thought to be capable of resolution through the judicial process.

Opinions: Justice Kavanaugh (for the Court); Justice Gorsuch (concurring in the judgment); Justice Barrett (concurring in the judgment); Justice Alito (dissenting)

CRS Resources: CRS Legal Sidebar LSB10578, *The Biden Administration’s Immigration Enforcement Priorities: Background and Legal Considerations*, by Hillel R. Smith; CRS Legal Sidebar LSB11023, *Supreme Court Limits States’ Ability to Challenge Immigration Enforcement Policies*, by Hillel R. Smith

Coinbase, Inc. v. Bielski

Argued: 3/21/2023

Decided: 6/23/2023

Topics: Commercial Law and Arbitration

Question Presented: When a district court denies a motion to compel arbitration under the Federal Arbitration Act, the party seeking arbitration may file an immediate appeal. Does the district court have jurisdiction to proceed with litigation while that appeal is pending, or does the appeal divest the district court of jurisdiction?

Holding: A district court must stay its proceedings while an interlocutory appeal on the question of arbitrability is ongoing.

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

United States v. Hansen

Argued: 3/27/2023

Decided: 6/23/2023

Topics: Criminal Law; Immigration Law

Question Presented: Is the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, 8 U.S.C. §

1324(a)(1)(A)(iv) and (B)(i), facially unconstitutional on First Amendment overbreadth grounds?

Holding: Because Section 1324(a)(1)(A)(iv) forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, the clause is not unconstitutionally overbroad.

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

CRS Resources: CRS Legal Sidebar LSB11003, *Supreme Court Rules That Statutory Criminalization of Encouraging or Inducing Illegal Immigration Is Not Facially Overbroad Under the First Amendment*, by Kelsey Y. Santamaria; CRS Legal Sidebar LSB11033, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, by Dave S. Sidhu

Samia v. United States

Argued: 3/29/2023

Decided: 6/23/2023

Topics: Constitutional Law; Criminal Law

Question Presented: Does admitting a co-defendant's redacted, out-of-court confession that immediately inculcates a defendant based on the surrounding context violate the defendant's rights under the Confrontation Clause of the Sixth Amendment?

Holding: It does not violate the Confrontation Clause to admit a nontestifying codefendant's confession that did not directly inculcate the defendant and that was subject to a proper limiting instruction.

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

Mallory v. Norfolk Southern Railway Co.

Argued: 11/8/2022

Decided: 6/27/2023

Topics: Civil Procedure; Constitutional Law

Question Presented: Does the Due Process Clause of the Fourteenth Amendment prohibit a state from requiring a corporation to consent to personal jurisdiction to do business in the state?

Holding: Under *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, suits premised on a corporation’s consent to personal jurisdiction as a condition of registering to do business in the state do not violate the Due Process Clause.

Opinions: Justice Gorsuch (for the Court); Justice Jackson (concurring); Justice Alito (concurring in part and concurring in the judgment); Justice Barrett (dissenting)

Moore v. Harper

Argued: 12/7/2022

Decided: 6/27/2023

Topics: Constitutional Law; Elections Law

Question Presented: May a state’s judicial branch nullify the regulations governing the manner of holding elections for Senators and Representatives prescribed by the state legislature and replace them with regulations of the state courts’ own devising, based on state constitutional provisions purportedly vesting the state judiciary with authority to prescribe rules it deems appropriate to ensure a fair or free election?

Holding: The Court has jurisdiction to decide this question, and the Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections.

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

CRS Resources: CRS Legal Sidebar LSB10838, *State Legislatures, State Courts, and Federal Elections: U.S. Supreme Court to Consider Moore v. Harper*, by L. Paige Whitaker

Counterman v. Colorado

Argued: 4/19/2023

Decided: 6/27/2023

Topics: Constitutional Law; Criminal Law

Question Presented: To establish that a statement is a “true threat” that is unprotected by the First Amendment, must the government show that the speaker subjectively knew or intended the threatening nature of the statement, or is it enough to show that an objectively reasonable person would regard the statement as a threat of violence?

Holding: In true-threats cases, the State must prove that the defendant has some subjective understanding of his statements’ threatening nature, but the First Amendment requires no more demanding a showing than recklessness.

Opinions: Justice Kagan (for the Court); Justice Sotomayor (concurring in part and concurring in the judgment); Justice Thomas (dissenting); Justice Barrett (dissenting)

CRS Resources: CRS Legal Sidebar LSB11033, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, by Dave S. Sidhu

Students for Fair Admissions v. President and Fellows of Harvard College;

Students for Fair Admissions v. University of North Carolina

Argued: 10/31/2022
Decided: 6/29/2023
Topics: Civil Rights; Constitutional Law

Questions Presented: (1) Should the Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions? (2) Does a private university violate Title VI of the Civil Rights Act through certain specific admissions practices, including engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives? (3) Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

Holding: Admissions programs at Harvard University and the University of North Carolina violate the Equal Protection Clause of the Fourteenth Amendment. Race-based college admissions must comport with strict scrutiny, must not use race as a stereotype or negative, and must at some point end; the admissions systems considered here fail each of these criteria.

Opinions: Chief Justice Roberts (for the Court); Justice Thomas (concurring); Justice Gorsuch (concurring); Justice Kavanaugh (concurring); Justice Sotomayor (dissenting); Justice Jackson (dissenting in *Students for Fair Admissions v. University of North Carolina*).

CRS Resources: CRS Legal Sidebar LSB10893, *The Supreme Court Strikes Down Affirmative Action at Harvard and the University of North Carolina*, by April J. Anderson; CRS Legal Sidebar LSB10893, *The Supreme Court Considers Affirmative Action: Arguments in the Cases Against Harvard and the University of North Carolina*, by April J. Anderson; CRS Video WVB00503, *The Supreme Court's October 2022 Term: A Preview of Select Cases*, by April J. Anderson et al.

Abitron Austria GmbH v. Hetronic International, Inc.

Argued: 3/21/2023

Decided: 6/29/2023
Topics: Intellectual Property

Question Presented: Did the court of appeals err in applying the Lanham Act, 15 U.S.C. § 1051, to foreign sales by foreign nationals, including purely foreign sales that never reached the United States?

Holding: The disputed provisions of the Lanham Act are not extraterritorial and extend only to claims where the infringing use in commerce is domestic.

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

Groff v. DeJoy

Argued: 4/18/2023
Decided: 6/29/2023
Topics: Civil Rights; Labor and Employment

Questions Presented: Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, an employer is not required to reasonably accommodate an employee’s or prospective employee’s religious observance or practice if it would cause an “undue hardship” to the employer’s business. (1) Should the Court disapprove of the more-than-de-minimis-cost test for refusing Title VII accommodations stated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)? (2) May an employer demonstrate “undue hardship” under Title VII merely by showing that the requested accommodation burdens the employee’s co-workers rather than the business itself?

Holding: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantially increased costs in relation to the conduct of its particular business.

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

CRS Legal Sidebar LSB10999, *Groff v. DeJoy: Supreme Court Clarifies Employment Protections for Religious Workers*, by Abigail A. Graber; CRS Legal Sidebar LSB10966, *Supreme Court Considers Religious Accommodations in the Workplace*, by Abigail A. Graber

303 Creative, LLC v. Elenis

Argued: 12/5/2022
Decided: 6/30/2023
Topics: Constitutional Law

Question Presented: Does applying a public-accommodations law to require an artist to speak or stay silent, contrary to the artist’s sincerely held religious beliefs, violate the Free Speech Clause of the Constitution?

Holding: The First Amendment prohibits a state from forcing a website designer to create expressive designs conveying messages with which the designer disagrees.

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

CRS Resources: CRS Legal Sidebar LSB11000, *303 Creative v. Elenis*: Supreme Court Recognizes Free Speech Exception to Nondiscrimination Law, by Valerie C. Brannon; CRS Legal Sidebar LSB10833, *Religious Objections to Nondiscrimination Laws*: Supreme Court October Term 2022, by Valerie C. Brannon

Biden v. Nebraska

Argued: 2/28/2023

Decided: 6/30/2023

Topics: Administrative Law; Statutory Interpretation

Questions Presented: The Secretary of Education invoked the Higher Education Relief Opportunities for Students Act of 2003 to continue a pause of repayment obligations for student loans and to issue student-loan relief to eligible borrowers. (1) Do the respondent States have Article III standing to challenge that plan? (2) Does that plan exceed the Secretary’s authority or constitute arbitrary or capricious agency action?

Holdings: (1) At least one respondent State has standing to challenge the Secretary’s program. (2) The Secretary’s authority to “waive or modify” existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act does not include the authority to cancel \$430 billion of student loan principal.

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

CRS Resources: CRS Legal Sidebar LSB10997, *Supreme Court Invalidates Student Loan Cancellation Policy Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff; CRS Legal Sidebar LSB10876, *Student Loan Cancellation Reaches the Supreme Court*, by Edward C. Liu and Sean M. Stiff

Department of Education v. Brown

Argued: 2/28/2023

Decided: 6/30/2023

Topics: Administrative Law; Constitutional Law

Questions Presented: The Secretary of Education invoked the Higher Education Relief Opportunities for Students Act of 2003 to continue a pause of repayment obligations for student loans and to issue student-loan relief to eligible borrowers. (1) Do the respondent student-loan borrowers have Article III standing to challenge that plan? (2) Was that plan statutorily authorized and adopted in a procedurally proper manner?

Holding: Respondents who did not have their loans forgiven failed to establish that any injury they suffered was fairly traceable to the Secretary’s plan, and as a result they lack Article III standing to claim that the plan was procedurally invalid.

Opinion: Justice Alito (for the Court)

CRS Resources: CRS Legal Sidebar LSB10876, *Student Loan Cancellation Reaches the Supreme Court*, by Edward C. Liu and Sean M. Stiff

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